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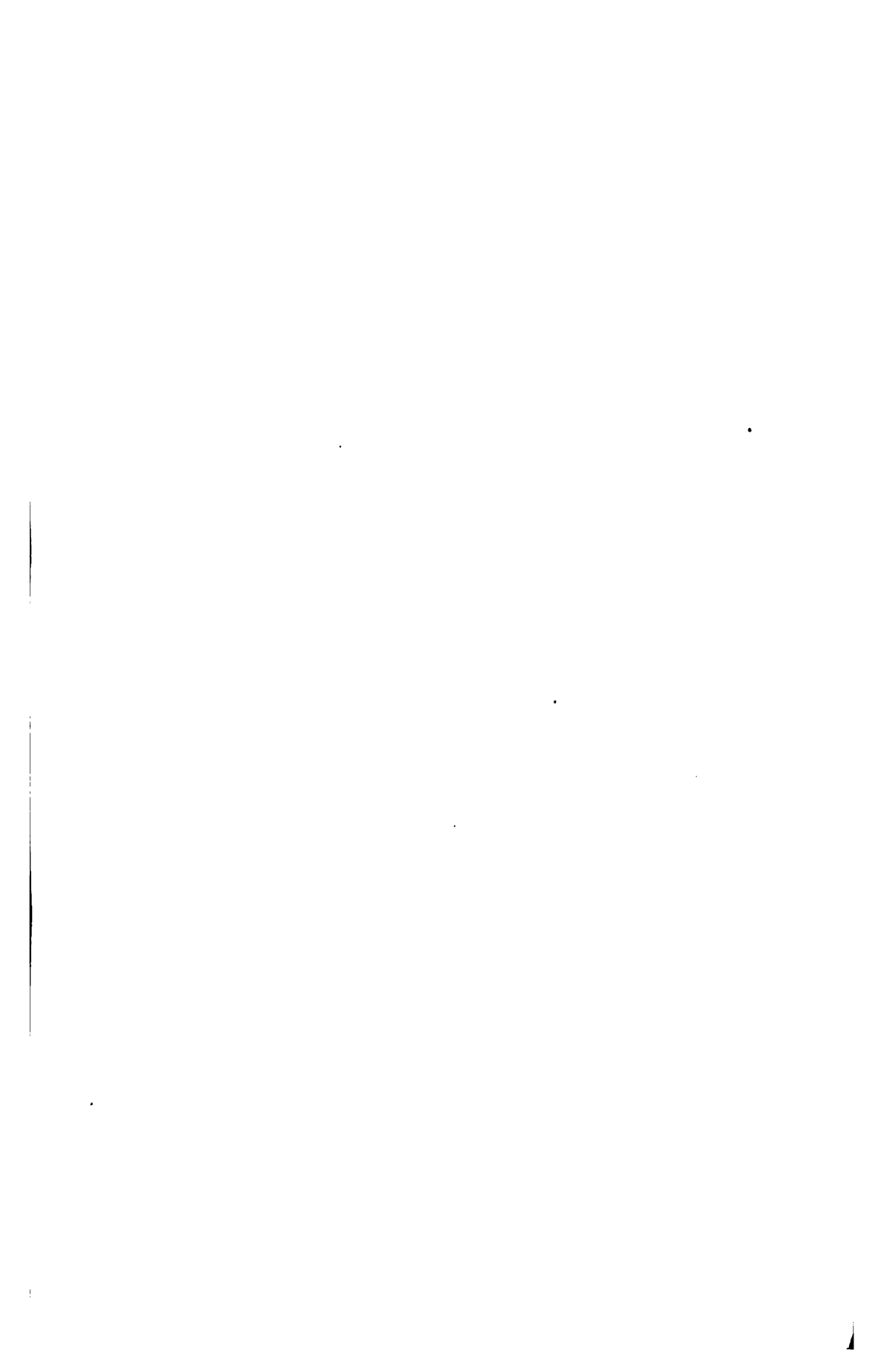
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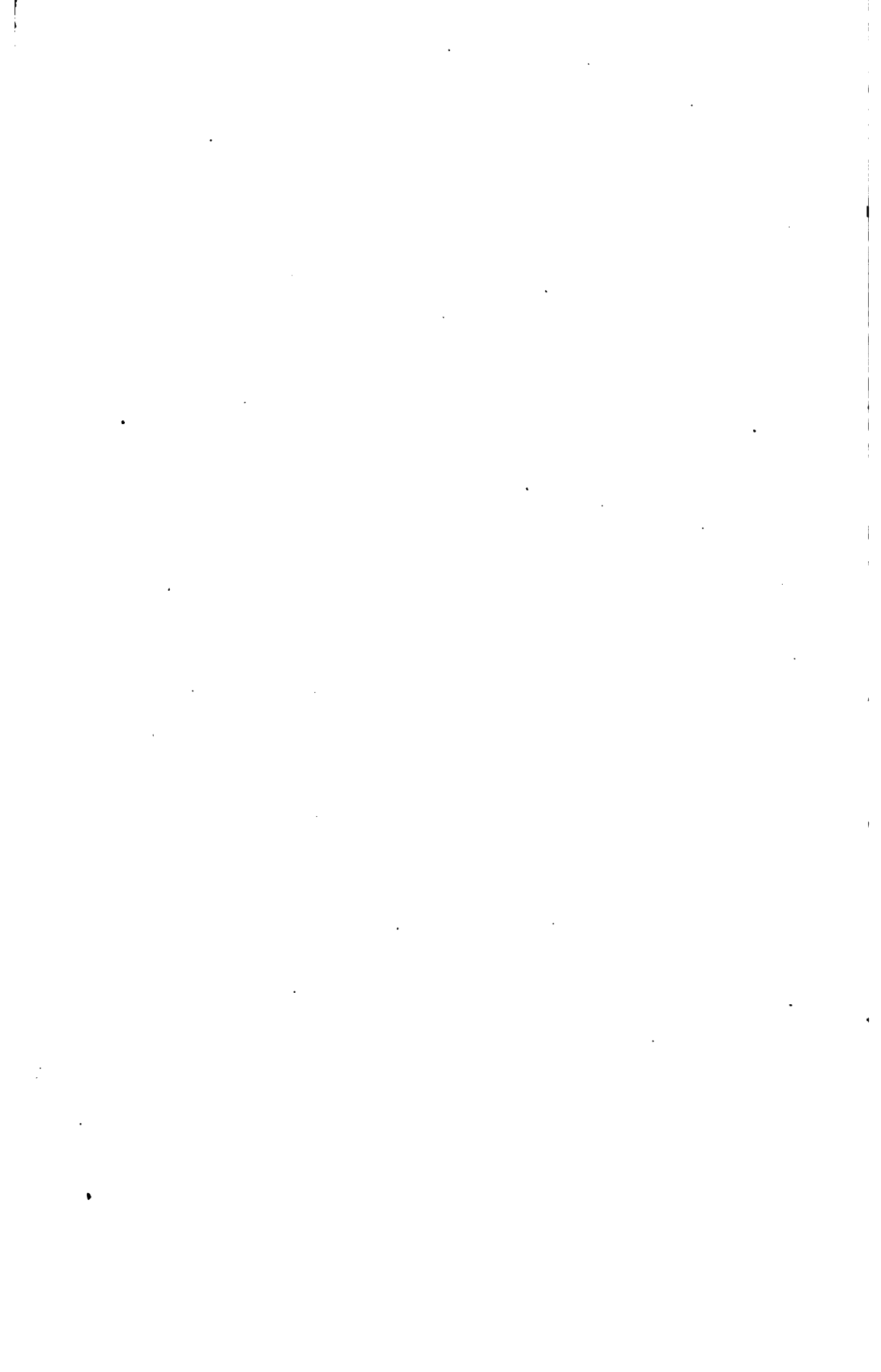
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THE
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BURDETT A. RICH, EDITOR, HENRY
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LAWYERS' REPORTS

ANNOTATED.

MICHIGAN SUPREME COURT.

Martin WALKOWSKI, *Plff. in Err.*,
v.
PENOKEE & GOGEBIC CONSOLIDATED
MINES.

(.....Mich.....)

1. Negligence is not shown by the mere fact of employing a boy seventeen or eighteen years old to manage the brake controlling the passenger cage connecting with a mine.

2. Due care in employing a boy seventeen years old to manage the brake controlling the passenger cage connected with a mine is shown by the facts that the machinery is simple and easily managed and the employer makes due inquiry of the applicant's experience and ability, and receives satisfactory replies before employing him.

3. An employer is not chargeable with notice that one employed to manage the brake controlling the passenger cage connected with a mine has become incompetent.

NOTE.—*Knowledge as an element of an employer's liability to an injured servant.*

- I. Introductory.
- II. Actual knowledge.
 - a. Existence of actual knowledge, effect of.
 - b. Absence of actual knowledge, effect of.
- III. Constructive knowledge.
 - a. Generally.
 - b. Liability predicated from constructive knowledge.
 1. General statements of the rule.
 2. As to the condition of the place of work.
 3. As to the condition of machinery and apparatus.
 4. As to the capacity of servants.
 - c. Nonliability predicated from want of constructive knowledge.
 1. General statements.
 2. As to place of work.
 3. As to machinery.
 4. As to servants.
- IV. Rule when the dangerous condition is due to the act of a stranger or of a fellow servant or to the operation of some abnormal physical force.
- V. Imputed knowledge of probable future events.
 - a. Introductory.
 - b. Accidents which might reasonably have been anticipated.
 - c. Accidents which could not reasonably have been anticipated.
- VI. Circumstances charging an employer with knowledge of the condition of his instrumentalities.
 - a. Introductory.
 - b. Notoriety.
 - c. Opportunities of master to observe defect.
 1. Generally.
 2. Rulings as to specific periods.
 - d. Length of time defect has existed.
 1. Generally.
 2. Rulings as to specific periods.
 - e. Scientific facts; what knowledge of, imputed.

VI.—(continued)

- f. Previous operation of instrumentalities.
 1. Efficient operation, inference from.
 2. Prior occurrences indicating defects.
 3. Defective operation of other appliances.
- g. Repairs and alterations.
- VII. Duty of active inspection of instrumentalities when first used.
 - a. Rule where the employer is himself the manufacturer.
 - b. Rule where the employer is a mere purchaser of the appliance.
- VIII. Duty of active inspection of instrumentalities while in use.
 - a. General principles.
 - b. Inspection must be efficient.
 - c. What degree of care must be exercised in the inspection.
 - d. As affected by the length of time used.
 - e. Frequency with which inspections should be made.
 1. Generally.
 2. Rulings as to specific periods.
 - f. Limits of liability based on duty of inspection.
 1. Generally.
 2. Cmission of duty must be proximate cause of injury.
 3. Employer not liable for latent defects.
 4. What tests an employer is not bound to apply.
 - g. Illustrative cases showing extent of duty.
 1. Place of work.
 2. Weight-supporting appliances.
 3. Steam boilers.
 4. Cars and their appurtenances.
- IX. Employer's duty to know the character and capacity of his servants.
 - a. At the time of hiring.
 - b. At time of promotion.
 - c. During time of service.
 1. Generally.

from the fact that the engineer thought that he ran the cage too fast, if there is nothing to show that the information had reached the employer.

4. **Incompetence which will render an employer liable for the act of an employee for injuring a coemployee** is not shown by the mere fact that after operating the machinery correctly for seven months, he, at the time of the injury, forgot and turned it the wrong way.
5. **Evidence that the brakeman was in the habit of lowering the cage into a mine at too great speed** is not admissible upon the question of his incompetency in case of an accident caused by his turning the brake the wrong way and letting the cage fall.
6. **A master who has used due care in employing a servant, and has properly instructed him, has no further duty until he receives notice of conduct which denotes incompetency.**

(January 25, 1898.)

IX. c—(continued)

2. **Single delinquency of servant prior to accident.**
3. **Several previous delinquencies.**
4. **After what time knowledge of servant's unfitness will be inferred.**
- d. **General reputation of the delinquent servant as notice to the master.**
 1. **Generally.**
 2. **Reputation not evidence of servant's unfitness.**
 3. **Nicknames as evidence.**
- e. **Omission to ascertain capacity of servant who is injured.**
- X. **Employer's duty as to the supervision of appliances not owned by him but used by his servants.**
 - a. **Introductory.**
 - b. **Rule as to the inspection of foreign cars.**
 1. **General principles.**
 2. **Degree of care required.**
 3. **Duty of inspecting foreign cars considered with reference to the doctrine of common employment.**
- XI. **Assignability of the duty of inspection.**
 - a. **Introductory.**
 - b. **Theory that the duty of inspection is assignable.**
 - c. **Theory that the master is bound merely to supervise the inspectors.**
 - d. **Theory that the duty of inspection is nonassignable.**
 1. **General principles.**
 2. **Illustrative rulings.**
 3. **Illustrative rulings expressed in terms of the doctrine of common employment.**
 - e. **As dependent upon the distinction between the furnishing and the use of agencies.**
- XII. **Employer's liability qualified by the servant's duty to acquaint himself with his environment.**
 - a. **Generally.**
 - b. **Obligations of the master and servant as to inspection compared.**
 1. **General statements of principles involved.**
 2. **Statements of the general rule with reference to particular instrumentalities.**
 3. **Rule where the servant has equal or superior knowledge or means of knowledge.**

ERROR to the Circuit Court for Gogebie County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Grant, Ch. J.:

The miners in defendant's employ were lowered into and raised out of the mine in iron cages about 12 feet square. These cages were attached to wire cables running over drums in the enginehouse, situated about 500 feet from the shaft, which was between 500 and 700 feet deep. The operation was as follows: If a cage is to be lowered, and its weight be insufficient to overcome the weight of the other cage, a gear (called a "friction gear") inside the drum is thrown into place, and the engine started, and, by hoisting up the lower cage, the upper one is lowered. If, however, the weight of the upper cage is sufficient to

XIII. Whose knowledge is imputed to the employer.

- a. **General principles.**
- b. **Illustrative cases of notice to various employees.**
 1. **Servants in complete control of the master's business.**
 2. **Servants charged with the duty of seeing that the place of work is safe.**
 3. **Servants charged with the duty of providing and maintaining appliances.**
 4. **Employees having power to hire and discharge servants.**
 5. **Employees whose knowledge is not imputed to the master.**

XIV. Duties of a master after learning of a danger to which his servant is exposed.

- a. **Introductory.**
- b. **Duty to remove the causes of the unusual risk; illustrative cases.**
 1. **Machinery and appliances.**
 2. **Place of work.**
 3. **Servants.**
- c. **Length of time during which the employer has had knowledge of a danger.**
- d. **Duty to instruct the servant.**

XV. Knowledge as an element of liability under statutes.

- a. **Decision under employers' liability acts.**
 1. **Statutes modifying the doctrine of common employment.**
 2. **Statutes embodying common-law rules.**
 3. **Acts imposing liability for wilful omissions of duty.**
 4. **Statutes modifying the rules of evidence.**
- b. **Damage acts.**

XVI. Pleading.

- a. **Necessity for an averment of knowledge on the master's part.**
- b. **Necessity for an averment of ignorance on the plaintiff's part.**
- c. **What particularity is required in the servant's petition.**
- d. **Necessity for an agreement between the allegations and the proof.**

XVII. Burden of proof; opinions as evidence.

- a. **Burden of proof.**
- b. **Admissibility of opinions as evidence.**

XVIII. Instructions.

overcome that of the lower, so as to descend of its own volition, it is handled by a hand brake. This is a wheel set on a perpendicular screw, which tightens or loosens a band running around the drum. By loosening this band, the drum will revolve if the weight of the descending cage is sufficient. This band is controlled by a screw, and can be loosened or tightened at the will of the man controlling it. In 1892, and about seven months before the accident, defendant employed one William Ryan as brakeman, whose duty it was, by use of the brake, to lower the cage in one shaft. On October 18 of that year, the cage was descending in the usual manner, with Ryan managing the brake. He turned the screw in the wrong direction, releasing the pressure. As a result, the cage fell to the bottom, and plaintiff, as well as others, was seriously injured. Plaintiff brought suit to recover for his injuries, planting his right of action upon three grounds of negli-

gence: (1) That Ryan was incompetent at the time of hiring, and that defendant did not use ordinary care in hiring him to ascertain his qualifications; (2) that Ryan was incompetent at the time of the accident, and that defendant had actual notice of such incompetency; (3) that defendant had not used reasonable care in ascertaining how Ryan was doing his work. At the conclusion of the evidence, the court directed a verdict for the defendant. The further essential facts will be stated in connection with the points raised.

Messrs. Button & Norris, for plaintiff in error:

An employer is bound to use such care in the selection of its employees as is commensurate with the duties and responsibilities of the position to be filled; ordinary care, but such as a careful prudent employer ought to exercise.

I. Introductory.

An act of an employer resulting in a personal injury to one of his servants may be either wilful and malicious or merely careless, but as cases involving acts of the former description do not offer any characteristic features specially distinguishing them from the cases in which the parties are strangers, there is no good reason why they should be referred to in the present disquisition. In the following note, therefore, the consequences of the employer's knowledge or ignorance will be discussed only in so far as they may bear upon his responsibility for negligent acts.

That knowledge is a constituent element of negligence under any of its aspects, will be sufficiently obvious to anyone who considers that a want of care can only be manifested in one of two ways, viz., either by a failure to make such inquiries as would have turned partial and merely constructive into complete and actual knowledge, or by a failure to act prudently with a full knowledge of the conditions. Any other theory would be inconsistent with that fundamental principle of jurisprudence which makes ignorance of facts a valid excuse for an injurious act, provided such ignorance is justifiable.

In the ordinary analyses of negligence, this aspect of the tort is somewhat obscured, for the reason that they lay the chief stress upon the standards by which its existence or non-existence is determined. In the two following well-known definitions, for instance, the element of knowledge is quite latent:

Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable man would not do. *Alderson, B., in Blyth v. Birmingham Waterworks Co. (1856) 11 Exch. 781, 25 L. J. Exch. N. S. 212, 2 Jur. N. S. 333.*

Negligence is the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may be in omission or commission. The duty is dictated by the exigencies of the occasion. *Swayne, J., in Baltimore & P. R. Co. v. Jones (1877) 95 U. S. 439, 24 L. ed. 500.*

In other definitions the presence of this element is more apparent, but is not very distinctly insisted upon.

Negligence, in its civil relations, is such an inadvertent imperfection, by a responsible human agent, in the discharge of a legal duty, as produces, in an ordinary and natural sequence, a damage to another. The inadvertency or want of due consideration of duty, is the *injuria*, on which, when naturally followed by the *damnum*, the suit is based. *Whart. Neg. § 3.*

Negligence is the want of such attention to the natural and probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns. *N. Y. Penal Code, § 10, subsec. 1.*

In a third set of definitions the element of knowledge is put prominently forward, though it can scarcely be said that any of them indicate satisfactorily the true relation which it bears to that absence of care which constitutes the main element in the conception of negligence. The defect in such explanations as the following is that they fail to take account of the case in which negligence is predicated of acts done by one who is fully aware of all the circumstances with reference to which he is called upon to choose a course of action, and who also knows that there is a probability which, in some instances, approaches to a moral certainty, that the course of action which he does adopt will prove injurious to someone. Unless the familiar phrase "wilful negligence," is based upon a wholly false conception, no definition which fails to cover an act done by a person in this condition of enlightenment can be termed satisfactory.

Negligence is practically synonymous with heedlessness or carelessness, not taking notice of matters relevant to the business in hand of which notice might or ought to have been taken. *II. Stephen, Hist. of the Criminal Law, p. 122.*

An actor is negligent when he is ignorant of the consequences of his act, if his ignorance proceeds from thoughtlessness, recklessness, carelessness, want of due attention. Negligence is inadvertence to consequences to which a man might have adverted and to which he would have adverted had he been desirous to obey the law and perform the obligations which it imposes. *Poste's Galus, p. 18.*

Of the three gradations of misconduct towards others, fault or negligence (*culpa*) is an unlawful act in ignorance of the subject, the degree, the instrument, the consequences, when it was reasonable to expect the mischief; un-

Wabash R. Co. v. McDaniels, 107 U. S. 454, 27 L. ed. 605; *Hilts v. Chicago & G. T. R. Co.* 55 Mich. 437.

No one above Willie Ryan in authority ever paid any particular attention to him after the first day he worked, and the duty imposed by law upon the defendant was not fulfilled.

Hilts v. Chicago & G. T. R. Co. 55 Mich. 445.

Mr. Charles E. Miller, for defendant in error:

The testimony as to what took place at the time of the hiring of William Ryan being undisputed, it was a question of law for the court to decide as to whether that testimony showed a state of facts which indicated negligence on the part of the defendant company.

Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99; 16 Am. & Eng. Enc. Law,

lawful intention (dolus) is breach of law with knowledge of these elements, but without premeditation; malice or depravity is evinced by the resolution or deliberate intention of violating law. Aristotle's Eth. Nic. 3, 5, 8 (translated in Poste's Galus, p. 15).

It is clear that such explanations as these are peculiarly defective when considered with reference to the circumstances from which an employer's liability is predicated, for they cannot be made to comprehend the cases of actual or constructive knowledge of the existence. It would be doing violence to common sense to say that the liability in this instance is based upon his blameworthy ignorance of consequences. His fault really consists in nonaction or wrong action, with a full appreciation of the probable results of his conduct.

In other words, the law requires him to indemnify the injured servant because he knows or is presumed to know that his instrumentalities are in a dangerous condition, and also knows or is presumed to know that this dangerous condition must in the long run cause injury to anyone who uses, or is brought into proximity to, those instrumentalities as frequently and as constantly as is the case with a servant.

The reason why the above definitions and explanations of negligence are inadequate when applied as a measure and test of an employer's liability is simply this, that the special duty which, above all others, is imposed by the law upon him, is the duty of maintaining the instrumentalities of his business in such a condition that his servants will not be exposed to unnecessary peril.

This duty cannot be effectively discharged, unless he exercises reasonable care in seeing that the instrumentalities do not fall below a given standard of safety. The primary duty of an employer therefore, is to obtain such knowledge as is necessary to enable him to decide whether that normal standard is or is not satisfied at any given moment, while his duty to raise the instrumentalities to that standard, after he ascertains that they come short of it, is a secondary duty imposed by the law for the reason that he must be aware that, if this is not done, his servants will be likely to suffer injury. In short, the very essence of the principle upon which he is held liable is his knowledge, either of existing conditions or of the probable consequences of the continuance of those conditions.

p. 467, note 1; 1 Shearm. & Redf. Neg. § 56; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 653; Cooley, Torts, p. 804; *Pleasants v. Fant*, 22 Wall. 116, 22 L. ed. 780.

The defendant company exercised all the diligence required of it at the time of the hiring.

There are no cases in the books which hold that it is negligent *per se* to employ a man seventeen years old to do this work, and, on the contrary, it has been frequently decided that the employing of such a person under circumstances like this is not negligent.

Sutherland v. Troy & B. R. Co. 125 N. Y. 737; *Kansas & T. Coal Co. v. Brownlie*, 60 Ark. 582; *Molaske v. Ohio Coal Co.* 86 Wis. 220.

Even if it were true that Ryan had been negligent in the lowering of cages in that he lowered them faster than was safe, and so fast as to indicate a reckless disregard for the safety of the persons riding in the cage

The criticisms of Cotton and Bowen, L. JJ., upon the general rule which Brett, M. R., undertook to formulate in *Heaven v. Pender* (1883) L. R. 11 Q. B. Div. 508, 52 L. J. Q. B. N. S. 702, 49 L. T. N. S. 857, 47 J. P. 709, probably forbid us to lay it down as a universal proposition, applicable to all civil relations, that, as has been laid down in *Mastin v. Levagood* (1891) 47 Kan. 36, "where any voluntary act may naturally result in the injury of another, the actor must see to it, at his peril, that injury does not follow."

But this doctrine undoubtedly expresses the conception which is the keynote of all the statements which we find in books respecting extent and character of the master's obligations to secure his servant against personal injury,—the conception, that is to say, of a duty to exercise a reasonably careful supervision with a view to eliminate unnecessary perils from the business.

A master must "exercise care and prudence that those in his employment be not exposed to unreasonable risks and dangers." *Noyes v. Smith* (1865) 28 Vt. 59, 65 Am. Dec. 222.

The legal implication is, that the employer will adopt suitable instruments and means with which to carry on his business. These he can provide and maintain by the use of suitable care and oversight; and if he fails to do so, he is guilty of a breach of duty under his contract, for the consequences of which he ought in justice and sound reason to be responsible. *Snow v. Housatonic R. Co.* (1864) 8 Allen, 441, 85 Am. Dec. 720. See also subd. VII., VIII., IX., post.

Or, to view the matter from a somewhat different standpoint, the qualifications ingrafted on the original rule that a servant assumes the ordinary risks of his employment are that a master shall not employ his servant in a work which the master is aware is of such a nature that no man could engage in it without incurring liability to the injury complained of. This appears to be a rational qualification of the rule which exempts the master from liability for injuries resulting from accidents to those in his employment, and involves the existence of knowledge on the part of the master of the dangerous nature of the employment. *Potts v. Plunkett* (1859) 9 Ir. C. L. Rep. 290, per Lefroy, Ch. J.

The obligation thus imposed upon the master is, it will be observed, the same in kind and degree as that incumbent upon all individuals or corporations who are under a duty towards a

previous to the time of the accident, the plaintiff has not made out a case here. There is no proof that the accident resulted from the fact that Ryan lowered the cage too fast or started to lower it too fast, and what proof there is on that subject is directly opposed to that theory.

It is not enough in order for the plaintiff to recover in this case, to show that the accident resulted from the negligence of Ryan; it must appear that it was the direct result of the incompetency of Ryan.

Catlin v. Michigan C. R. Co. 66 Mich. 358; *Thompson v. Lake Shore & M. S. R. Co.* 84 Mich. 281; 1 Bailey, Personal Injuries Relating to Master & Servant, § 1481; *Core v. Ohio River R. Co.* 38 W. Va. 456; *McNally v. Colwell*, 91 Mich. 528.

Where injury is not the result of inability to perform the duties devolving upon the servant, but is the result of momentary inattention and carelessness, such injury is

caused by the negligence of a coservant, for which the defendant could not be held liable.

1 Bailey, Personal Injuries Relating to Master & Servant, § 1474; *Harvey v. New York C. & H. K. R. Co.* 88 N. Y. 481.

There is no claim, and no evidence in the case, that the defendant company ever had any actual notice of acts of carelessness or incompetency upon the part of Ryan.

So that if defendant can be held at all, it must be upon the assumption that the circumstances of Ryan's alleged carelessness were such as that the company ought to have known of it.

In order to make the company liable for not discharging an employee who has become incompetent during his employment, notice of the incompetency, or of the improper habit, must be brought home to the company, or the incompetency or habit must be so notorious as to charge the company with knowledge.

given class of persons to keep certain material substances in a safe condition. The most familiar example of this duty, apart from the relations of master and servant, is that which requires municipal corporations to maintain safe highways, etc., for the benefit of travelers. It is the accepted rule that no action can be maintained for a breach of this duty unless the corporation is proved to have had notice, actual or constructive, of the dangerous conditions which caused the injury. See 2 Dill. Mun. Corp. § 790.

This similarity of the principles involved, and of the results to which those principles lead, has not escaped the notice of the courts.

As was aptly remarked in *Huffman v. Chicago, R. I. & P. R. Co.* (1883) 78 Mo. 50, "cases of this sort [i. e., where masters are sued by injured servants] are obviously analogous to those where a municipal corporation is sued for an injury arising from a defect in one of its streets, where one of two things must be shown to hold the city liable, either notice of the defect communicated to the city, or evidence that the defect had continued so long as to allow the inference to be drawn that notice of such defect had been communicated."

The same rule prevails as regards other relations in which a duty resembling that imposed on an employer is imposed on one of the parties.

Thus, the knowledge which the employer of an independent contractor possesses respecting the condition of the instrumentalities which he may be required, whether by express contract or by the custom of the business, to furnish for the use of the contractor's servants, is a material element in the determination of the question whether he has failed in the performance of his duty. Accordingly it has been said that the law is well established that a vessel is bound to furnish rigging and appliances reasonably safe for the use of those employed in receiving or discharging her cargo, although they may be in the immediate employ and pay of the stevedore, and that an action in rem will lie for damages arising from defects and imperfections in such appliances furnished, whenever the defect was such that a careful examination at the time could have detected it. *The Para* (1894) 23 U. S. App. 72, 60 Fed. Rep. 107, citing *The Carolina* (1886) 30 Fed. Rep. 199, *The Rheola* (1884) 19 Fed. Rep. 926; *The William Branfoot* (1892) 48 Fed. Rep. 914; *The Protos* (1891) 48 Fed. Rep. 919; *The Serapis* (1891) 49 Fed. Rep. 393.

Similarly where A contracts with the owners of a mine to excavate the ore, they agreeing to erect such supports and props as would render the miners safe, whenever notified by the contractor that the same were necessary, the owners, even in the absence of such notice, are liable to a servant of the contractor for injury caused by the lack of proper supports, if, having actual knowledge of the necessity for such supports, they failed to erect them. *Kelly v. Howell* (1884) 41 Ohio St. 438.

On the other hand, a ship is not liable for an injury to a stevedore by the fall of a bale of cotton, caused by the breaking from a latent defect of a hook used in raising and lowering cotton into the hold. *The Benbrack* (1888) 33 Fed. Rep. 687.

The same principles also inure to the advantage of the owner of premises who is sued for damages by a licensee.

Thus, a person who is injured by the fall of a plank of a roof which gave way under a man hired to do some repairs cannot recover unless he shows, either that the hirer knew or had the means of knowing, or was bound to take steps to know, that the roof was not sufficiently strong to support the workman's weight. *Welfare v. London & B. R. Co.* (1869) L. R. 4 Q. B. 606, 38 L. J. Q. B. N. S. 241, 20 L. T. N. S. 743, 17 Week. Rep. 1066.

They are also admitted as a restriction upon the liability of carriers for injuries to passengers, the extent of their duty, where freight is concerned, being determined upon the peculiar considerations which render them practically insurers of the safety of the goods conveyed.

The established rule in regard to the liability of a carrier to a passenger seems to be that the fact of the carrier's having employed an independent contractor to furnish the appliances or structures used in carrying on the business of transportation will not warrant him in trusting to the external appearance of the materials, or relieve him of the duty of carefully inspecting and testing those materials. *Hutchinson, Carr.* § 512, et seq.

The leading American case on this point is *Ingalls v. Bills* (1845) 9 Met. 1, 43 Am. Dec. 346, where the court, after an exhaustive discussion of the earlier authorities, stated its conclusions as follows: "The result at which we have arrived, from the examination of the case before us, is this: That carriers of passengers for hire are bound to use the utmost care and diligence

Lee v. Michigan C. R. Co. 87 Mich. 579; *Oameron v. New York C. & H. R. R. Co.* 145 N. Y. 400.

The character and qualifications once possessed may be presumed to continue, and the master may rely upon that presumption until notice of change, or knowledge of such facts as would be equivalent to notice, or such at least as would put a reasonable man on his guard.

1 Bailey, *Personal Injuries Relating to Master & Servant*, § 1413; *Chapman v. Erie R. Co.* 55 N. Y. 579.

Grant, Ch. J., delivered the opinion of the court:

1. Ryan was seventeen years and five months old at the date of his employment. It is urged that it is negligence to employ one so young in such a responsible position, or, at least, that it is a question for the jury to determine. Young Ryan had had an experi-

ence of nearly two years in a similar position at another mine, where he had performed his work satisfactorily. He had performed his work satisfactorily and without accident, for between seven and eight months at the defendant's mine. It is conceded that he had sufficient physical ability, and was possessed of ordinary intelligence. Plaintiff's own testimony shows that he had the "appearance of being older than he was." Plaintiff cites no authorities to sustain his contention. The work was not difficult. There is nothing to show that it would be safer to employ for this work a person who was older. The fact that he had done his work safely and satisfactorily for over seven months is the best proof of his competency. There is no presumption of law that one seventeen or eighteen years of age cannot do such work as safely and as well as one older. There is no authority or reason in the proposition that one of that age is an improper person to employ for such work.

in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachman, in order to prevent those injuries which human care and foresight can guard against; and that if an accident happens from a defect in the coach, which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger happening by reason of such accident. On the other hand, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense." [The doctrine laid down in this case has been adopted by all the American courts (See Hutchinson, Carr. § 507), and is also established law in England. See *Readhead v. Midland R. Co.* (1867) L. R. 2 Q. B. 412, 36 L. J. Q. B. N. S. 181, 16 L. T. N. S. 485, 15 Week. Rep. 831, 8 Best & S. 871, Affirmed (1869) L. R. 4 Q. B. 379, 38 L. J. Q. B. N. S. 169, 17 Week. Rep. 787, 9 Best & S. 519.]

The fundamental propositions which the foregoing discussion indicates to be controlling in every action brought by a servant to recover damages for an injury received in the course of his employment may be stated as follows:

(A) The servant's case is not completely made out unless he proves: (I.) That the instrumentality which caused his injury was in an abnormally dangerous condition; (II.) that the accident which occurred to the servant was such as might reasonably have been expected to result from the existence of that abnormal condition; (III.) that the master either actually knew of that condition, or would have known of it if he had made a proper use of the means of information which he possessed; (IV.) that the master, having this actual or constructive knowledge of the special risk to which the servant was exposed, omitted to take such steps as a prudent man would have taken for the protection of the servant by remedying the defect immediately, or, if that should not be feasible, by informing the servant of the existence of the risk and so placing him in a position to provide for his own safety; (V.) in cases where the mas-

ter's failure to examine with reasonable care and frequency the condition of his appliances is the breach of duty specifically relied upon, the servant is also required to show that the abnormal condition which produced the injury would have been discovered by an examination of the kind which the law requires under the circumstances of the case.

(B) When the servant has established a *prima facie* right of action by proof of these particulars, the master may still escape liability by showing that the servant was himself aware of the danger to which he was exposed, and went on working under circumstances which charge him with an assumption of the risk or with contributory negligence.

All these propositions except the first under (A) are more or less germane to the subject of the present note, and we shall now proceed to review, under convenient headings, the cases by which they are illustrated.

Cases are not wanting in which the principle that fault cannot be imputed to the master unless he has knowledge of the existence of the conditions from which the servant's injury resulted seems to have been ignored, and liability imposed upon evidence which merely showed that those conditions existed. See, for example, the following: *McCray v. Galveston, H. & S. A. R. Co.* (1896) 89 Tex. 168; *Bonner v. Glenn* (1891) 79 Tex. 531; *Taylor, B. & H. R. Co. v. Taylor* (1890) 79 Tex. 104; *Texas P. R. Co. v. White* (1891) 82 Tex. 548; *Texas & P. R. Co. v. Crow* (1893) 3 Tex. Civ. App. 266; *Engstrom v. Ashland Iron & S. Co.* (1894) 87 Wis. 166; *Kennedy v. Lake Superior Terminal & T. R. Co.* (1896) 93 Wis. 32; *Darling v. New York, P. & E. R. Co.* (1892) 17 R. I. 708, 16 L. R. A. 643; *Gorham v. Kansas City & S. R. Co.* (1892) 113 Mo. 408.

But doubtless the language in these cases is to be explained by the fact that no question was raised as to the master's possession of the knowledge demanded by the law, and the attention of the court was therefore fixed more particularly upon the material results of his negligence.

As illustrating the foregoing remarks, the cases in which the courts have laid down the doctrine that knowledge is an essential element of contributory negligence may usefully be noted. In one of these the rule was thus stated in the most general terms:

"Negligence can only be affirmed in respect of situations and conditions known to the party

The authorities appear to be uniform against the proposition. *Sutherland v. Troy & B. R. Co.* 125 N. Y. 737; *Kansas & T. Coal Co. v. Brownlie*, 60 Ark. 582; *Neal v. Gillett*, 23 Conn. 437; *Molaske v. Ohio Coal Co.* 86 Wis. 220. In *Sutherland v. Troy & B. R. Co.* the telegraph operator, through whose negligence the accident happened, was a little over seventeen years old, had had over a year's experience, been in the employ of the company three months prior to the accident, and had discharged his duties intelligently and to the entire satisfaction of the company. It was held that the jury could not be permitted to infer that the operator was "incompetent . . . from his age only, or that the company was negligent in employing him, or to speculate whether, if the operator had been a man of mature years or judgment, he would have been less likely to have committed the mistake which Johnson did." In *Molaske v. Ohio Coal Co.* it was held negligence to em-

ploy a boy twelve years old in a responsible position, requiring constant watchfulness and attention. The court appears to have placed its holding upon the presumption of the common law, which fixes the age when the presumption of capacity arises at fourteen.

2. Did the company exercise due care in employing Ryan? One Richard Pascoe, the master mechanic of the defendant, was the authorized agent to employ him. Ryan's father had been a practical engineer, known to Mr. Pascoe for eighteen years. Mr. Pascoe was informed by his father of the experience his son had had, and was advised that he was capable of doing the work. Mr. Pascoe was familiar with the method of braking at the Michigamme mine, where young Ryan had had his experience, which was the same as in the defendant's mine. It further appears that the duties of the hand brakeman at the defendant's mine were more simple than at

to whom it is imputed." *Brown v. Louisville & N. R. Co.* (1895) 111 Ala. 275.

To the same effect see *Mather v. Billston* (1895) 156 U. S. 891, 39 L. ed. 464; *Cleveland Rolling Mill Co. v. Corrigan* (1899) 46 Ohio St. 283, 3 L. R. A. 385.

II. Actual knowledge.

a. Existence of actual knowledge, effect of.

The cases which furnish the simplest illustrations of the general principle discussed in the preceding subdivisions are those involving facts which justify the conclusion that the employer had actual knowledge of the abnormal conditions which caused the servant's injury.

"If there is personal negligence in the master he is liable, and if he knows the defects which caused the injury that is evidence of personal negligence." *Meilors v. Shaw* (1861) 1 Best & S. 437, 30 L. J. Q. B. N. S. 838, 7 Jur. N. S. 845, per Crompton, J. Compare *Cumberland & P. R. Co. v. State, Moran* (1875) 44 Md. 283 (arg.).

In the first named of these cases it was contended by counsel that, to render the master liable, there must be actual personal interference on his part so as to lay a trap for the servant in the particular matter, from which he received the injury. But Mr. Justice Crompton said: "I do not agree to that; I think it is negligence for which the master is liable, if he knows that the machinery or tackle to be used by the persons employed by him is improper or unsafe, and notwithstanding that knowledge sanctions its use, as in *Roberts v. Smith* (1857) 2 Hurlst. & N. 218; though there may be a doubt as to his liability, where the servant is aware of the defective state of the machinery, and so may be presumed to have taken upon himself the extra risk for the sake of extra wages."

The following decisions will indicate the operation of the general principle in different connections:

It is culpable negligence in a mine owner to neglect a rule which he has promulgated to insure the testing of the rope by which the miners are lowered into and raised from the shaft, and to keep in his employment a servant who to his knowledge habitually disregards that rule to his knowledge habitually disregards that rule. *Senior v. Ward* (1850) 1 El. & El. 335, 28 L. J. Q. B. N. S. 139, 5 Jur. N. S. 172, 7 Week. Rep. 261.

41 L. R. A.

An employer is liable if, having received specific notice that a hoisting rope is rotten, he goes on using it. *Perry v. Bicketts* (1870) 55 Ill. 234.

In *Keegan v. Western R. Corp.* (1853) 8 N. Y. 175, 59 Am. Dec. 476, the plaintiff was injured by the explosion of the boiler of a locomotive engine on which he was employed by the defendants as a fireman. The boiler was defective and dangerous, and its condition in this respect was, and had for some time been, known to the defendants by the reports of the engineer made on five or six different occasions, which were entered on the books of the defendants kept for that purpose, and the injury to the plaintiffs resulted from the improper conduct of the defendants in using the engine in question thus known to be defective. Held, that on this statement of facts, no doubt could be entertained of the liability of the defendants.

So, the owners of a threshing machine are liable for personal injuries to a workman who, without knowledge that certain wheels and cogs usually covered are uncovered, attempts to oil the machine and has his hand caught in such cogs, when they operate the machine knowing it to be imminently dangerous in such condition. *Mastin v. Levagood* (1891) 47 Kan. 38.

So, it is negligence in a railroad company to continue to use a defective car coupling with knowledge of the defect, and a brakeman injured in consequence of the defect is entitled to recover damages. *Bowers v. Union P. R. Co.* (1885) 4 Utah, 215.

Where there is evidence showing that the master knows a boiler to be in a defective condition, it is not error to submit to the jury the question whether he was guilty of negligence in not providing suitable appliances. *Glossen v. Gehman* (1892) 147 Pa. 619; *Essex County Electric Co. v. Kelly* (1897; N. J. L.) 37 Atl. 619.

So, it is negligence on the part of a railroad company to allow a loose mass of rock to remain in a position above and near its track, in such a position as to slide or fall upon the track when detached, when the danger therefrom was known to such company or its officers. *Bean v. Western N. C. R. Co.* (1890) 101 N. C. 731.

So, it has been said to be "well settled that if proper persons are employed who afterwards become incompetent or unfit, from bad habits, to discharge their duties, and this is brought to the knowledge or notice of the principal or its

the mine at Michigamme. One McCall, an engineer, and witness for the plaintiff, testified that, "if a man had had a year's experience, he ought to be a very good man," and "I should consider two years' experience would make anyone all right." One John St. Cyr, another witness for the plaintiff, testified on cross-examination: "I should think that if Mr. John Ryan recommended a man, that he would be all right." These facts were undisputed. It therefore became a question of law for the court to determine whether the defendant had exercised due care in the employment of Ryan. The degree of care required is well stated in *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 27 L. ed. 605: "It is such care as, in view of the consequences that may result from negligence on the part of employees, is fairly commensurate with the perils or dangers likely to be encountered." In this case the machinery used was simple and easily managed. Defendant made due inquiries,

of one competent to judge, as to Ryan's experience and ability. The defendant therefore exercised due care in employing him.

3. There was no evidence that Ryan had become incompetent, or, if there were, that knowledge of his incompetency had been brought home to the defendant. When the master has exercised due care in the employment of a servant, he may rely upon the presumption of competency until he has notice or knowledge to the contrary. 1 Bailey, *Personal Injuries Relating to Master & Servant*, § 1413; *Chapman v. Erie R. Co.* 55 N. Y. 579. The only evidence plaintiff offered from which he claimed the right to go to the jury upon the question of notice was the testimony of one O'Donnell, who was at the time the engineer of the hoisting machinery for the defendant. He testified that he thought Ryan sometimes lowered the cage too fast. He also testified that they disagreed in regard to the speed at which men should be

managing officers who have power to act in the premises, a failure or neglect promptly to discharge them will render the principal liable for injury caused thereby." *Chapman v. Erie R. Co.* (1874) 55 N. Y. 579; *S. P. Frazier v. Pennsylvania R. Co.* (1861) 38 Pa. 104, 80 Am. Dec. 467; *Alabama & F. R. Co. v. Waller* (1872) 48 A. a. 459; *New Orleans, J. & G. N. R. Co. v. Hughes* (1873) 49 Miss. 283; *Lake Shore & M. S. R. Co. v. Stupak* (1889) 123 Ind. 210; *Ohio & M. R. Co. v. Collarn* (1881) 73 Ind. 128, 38 Am. Rep. 134; *Indiana Mfg. Co. v. Millican* (1882) 87 Ind. 87; *Pennsylvania Co. v. Roney* (1883) 89 Ind. 453, 46 Am. Rep. 173; *Texas & P. R. Co. v. Johnson* (1886) 89 Tex. 519; *Kean v. Detroit Copper & B. Rolling Mills* (1887) 68 Mich. 277; *Chicago & A. R. Co. v. Sullivan* (1872) 63 Ill. 293; *Mexican Nat. R. Co. v. Musette* (1894) 7 Tex. Civ. App. 169 Affirmed in (1894) 86 Tex. 708, 24 L. R. A. 642.

So, also, it has been held that a railroad company would be liable for injury to an employee through the mismanagement of a locomotive engine by a fireman, if the superintendent of engineers on, or superintendent of, the road knew that firemen were permitted to manage and control such engines, in the absence of engineers, about switches and stations, and failed or neglected to prohibit it. *Harper v. Indianapolis & St. L. R. Co.* (1871) 47 Mo. 567, 4 Am. Rep. 333.

See also the cases (III. post), turning upon the effect of constructive knowledge.

In estimating the extent of the employer's liability the essential part to be settled is not whether he knew that certain conditions existed, but whether he knew that those conditions involved danger to the servant.

Proof, merely, of knowledge on the employer's part that steps by which a servant is required to descend into a cellar are movable, without any evidence to show that movable steps are unsafe in themselves or unsuitable for the place, or that defendants knew or had reason to suppose that the owner would leave them insecurely placed, is not sufficient to enable the plaintiff to recover on the theory that he was set to work in a place of peculiar danger without a caution to look and see that the steps were properly placed. *Regan v. Donovan* (1893) 159 Mass. 1. Compare the cases cited in V. post.

And the analogous rule by which the material question in cases where the defenses of con-

tributory negligence or assumption of risks are raised is not whether the servant was aware of the abnormal conditions which produced the danger but whether he comprehended that there was such danger.

In an action for an injury occasioned by the alleged negligence of the defendant, the negligence, if any, of either plaintiff or defendant is to be measured by the condition of things at the place where the accident took place as they were known to exist by each of the parties at the time of the acts of each one complained of as being negligent; and these acts cannot be characterized one way or the other by the subsequent determination of conditions unknown at the time to both or either, except so far as that knowledge may properly affect the act of the one so informed. *Ray, Negligence of Imposed Duties*, 134, cited with approval in *Murphy v. Great Northern R. Co.* (1897) (Minn.) 71 N. W. 662.

If a railway company violates its duty by furnishing machinery and appliances which it knows to be defective, the danger to an employee who is required to use the appliances, in ignorance of their defective condition, is the same on one day as on another. The fact that they were being used on Sunday, therefore, when the servant was injured, will not enable the company to interpose as an excuse for its wrong a law enacted to secure the observance of Sunday. *Louisville, N. A. & C. R. Co. v. Buck* (1883) 116 Ind. 566, 2 L. R. A. 520.

The master may be held responsible on the ground of actual knowledge obtained through any channel, even though he has duly fulfilled the duty cast upon him by the law to see that the instrumentalities of his business are properly examined by competent agents, if not by himself in person.

In *Indiana, I. & I. R. Co. v. Snyder* (1894) 140 Ind. 647, the defendant's counsel place stress upon the fact that the lumber, out of which a defective car handle was constructed, was inspected before it went into the shops, and found to be clear and free of knots; but the court said: "An inspection is but the means employed by the master to discover defects. However, if, as in this case, he obtains notice through another representative agent of the insufficiency of the appliances in time to remedy the same, then the fact that an inspection was made by another of his agents, and noting as to the defectiveness in question ascertained, would not be available in favor of the

lowered; that he did not know who knew the most about running the brake, Ryan or himself; that Ryan "had always attended to his business up to this time (the time of the accident)." The officers of the mine were frequently in the engine room, frequently rode up and down in the cages, had seen Ryan perform the work, and had never seen or had their attention called to any act of incompetency or fault otherwise than, as above stated, that one person thought that he ran too fast. An employee may frequently use machinery in a negligent manner, but if such negligent use leaves no trace behind it, which it is the duty of the master upon inspection to see, no presumption of knowledge on the part of the master arises. A switchman may for a long time frequently leave a switch open, and habitually violate the rules of the master, but no inference of knowledge on the part of or notice to the master will arise

master. Where there is actual knowledge, the matter of inspection is not controlling."

It will be shown below that some courts hold that an employer may to a certain extent relieve himself of liability by delegating to a competent agent the duty of furnishing reasonably safe instrumentalities, but the operation of this principle is suspended wherever the employer had knowledge of the existence of the defects from which the plaintiff's injury resulted. *Mansfield Coal & Coke Co. v. McEnery* (1879) 91 Pa. 185, 38 Am. Rep. 662.

And generally it may be said that the master will often be held responsible, for the reason that he understood the conditions which exposed the servant to unnecessary danger, although, in other aspects of the case, the servant would have been unable to maintain his action.

Thus, the rule that a servant, when he accepts a certain employment, impliedly contracts that he possesses a certain degree of skill, does not avail to absolve the master from responsibility for injuries to a servant whose inexperience is put forward as a material ingredient in his right of action, where the master has actual knowledge of the extent of the servant's skill. *Goins v. Chicago, R. I. & P. R. Co.* (1889) 37 Mo. App. 221; *Missouri P. R. Co. v. King* (1893) 2 Tex. Civ. App. 122; *Arizona Lumber & T. Co. v. Mooney* (Ariz. 1893) 33 Pac. 400.

In other words it is negligence to set a servant to work at a special task where the employer knows that he lacks the strength and skill necessary to enable him to do it safely. *Noblesville Foundry & Mach. Co. v. Yeaman* (1892) 3 Ind. App. 521.

In certain cases, as will be shown in a note to be shortly published in this series, the master may escape the liability arising out of this state of facts by properly instructing the servant. But it will also be shown in the same note that his liability remains absolute if he knows that the servant lacks capacity to understand the dangers of the work, however much he may have been instructed.

[For an illustration of the converse of the doctrine just stated see *Whittaker v. Coombs* (1884) 14 Ill. App. 498; cited in the next section.]

It has, however, been held that the mere fact that the agent of the employer who hired a brakeman knew him to be inexperienced, will not make the employer liable as for negligence, the special reason assigned being that the em-

ployer cannot properly be deemed guilty of greater negligence in hiring him than he is in soliciting and accepting the employment. *McDermott v. Atchison, T. & S. F. R. Co.* (1896) 56 Kan. 319.

Other illustrations of the same general principle are these: The existence of proper regulations, and the fact that personal injuries to an employee occurred in consequence of violations thereof by an incompetent fellow employee, will not preclude recovery by the former, if the employer knew of the incompetence. *Bonner v. Whitcomb* (1891) 80 Tex. 178. The negligence of one fellow servant of an engineer in failing to report to the company his violations of a rule of the company will not relieve the company from an injury to another fellow servant caused by the negligence of the engineer, where the company retained such engineer in its employ although aware of his negligent acts. *Mexican Nat. R. Co. v. Musette* (1894) 7 Tex. Civ. App. 169, Affirmed in (1894) 86 Tex. 708, 24 L. R. A. 642. The right of an employee to recover for negligence of a corporation in hiring an incompetent servant over the protest of some of its officers who are aware of his incompetence is not affected by the failure of another employee to give notice of subsequent neglect and unfitness of such servant. *Mexican Nat. R. Co. v. Musette* (1894) 86 Tex. 708, 24 L. R. A. 642, Aff'd (1894) 7 Tex. Civ. App. 169. The servant's breach of a rule formulated for the safety of employees will not be imputed to him as contributory negligence, where such rule has been habitually violated with the knowledge and consent of the master or his representative. *Boess v. Clausen & P. Brewing Co.* (1896) 12 App. Div. 866. *Contrast Cameron v. New York C. & H. R. Co.* (1895) 145 N. Y. 400, cited in the next section.

[This subject will be fully developed in a note to be published at an early date in this series, and it will be unnecessary in the present connection to do more than make a passing reference to it.]

Agreeably to the principle by which a tortfeasor is required to indemnify the injured person for all the damage suffered by him, although other causes for which he is not responsible may have contributed to the result, a master cannot escape liability for injuries caused by instrumentalities which he knows to be defective, on the ground that the injuries were in part due to the act of a fellow servant of the plaintiff.

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ter & Servant, § 1474; *McNally v. Colwell*, 91 Mich. 527; *Thompson v. Lake Shore & M. S. R. Co.* 84 Mich. 281.

5. Plaintiff sought to show talk among the men that Ryan lowered the cage too fast. This was ruled out. It had no tendency to prove general reputation for incompetency. *Davis v. Detroit & M. R. Co.* 20 Mich. 105, 4 Am. Rep. 364; 1 Bailey, Personal Injuries Relating to Master & Servant, § 1501. Not only is there no evidence that the accident was due to too great speed, but there is affirmative evidence from plaintiff's own witness O'Donnell that the cage was descending at its "natural speed." This testimony could therefore have had no bearing upon the issue. Ryan was lowering the cage as he had done hundreds of times before, at the same or less speed. The speed, therefore, had nothing to

do with the accident. *Core v. Ohio River R. Co.* 38 W. Va. 456; 1 Bailey, Personal Injuries Relating to Master & Servant, § 1481; *Thompson v. Lake Shore & M. S. R. Co.* 84 Mich. 281, and *McNally v. Colwell*, 91 Mich. 528.

6. It follows from what has already been written that defendant was not guilty of negligence in failing to watch Ryan, and ascertain how he was doing his work. It exercised due care in employing him, and its engineer watched and instructed him when he commenced to work. The law imposed no further duty upon defendant until it had received notice of conduct which denoted incompetency.

The judgment must be affirmed.

The other Justices concur.

Thus, a railroad company is not relieved from liability to a sectionhand resulting from the use of a hand car with an insufficient brake, of whose insufficiency it had notice, by the fact that the section foreman in charge of the car was a fellow servant of the person injured. *Northern P. R. Co. v. Charles* (1892) 7 U. S. App. 859, 51 Fed. Rep. 562, 2 C. C. A. 330.

Nor will the fact that the plaintiff was injured partly through the negligence of a coservant in failing to block an engine with a leaking throttle valve, which was apt to move of its own accord, operate as a bar to the action, if the employer has also been negligent in allowing such engine to be kept in use with knowledge of its condition. *Atchison, T. & S. F. R. Co. v. Holt* (1883) 29 Kan. 149.

Where a foreman of a stevedore, having full charge of the loading and unloading of a vessel, called the attention of the mate of the ship to the unsafe character of a sling furnished by the vessel, and used in lowering cotton, the fact that the man at the gangway, whose duty it was to warn the men below when the cotton was on its way, failed to do so, was not, in admiralty, matter in discharge of the liability of the vessel, but only in mitigation of damages. *The Phoenix* (1888) 34 Fed. Rep. 760.

Still less can the master be absolved on the ground that a coservant of the plaintiff might, by exercising an unusual degree of care, have obviated the consequences of the master's negligence. Thus, where a locomotive the valves of which have been leaking for several months to the knowledge both of the company's superintendent and of the engineer, is left unattended by the latter without his taking certain precautions which would, as he knew, have prevented the escape of steam into the cylinder, the company is liable for injuries received by a car repairer as a result of the locomotive's being set in motion by such an escape of steam. *Cone v. Delaware, L. & W. R. Co.* (1880) 81 N. Y. 206, 37 Am. Rep. 401.

The above rule, however, is applicable only in cases where the master's negligence is, in the proper sense of the word, a concurrent cause of the injury. Upon familiar principles, it is clear that the master's knowledge of the incompetency of the culpable servant is immaterial where the efficient cause of the injury is the negligence of the plaintiff himself in voluntarily and knowingly exposing himself to the dangers created by the act of the incompetent servant. *Sheets v. Chicago & I. Coal R. Co.* (1894) 139 Ind. 682, where a brakeman was killed in coupling cars which he knew to be moving at a dangerous rate of speed, and it was held that the master was not liable at all. *I. R. A.*

though he knew that the engineer was unfit for his position.

b. Absence of actual knowledge, effect of.

The converse of the rule stated in the preceding section does not hold good in all respects, for, as will be shown in the next subdivision, the employer may be held liable although no actual knowledge on his part is established, if it appears that by the use of ordinary care he could have ascertained that the conditions existed which caused the servant's injury.

The only effect of its being shown that the master had no actual knowledge is that the burden of proving that his ignorance was culpable is cast upon the servant.

It is true that statements of the courts as to the effect of a want of knowledge on the master's part sometimes omit a formal reference to constructive knowledge, but, with a few exceptions to be presently noticed, such statements were not made in cases in which the question whether there was any difference between the legal consequences of actual and of constructive knowledge was fairly raised.

No special importance, therefore, is to be attached to the fact that we find in the books such remarks and rulings as these.

"As the declaration contains no charge that the defendant knew any of the defects mentioned, the court is not called upon to decide how far such knowledge on his part of a defect unknown to the servant would make him liable." *Priestley v. Fowler* (1873) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987.

It is not negligence in the master if a tool or machine breaks, whether from an internal original fault, not apparent when the tool or machine was first provided, or from an external apparent one produced by time and use, not brought to the master's knowledge. *Baker v. Allegheny R. Co.* (1890) 95 Pa. 211.

A seaman cannot recover damages from the owner of his ship on the ground of her being unseaworthy, unless he alleges and proves that such owner was aware of her condition. *Couch v. Steel* (1854) 3 El. & Bl. 408, 2 C. L. Rep. 940, 23 L. J. Q. B. N. S. 121, 18 Jur. 515.

A verdict for the defendant is rightly directed where there is no evidence of knowledge on the employer's part. *Skellenger v. Chicago & N.W. R. Co.* (1883) 61 Iowa, 714.

The evidence is insufficient to sustain a verdict for the plaintiff, where it does not prove that the defendant knew of the defect. *Arcade File Works v. Juteau* (1896) 15 Ind. App. 461.

A servant not hired for any special duties, who is directed to couple two cars, and receives

an injury because he undertakes to do this on the inside of a curve, cannot recover damages on the theory that he was unskilled in such work, where there is no evidence that his want of skill was known to the master or the master's representative. *Whittaker v. Coombs* (1884) 14 Ill. App. 498. Compare *Mahoney v. Vacuum Oil Co.* (1894) 76 Hun, 579; *Fisk v. Central P. R. Co.* (1887) 72 Cal. 43; *Johnson v. Armour* (1883) 18 Fed. Rep. 490; *Illinois Steel Co. v. Paschke* (1893) 51 Ill. App. 456; *Acme Coal Min. Co. v. McIver* (1894) 5 Colo. App. 267; *Behm v. Armour* (1883) 58 Wis. 1.

It will be found, on referring to the cases cited in the following subdivisions, that all the courts which have expressed themselves in this manner have fully recognised the doctrine that the two kinds of knowledge are equivalent in law, so far as the master's liability is concerned.

The only cases, it is believed, in which this doctrine has been explicitly rejected, are *McMillan v. Saratoga & W. R. Co.* (1855) 20 Barb. 460; *Anderson v. New Jersey S. B. Co.* (1867) 7 Robt. 611; and perhaps *Kuns v. Stuart* (1865) 1 Daly, 481. That these rulings are of no authority need scarcely be said.

III. Constructive knowledge.

a. Generally.

The principle that the obligations of the master to the servant can be fulfilled only by the exercise of due care in providing that suitable instrumentalities are provided for the operation of his business is applied in a somewhat different manner according as the plaintiff's theory and the evidence adduced to support it bring into greater prominence the question whether the master was negligent in allowing certain abnormal conditions to remain unremedied, or the question whether he was negligent in remaining ignorant that such abnormal conditions existed.

In cases in which the former is the main issue presented, the essential object of the investigation is to ascertain whether the instrumentality which produced the injury was abnormally dangerous to persons using it or working in proximity to it, and the master's knowledge or ignorance of its dangerous condition is treated as material only for the reason that the existence of that condition cannot be imputed to him as negligence unless it was known to him either actually or constructively. To this conception are referable such statements of the extent of the master's liability as the following:

The master may be negligent in not exercising ordinary care to provide suitable and safe machinery or appliances or in making use of those which he knows have become defective, but the defects in which he does not explain to the servant, or in continuing ignorantly to make use of those which are defective, where his ignorance is due to a neglect to use ordinary prudence and diligence to discover defects. *Cooley, Torts*, p. 556, quoted with approval in *Louisville & N. R. Co. v. Orr* (1882) 84 Ind. 50.

"The master is bound to use ordinary care in providing suitable structures and engines and proper servants to carry on his business, and is liable to any of their fellow servants for his negligence in this respect. This care he can and must exercise both in procuring and in keeping or maintaining such servants, structures, and engines. If he knows, or in the exercise of due care might have known, that his servants are incompetent, or his structures or engines insufficient, either at the time of procuring them, or at any subsequent time, he

falls in his duty." *Gilman v. Eastern R. Co.* (1866) 13 Allen, 433, 440, 90 Am. Dec. 210, per Gray, J.

"The rule has long been established, and it is founded in justice and reason, that it is the duty of railroad companies to keep their road and works, and all portions of the track, in such repair and so watched and tended as to insure the safety of all who may lawfully be upon them, whether passengers or servants or others. They are bound to furnish a safe road, and sufficient and safe machinery or cars. The legal implication is, that the roads will have and keep a safe track, and adopt suitable instruments and means with which to carry on their business. They can provide all these by the use of requisite care and foresight, and if they fail to do so, they are guilty of a breach of duty, and are liable for the consequences. . . . Under this rule it is held that the companies are liable for the existence of all defects which they knew, or by reasonable care and diligence might have known." *Lewis v. St. Louis & I. M. R. Co.* (1875) 50 Mo. 495, 21 Am. Rep. 385.

The liability of an employer for defective machinery does not depend on the fact that the defects are latent or patent, but on the question of proper care in selecting the machinery and keeping it in repair. *Gunter v. Grantville Mfg. Co.* (1881) 15 S. C. 443.

Another form in which the rule is expressed is that the employer is not liable for an injury caused by a "latent" defect; that is to say, one which is not discoverable by a reasonable inspection. *Essex County Electric Co. v. Kelly* (1894) 57 N. J. L. 100; *Throckmorton v. Missouri, K. & T. R. Co.* (1896, Tex. Civ. App.) 39 S. W. 174.

Or, to express the same idea in another way, the duty of a master to provide for the safety of his servant includes the obligation to protect him from latent or unseen defects, so far as that end can be attained by reasonable care. *Edward Hines Lumber Co. v. Ligas* (1896) 68 Ill. App. 523.

In another class of cases the essence of the negligence imputed to the master is his failure to adopt such measures as a man of ordinary prudence would have adopted under the circumstances for the purpose of keeping himself acquainted with the condition of the instrumentalities of his business. The main problem to be then solved is whether the master has discharged his duty of inspection, and his duty to maintain in safe condition is relegated to the background. Hence we find in the reports such statements as the following:

"It is incumbent upon a railway corporation, in the discharge of its duty as master, not only to provide machinery and instrumentalities for its employees which are suitable and safe, but also to use reasonable diligence to keep them so. Necessarily incident to these obligations is the duty of frequent inspection, and the corporation, acting by its servants in the discharge of such duty, is liable for their negligence." *Tierney v. Minneapolis & St. L. R. Co.* (1885) 33 Minn. 311.

The duty of a master to his servant to exercise reasonable care and skill in furnishing suitable machinery and appliances for carrying on the business for which the servant is employed, and in keeping such machinery and appliances in repair, includes the duty of making inspections and tests at proper intervals. *Nord Deutscher Lloyd S. S. Co. v. Ingebregsten* (1894) 57 N. J. L. 400.

"It is the duty of the company to exercise reasonable and ordinary care and diligence in providing and keeping in repair reasonably safe machinery and appliances for the use of its

servants; and this is a continuing duty, requiring the company to exercise reasonable diligence and care in supervision and inspection." *Chicago & E. I. R. Co. v. Kneirim* (1894) 152 Ill. 458.

The master should take notice of the liability of the parts of machinery to wear out and become defective. Hence the duty of the master to provide safe machinery and appliances is a continuous one. He must supervise, examine, and test his machinery as often as custom and experience require. *Wabash & W. R. Co. v. Morgan* (1892) 132 Ind. 430.

"Engines and other appliances used in operating a railroad are liable to wear out, to break, become defective and dangerous, and a railroad company employing such agencies is charged with notice of this fact, and consequently is bound to exercise a degree of watchfulness over them commensurate with the nature of the business in which they are employed and the consequences incident to neglect. Therefore, if a company fails to make frequent examinations of its engines, machinery, and appliances, or fails to take other measures of precaution necessary to prevent such appliances and machinery from becoming defective and dangerous from natural causes; and if from such defects which might have been known by the use of ordinary care or diligence, an employee suffers injury without his fault, negligence may be predicated thereon, as such omissions would be regarded as negligence." *Atchison, T. & S. F. R. Co. v. Holt* (1883) 29 Kan. 149, 152.

It is error to give an instruction implying that, "having furnished suitable and proper machinery and appliances, the master can thereafter remain passive, so long as they work well and seem safe." The duty of inspection is affirmative, and must continuously be exercised. *Houston v. Brush* (1894) 66 Vt. 331.

[The general principle to which these statements refer will be discussed at length in later subdivisions of this note. See especially, VII., VIII.]

These two types of cases in which the distinctive issues are the failure to remove a defect of which the master ought to have known, and the failure to ascertain that such a defect existed, are not always differentiated by trial courts as clearly as is desirable.

As both these issues are involved in every action of the class under consideration, although the main controversy may centre itself upon one rather than the other, it seems proper that each should be submitted to the jury by separate instructions rather than in one instruction, as is now the more common practice.

We shall now proceed to give the substance of a number of rulings and judicial statements in which the principle is recognized that for the purposes of affecting the master with or relieving him from, liability, constructive knowledge is equivalent to actual knowledge.

b. *Liability predicated from constructive knowledge.*

1. *General statements of the rule.*

The question is not whether the master believes that the materials furnished by him are free from defects, but whether he is justified in such a belief. *Roberts v. Smith* (1857) 2 Hurlst. & N. 213.

It is not enough that the master did not know of the danger, if, by reasonable care, he might have known, and if, reasonably, he ought to have known, and to have taken the proper means of knowing." *Webb v. Rennie*, (1865) 4 Foat. & F. 608, per Cockburn, Ch. J.

"It is the master's duty to be careful that his servant is not induced to work under a notion 41 L. R. A.

that tackle or machinery is staunch and secure, when in fact the master knows, or ought to know, that it is not so. If from any negligence in this respect damage arise the master is responsible." *Paterson v. Wallace*, 1 Macq. H. L. Cas. 748, 751. [Quoted as "recognised law" in *Herdler v. Buck's Stove & Range Co.* (1896) 136 Mo. 8.]

In *Feltham v. England* (1885) 4 Foat. & F. 460, where one of the pieces supporting a tramway collapsed, Cockburn Ch. J., charged the jury that "although it may be that the defendant had no actual knowledge . . . [of the inadequacy of the supports] the question is whether he might not and ought not to have had personal knowledge, and whether it was not negligence in him to allow the tramway to remain with the pieces in that insufficient state."

"Ignorance itself is negligence in a case in which any proper inquiry would have obtained the necessary information, and where the duty to inquire is plainly imperative." *Davis v. Detroit & M. R. Co.* (1870) 20 Mich. 124, 4 Am. Rep. 364, per Cooley, J.

"Where knowledge is essential to charge the master, negligent ignorance is equivalent to knowledge." *Schmidt v. Block* (1886) 76 Ga. 823, referring to 2 Thomp. Neg. p. 994; *Shearm. & Redf. Neg. § 93*; *S. P. Ocean S. S. Co. v. Matthews* (1890) 86 Ga. 418.

A master is liable for furnishing appliances which he knew, or ought to have known, to be unsafe. *McGhee v. Bell* (1897) 38 S. W. 702, 19 Ky. L. Rep. 267.

"The master is chargeable, not only with such knowledge as he actually has, but also with that which he ought to have by the exercise of reasonable care and diligence on his part in the performance of his duties as master." *Houston v. Brush* (1894) 66 Vt. 331.

"The law will imply notice of any defect which, by the use of ordinary care, might have been known to the master." *Consolidated Coal Co. v. Haenni* (1893) 146 Ill. 614; *Goff v. Toledo, St. L. & K. C. R. Co.* (1887) 28 Ill. App. 529.

The master's liability to his servant extends not only to such unnecessary and unreasonable risks as are in fact known to him, but to such as he ought to know in the exercise of proper diligence, i. e., diligence proportionate to the occasion. *Cook v. St. Paul, M. & M. R. Co.* (1885) 34 Minn. 45.

"Knowledge may be established by showing actual cognizance of the defect, or knowledge imputed from the opportunities for actual knowledge arising from the duty to observe its machinery and appliances for the safety of 'ts workmen." *Evanville & T. H. R. Co. v. Ducl* (1892) 134 Ind. 156.

"A master cannot screen himself from liability on the ground that he did not know of the defects in the machinery, or of the incompetency of his servants, if he might have known of them by the exercise of due care." *Consolidated Coal Co. v. Haenni* (1893) 146 Ill. 614.

Ignorance by the master of defects in the instrumentalities used by his servants, in performing his work, is no defense to an action by the employee who has been injured by them, when in the exercise of proper care and inspection the master could have discovered and remedied the defects, or avoided the danger incident therefrom. *Benzing v. Steinway* (1886) 101 N. Y. 547.

A master is chargeable with notice of a disorder or deficiency in anything which it is his duty to his servant to keep in reasonably safe condition, if a proper inspection would disclose its existence. *Chesson v. John L. Roper Lumbar Co.* (1896) 118 N. C. 59.

If the instrumentality which causes the servant's injury is a vicious animal belonging to the category known as "domestic" the master cannot avail himself of the rule which disables strangers from recovering damages from the owner of such an animal, unless he is shown to have had actual knowledge of its evil propensities.

That rule is based on the fact that the owner was not instrumental in placing the injured party in danger, and does not apply to a servant because he is not a mere volunteer. He is required by his master to assume the danger which the existence of vicious and uncured propensities implies, and if the master could, by the exercise of reasonable care, know of the existence of such propensities, his actual ignorance of them is no excuse in law. *George H. Hammond Co. v. Johnson* (1893) 38 Neb. 244.

From the principles stated in the cases above cited it follows that an instruction is erroneous which absolves an employer from liability "unless he knew of the defects" which caused the injury. *Bier v. Standard Mfg. Co.* (1889) 130 Pa. 446; *Houston v. Brush* (1894) 66 Vt. 331.

Conversely, an instruction is correct which declares that a servant has a right to recover on proof that the injury was occasioned by the use of defective machinery, and that the master was aware of the defect, or that the exercise of reasonable care would have disclosed it. *Elliott v. St. Louis & I. M. R. Co.* (1878) 67 Mo. 272.

Or that, if the jury "believe from the evidence that the defendant knew of the defects, if any existed and are proved by the evidence, and that the existence of such defects constituted negligence on the part of the defendant, and in the exercise of ordinary care and diligence the defendant could have known of and repaired them, then the defendant is liable therefor." *Peoria, D. & E. R. Co. v. Hardwick* (1892) 48 Ill. App. 562.

A demurrer to the evidence should not be sustained where there is some evidence tending to show that the defendant might, by the exercise of ordinary care, have discovered and remedied a defect prior to the accident of which it was the cause. *Harter v. Atchison, T. & S. F. R. Co.* (1896) 55 Kan. 250.

Where there was no distinct evidence that defendant or its agents knew of the defect, but there was evidence tending to show that the implement was made of bad material, which could have been discovered by the use of ordinary care, and not discoverable by ordinary use, a demurrer to such evidence is properly overruled. *Corey v. Hannibal & St. J. R. Co.* (1885) 86 Mo. 635; *S. P. Coonts v. Missouri P. R. Co.* (1894) 121 Mo. 662.

Where the evidence tends to show that the master's representative did not carefully perform his duty to see that an appliance was in good condition before it was delivered to the servants, and that the plaintiff's injury resulted from this dereliction of duty, a nonsuit is error. *Nord Deutscher Lloyd S. S. Co. v. Ingebregsten* (1894) 57 N. J. L. 402.

Where it is proved that a car-coupler gave way suddenly and injured a brakeman, but there is no evidence adduced to show that the company had knowledge of the existence of any defect, or that it had been derelict in regard to its duty of inspection, the plaintiff is properly nonsuited. *Fenderson v. Atlantic City R. Co.* (1894) 56 N. J. L. 708.

As illustrating the effect attributed to the neglect of a master to use care in keeping himself acquainted with the condition of certain specific instrumentalities of his business, the following rulings may be referred to:

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2. As to the condition of the place of work.

The duty of an employer to use reasonable diligence in seeing that the place where the work of his servant is to be performed is safe for that purpose extends, not only to such risks as are known to him, but to such as he ought to know in the exercise of due diligence, and includes keeping the edge of a pile of ore in such condition that it will not fall upon those ordered to work at its base. *Illinois Steel Co. v. Schymanowski* (1896) 162 Ill. 447.

An employer who ought by the exercise of reasonable diligence to discover the existence of a defect in the place where the employees are required to work is chargeable with such knowledge. *Linton Coal & Min. Co. v. Persons* (1894) 11 Ind. App. 264.

A railroad company is liable for an injury to an employee caused by the falling of a tower in which he was employed, by the striking of a car which has run off the track because of a defect therein, although it did not have actual notice of such defect, if it might have known thereof by the exercise of reasonable diligence. *Lake Shore & M. S. R. Co. v. Conway* (1896) 87 Ill. App. 155.

The risk of finding a snow drift on the track is one of those assumed by trainmen in climates where snow falls; but a snow-slide, being usually mingled with gravel and rock, is an essentially dangerous obstruction on the track, and if it derails a train the company will be liable to the servant injured by the derailment, unless it can show that it was reasonably careful in discovering the defect, and warning its servants of the danger. *Fisher v. Oregon Short Line R. Co.* (1892) 22 Or. 533, 16 L. R. A. 519.

A jury is warranted in finding that a railway company was negligent in the maintenance of its tracks, where it had left a derrick dangerously near an overhanging bank of earth, which, as might have been readily seen by anyone who had casually examined it the day before the accident in suit, was liable to fall at any moment, and it actually did fall, knocking down the derrick and bringing a guy which extended across the track into such a position that it swept over the top of a passing train and injured a brakeman. *Holden v. Fitchburg R. Co.* (1890) 129 Mass. 268, 37 Am. Rep. 343.

A railroad company is guilty of a want of ordinary care to maintain its roadway in good order, if its agents, charged with the duty of inspecting and repairing a bridge, have notice of defects in it, or by the exercise of reasonable diligence would have learned of them, and omit to make repairs; in consequence of which the bridge falls and an employee is injured. *Locke v. Eloux City & P. R. Co.* (1877) 46 Iowa, 109.

Actual notice to a railroad company that the blocking of a guard rail has become defective through wear is not necessary to render it liable for injury to a switchman through such defect, as it owes him the duty of vigilant and careful inspection. *Paine v. Eastern R. Co.* (1895) 91 Wis. 340.

A ship is liable for injuries to a stevedore employed by a charterer to discharge her, from the fall of a stanchion whose fastenings were so insecure that upon the removal of the cargo some slight vibration caused its fall, when its conditions were known to those having the vessel in charge, or could have been discovered upon proper inspection, which was not made. *The William Branfoot* (1892) 8 U. S. App. 129, 62 Fed. Rep. 390, 3 C. C. A. 155.

An employer is responsible to his employee for an injury sustained by the latter from a defect in the building where he works, which the

former knew of, or might have known of by the exercise of ordinary care. *Clefield v. Browning* (1894) 9 Misc. 98.

2. As to the condition of machinery and apparatus.

A master is liable for injuries resulting from defective appliances, where he "knew or might have known, by the exercise of reasonable skill," that they were defective. *Union P. R. Co. v. Snyder* (1893) 152 U. S. 684, 38 L. ed. 597.

A railway company is liable, as for culpable negligence in allowing machinery to remain out of repair when its condition is brought to its notice, or by proper inspection might be known. *Northern P. R. Co. v. Herbert* (1885) 116 U. S. 642, 26 L. ed. 755.

An employer is liable for an injury caused by the defective condition of machinery, "if he knew of the defect, or if, under all circumstances, as a reasonable man, he should have discovered, though he did not, their defective condition, or if he negligently remained ignorant of their defective condition." *Jones v. Yeager* (1872) 2 Dill. 64 (charge to jury).

Where the agents of the employer prior to the accident had received such reports in regard to defective appliances as ought to have put them on their guard, and to have led, by the use of proper diligence, to a knowledge of the facts, the employer must be held to the same liability as if his agents had had actual knowledge. *Chicago & A. R. Co. v. Shannon* (1867) 43 Ill. 338.

In *Walsh v. Whiteley* (1888) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38, where the machine which caused the injury had been in use for several years, and it appeared that another form of machine had been brought into use, it was held to be a question for the jury, whether the machine was defective in the sense of being dangerous to the workmen using it, and if it was so defective, whether or not the master, by the exercise of ordinary care, would have known it to be dangerous.

A verdict against a railroad company is properly given where the evidence goes to show that the injury was caused by a defective tool, and that the defect ought to have been known to the company's foreman. *Chicago, K. & W. R. Co. v. Blevins* (1891) 46 Kan. 370.

Where the evidence tends to show that a brakeman fell from a car owing to the breaking of one of the rungs of a climbing ladder, and the broken rung appears to have been bent by a blow at some previous time, a jury is entitled to find that the bend should have indicated to the company the propriety of examining it, and, if necessary, replacing it. *Jones v. New York C. & H. R. Co.* (1882) 28 Hun. 364.

Where there is evidence tending to prove that a car had been in an unsafe condition for several years before the accident; that the company had set aside the car for repairs on several occasions, and knew, or by the exercise of ordinary care could have discovered, that the timbers beneath the floor were decayed and rotten, and that the car was unsafe,—a verdict for the plaintiff will not be disturbed. *Chicago & E. R. Co. v. Branyan* (1894) 10 Ind. App. 570.

A railroad company is liable for negligence in permitting a car to be used from which the reach-rod was absent from the brakebeam in front of the wheels, causing the beam to hang lower and farther forward than it otherwise would have done, making it dangerous to brakemen going between cars to uncouple them, where the absence was known, or might have been known, to the company. *Louisville, N. A. & C. R. Co. v. Buck* (1888) 116 Ind. 566, 2 L. R. A. 520.

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In a suit by a brakeman against a railroad company to recover damages for injuries received by the giving way of a defective ladder attached to a car, said accident occurring while he was in the discharge of his ordinary duties as such brakeman, the plaintiff cannot recover unless knowledge of the defect must have been brought home to the defendant, or proof made that it was ignorant of the same through its own negligence or want of care. *Chicago & A. R. Co. v. Platt* (1878) 89 Ill. 141.

An employee of a smelting company cannot recover for an injury resulting from the breaking of a wire cable within a hook socket by which the cable was fastened to a car, which was thereby lowered to and raised from a pit, where the breaking of the cable was due to a defect which could not be seen either before or after the cable was placed in the socket. *Quintana v. Consolidated Kansas City Smelting & Ref. Co.* (1896) (Tex. Civ. App.) 37 S. W. 869.

Whatever may be the responsibility of the manufacturer a master is not liable for injuries to a servant resulting from his selection from an adequate stock of suitable appliances an appliance which was unsuitable for the purpose for which he intended to use it, if such unsuitableness was the result of a defect which could have been detected and provided against with reasonable care on the part of the master. *Toohy v. Equitable Gas Co.* (1897) 179 Pa. 437.

If a car-brake be so defective as not to operate effectually with proper use, a brakeman injured while setting it, in ignorance of the defect, is entitled to recover of the railway company, if the officers knew, or should, in exercise of proper diligence, have known, of its existence. *Texas P. R. Co. v. McAtee* (1884) 61 Tex. 695.

A brakeman who while performing his duties was injured by reason of a defective step on a car may recover damages from the company if its officers knew or ought to have known of the defect. *Texas P. R. Co. v. Wisenor* (1886) 66 Tex. 674.

A master is chargeable with knowledge of a latent defect in a steam drill which might have been discovered by the exercise of reasonable diligence upon his part. *Salem Stone & L. Co. v. Tepps* (1894) 10 Ind. App. 516.

A finding that an employer was negligent in furnishing an improper or defective jackscrew by the breaking of which his employee was injured is justified by proof that the break had begun before the jackscrew was given, that an inspection would have disclosed it, and that the inspection was not made. *Kennedy v. Chicago, M. & St. P. R. Co.* (1894) 57 Minn. 227.

A master who carries on an imminently dangerous undertaking—such as the generation and distribution of electricity—is bound to know the character and extent of the danger, and to notify the same to the servant specially and unequivocally, so as to be clearly understood by him. *Myhan v. Louisiana Electric Light & P. Co.* (1889) 41 La. Ann. 964, 7 L. R. A. 172.

It is the duty of an employer before using a highly dangerous explosive to ascertain and make known to his employees the dangers to be reasonably apprehended from its use; and his ignorance is no excuse if knowledge can be obtained by the exercise of reasonable diligence. *Bertha Zinc Co. v. Martin* (1895) 93 Va. 791.

4. As to the capacity of servants.

See also IX. post.

The general principle that a servant assumes the risk of injury from the negligence of a fel-

low servant is subject to the qualification that the master cannot avail himself of this defense where he is himself guilty of negligence in respect to the employment of the defaulting servant. It is a well-established rule that "a master is liable to his servant for an injury caused by the incompetency or want of skill of a fellow servant, whether it existed when the fellow servant was hired, or has come upon him since the hiring, the fellow servant having been in the first instance hired, or afterward continued in the service, with notice or knowledge or the means of knowledge of this lack." *Laning v. New York C. R. Co.* (1872) 49 N. Y. 521, 10 Am. Rep. 417.

"If, acting through appropriate officers, a railroad company knowingly or negligently employs incompetent servants, it is liable for an injury occasioned to a fellow servant by his incompetency. If it continues in its employment an incompetent servant after his incompetency is known to its officers, or so manifest that its officers, using due care, would have known it, such continuance in its employment is as much a breach of duty and a ground for liability as the original employment of an incompetent servant." *Gilman v. Eastern R. Co.* (1866) 13 Allen, 433, 90 Am. Dec. 210.

"The same care requisite in hiring a servant in the first instance must still be exercised in continuing him in the service; otherwise the employer will become responsible for his want of care or skill. The employer will be equally liable for the acts of an incompetent or careless servant, when he continues in his employment after a knowledge of such incompetency or carelessness, or when, in the exercise of due care, he should have known it, as if he had been wanting in the same care in hiring." *Shanny v. Androscoggin Mills* (1876) 66 Me. 420.

Absence of knowledge of the fellow servant's incompetency is not, in itself, an answer to an action for injuries caused by such incompetency, the master's true obligation being to use due care in selecting the servant. *Skerritt v. Scallan* (1877) 11 Ir. Rep. C. L. 380.

The master's knowledge of the bad reputation for intemperance of a person employed as brakeman on a train is not necessary to render him liable for injuries caused by the brakeman's untidiness, if he was negligent in not knowing of such reputation. *Norfolk & W. R. Co. v. Hoover* (1894) 79 Md. 253, 25 L. R. A. 710.

In *Hilts v. Chicago & G. T. R. Co.* (1885) 55 Mich. 437, the trial judge was alleged to have erred in instructing the jury as follows, to wit: "There is another ground which I submit to you, as jurors, to say whether or not defendant is liable, and that is whether or not the engineer had been guilty of such acts, showing his intemperance, that the company was negligent in not knowing his bad habits;" but the appellate court denied that there was any error, saying: "The instruction was based upon the well-settled principle of law that it is a duty which masters owe to servants employed by them, that the master will exercise due care in the employment of servants to select those who are competent; and that failure to do so is negligence. In the master, which will render him liable for injury caused by the negligent act of the servant, if occasioned by such incompetency. And this principle extends to the act of the master in retaining an incompetent servant in his employment after knowledge comes to him of the untidiness of the servant for the service in which he is engaged, or of whose untidiness he might have known by the exercise of due diligence or ordinary care."

To the same general effect, see the following cases: *Alabama & F. R. Co. v. Waller* (1872) 48 Al. R. A.

Ala. 459; New Orleans, J. & G. N. R. Co. v. Hughes (1873) 49 Miss. 258; *Texas & P. R. Co. v. Harrington* (1884) 62 Tex. 597; *Texas & P. R. Co. v. Mallon* (1885) 65 Tex. 115; *American Wire Nail Co. v. Connolly* (1893) 8 Ind. App. 398; *Nelson v. Kansas City, St. J. & C. B. R. Co.* (1886) 85 Mo. 599; *Kerlin v. Chicago, P. & St. L. R. Co.* (1892) 50 Fed. Rep. 185.

In *Davis v. Detroit & M. R. Co.* (1870) 20 Mich. 105, 4 Am. Rep. 364, the court made the following remarks: "From the language employed in some cases it might be supposed that the notice of unfitness, which was to charge the employer, must be nothing else than actual notice; but we are not disposed to question in the least the correctness of the doctrine advanced in the case of *Gilman v. Eastern R. Corp.* (1866) 10 Allen, 233, 87 Am. Dec. 635, and which put upon the employer the responsibility of negligently employing an unfit person, generally known and reputed to be such, notwithstanding the employer may in fact have been ignorant of such unfitness. The ignorance itself is negligence in a case in which any proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative."

In *Cayser v. Taylor* (1857) 10 Gray, 274, 277, 69 Am. Dec. 317, the following instruction was held correct: "It is contended that the defendant was negligent in the selection of an incompetent engineer, and negligent in continuing him in his employment. There are two inquiries here: 1. Was the engineer competent or incompetent? 2. If he was not, had the master reason to know it? If he had reason, and if he knowingly, or having good reason to know, and without due care and prudence, employed or continued in his employment such incompetent person, and the accident happened or injury arose by reason of such incompetency, and the plaintiff has satisfied you of this, the burden being on him, he is entitled to recover. If he was not negligent in this respect, or had not reason to know of this incompetency, and the injury did not arise from incompetency, he is not liable on this ground. If it was the careless act of an incompetent engineer, negligently and knowingly employed by the defendant, he would be liable; if it was the careless act of a competent engineer he would not be liable."

In an action by a brakeman against his employer to recover damages for personal injuries caused by the negligence of the conductor of a log train upon which plaintiff was employed, a verdict and judgment for the plaintiff will be sustained, where the evidence tended strongly to show that the conductor was a manifestly incompetent servant for the duties he had to perform, and that the fact of his incompetency was known or ought to have been known to the defendants when they employed him as conductor. *Huntsinger v. Trexler* (1897) 131 Pa. 497.

c. *Nonliability predicated from want of constructive knowledge.*

1. *General statements.*

The complement of the principle laid down in the cases cited in the preceding section is that the master is not liable for injuries which his servant receives through an imperfection in the instrumentalities of the business unless he knew or ought to have known of the existence of that imperfection. This rule which makes proof of knowledge on the master's part, or its equivalent, culpable ignorance, a prerequisite to the maintenance of an action by the servant,

is a necessary deduction from the doctrine that the standard to which the question whether the master is derelict in regard to his duties is referable is that of ordinary care. The master, in other words, does not insure the servant against injury from the perils of the employment. *Gutridge v. Missouri P. R. Co.* (1887) 94 Mo. 408.

In *Toledo, P. & W. R. Co. v. Conroy* (1871) 61 Ill. 162, the court said: "The rule is settled that, while a railway is bound to use the degree of diligence just stated in furnishing to the public a safe roadbed, yet it is not an absolute insurer, and cannot be held liable for defects of which such diligence would not inform it. Actual knowledge of the defect is not necessary. It is sufficient if the company might have been informed by the use of such diligence as the law imposes upon it, but where it did not know and could not have informed itself of the defect, we do not see how it can be held responsible."

The master merely stipulates that he will use due diligence in seeing that the appliances of his business shall not be of such quality that a prudent man would abstain from using them.

"An employer does not undertake absolutely with his employees for the sufficiency or safety of the implements and facilities furnished for their work, but only for the exercise of reasonable care in that respect, and where injury to an employee results from a defect in the implements furnished, knowledge of the defect must be brought home to the employer, or proof given that he omitted the exercise of proper care to discover it." *Devlin v. Smith* (1882) 89 N. Y. 470, 42 Am. Rep. 311.

"If the injury arises from a defect or insufficiency in the machinery or implements furnished to the servant by the master, knowledge of the defect or insufficiency must be brought home to the master, or proof given that he was ignorant of the same, through his own negligence and want of proper care; in other words, it must be shown that he either knew or ought to have known the defects which caused the injury." *Wright v. New York C. R. Co.* (1862) 25 N. Y. 582.

"The rule is unquestioned that, in order to charge a master with the consequences of an injury resulting to the servant from the use of defective machinery or other appliances with which the servant is at work it must appear that the master knew of the defective character of such machinery or appliances, or in the exercise of reasonable or ordinary care and diligence ought to have known of the same." *Atchison, T. & S. F. R. Co. v. Swarts* (1897) 55 Kan. 235.

"If the servant claims damages from the master for injuries received on account of defective premises, buildings, machinery, or appliances, he must allege and prove that the unfitness or the defect which caused the injury was known to the master, or was such as, with reasonable diligence and attention to his business, he ought to have known." *Pittsburgh, C. & St. L. R. Co. v. Adams* (1896) 103 Ind. 151.

"When there is no notice to the master of defects, and no blame imputable in not discovering them, he is not liable, if injury results to his employee therefrom." *St. Louis, I. M. & S. R. Co. v. Harper* (1884) 44 Ark. 524.

"The condition of the implements or the premises must be such as to suggest to an ordinarily careful man that there is danger before an employer can be charged with negligence in not providing against it." *Nelson v. Allen Paper Car-Wheel Co.* (1880) 29 Fed. Rep. 840.

"Where an employee seeks to recover damages for injuries resulting from insufficiency of

any of the machinery or instrumentalities furnished by the railroad company, it will not only devolve upon such employee to prove such insufficiency, but it will also devolve upon him to show either that the railroad company had notice of the defects, imperfections, or insufficiencies complained of, or that, by the exercise of reasonable and ordinary care and diligence, it might have obtained such notice." *Atchison, T. & S. F. R. Co. v. Wagner* (1886) 33 Kan. 606.

Injuries resulting from defective appliances are regarded as unforeseen accidents where the appliances were originally selected with care and there was no reason to suspect that they had deteriorated. *Kelley v. Forty-second Street, M. & St. N. Ave. R. Co.* (1890) 58 Hun, 93.

It is also a general principle that an employer cannot be held liable as for a breach of his duty to instruct unless he knew, actually or constructively, that the servant was unable to comprehend the danger of his work without instruction. *Klochinski v. Shores Lumber Co.* (1896) 93 Wis. 417. [See note on the Master's Duty to Instruct a Servant, to be shortly published in this series.]

The right to damages in actions brought by servants for injuries resulting from use of defective implements depends on proof that injury was caused by their use, and that defendant was aware of the defect, or reasonable care was not exercised to disclose the defect. *Covey v. Hannibal & St. J. R. Co.* (1885) 86 Mo. 635.

The following passage from 2 Thompson, Neg. p. 992, has been quoted with approval in *Stiles v. Richie* (1896) 8 Colo. App. 393: "If the master knew, or ought to have known, and the servant did not know, and was not bound to know of its existence [the danger] the liability of the master—the servant having been otherwise in the exercise of due care—is fixed, and it is equally true, in every case, that unless the master knew of the defect which subsequently produces the injury, or was under a duty of knowing it, he cannot be held liable; for, in the absence of such knowledge or duty of knowing, there is nothing of which negligence can be predicated."

In the following cases, also, constructive and actual knowledge are coupled together in stating the rule as to the facts which must be established by the servant in order to render the employer liable: *Hobbs v. Stauer* (1885) 62 Wis. 108; *Toonan v. Brockway* (1864) 3 Robt. 74 (1864) 28 How. Pr. 472; *Golts v. Milwaukee, L. & W. R. Co.* (1899) 76 Wis. 136; *Klupp v. United Ice Lines* (1891) 39 N. Y. S. R. 782; *Myers v. American Steel Barge Co.* (1896) 64 Ill. App. 187; *Bannon v. Sanden* (1896) 68 Ill. App. 164; *Columbus, C. & I. C. R. Co. v. Troesch* (1878) 68 Ill. 545, 18 Am. Rep. 578; *Ohio Valley R. Co. v. McKinley* (1895) 17 Ky. L. Rep. 1028; *Wells v. Coe* (1886) 9 Colo. 159; *Doling v. New York, O. & W. R. Co.* (1893) 73 Hun, 270; *Prentiss v. Kent Furniture Mfg. Co.* (1896) 63 Mich. 478.

The same principle prevails, even though from the nature of the accident it may readily be concluded that some defect did in fact exist. *Sack v. Dolse* (1890) 35 Ill. App. 636; *Statling Effect of De Graff v. New York C. & H. R. R. Co.* (1879) 70 N. Y. 125.

Thus, where a corporation believed, and was justified in believing, that a certain quantity of grain could be safely stored on a floor of its building, the fact that the floor gave way without warning, is not sufficient to render the corporation liable in damages to one of its employees who was injured by the fall. *Dillon v. Sixth Ave. R. Co.* (1882) 16 Jones & S. 283.

So, the mere fact that a millowner furnishes

an employee operating a circular saw with some timber that is uneven and knotty, in sawing which the employee is killed, does not constitute negligence on the part of the employer, unless he knew or should have known by the exercise of ordinary care that the timber was dangerous to be used. *Hooper v. Snead Iron Works* (1890) 12 Ky. L. Rep. 488.

In *The France* (1894) 20 U. S. App. 212, 59 Fed. Rep. 479, 8 C. C. A. 185, (Rev'g (1893) 53 Fed. Rep. 843), a steamship was held not liable for injuries to a fireman engaged in filling and hooking bags of ashes to a chain for removal from the stokehole, from the giving way of the handle of an ash-bag, where the bag was new, apparently sufficiently strong, and no defect had been observed in it by anyone, but which was fastened to the chain by passing one of its two handles through the other and hooking that handle to the chain without any reason why the hook should not be passed through both, and the chain slipped off the drum of the winch, jerking the bag violently so that the handle gave way. The court based its decision on, (1) the general principle that the existence of a defect is not necessarily inferable from the failure of the appliance; (2) the failure of the plaintiff to prove that the defendant knew that there was any danger; and (3) that the cause of the accident was apparently the unnecessary strain put upon the appliance by the plaintiff's co-servants.

Instructions are erroneous which permit a jury to infer that a verdict for the plaintiff may be based merely upon the fact of the injuries having been received without proof of negligence. *Lincoln Street R. Co. v. Cox* (1896) 48 Neb. 807.

Where a servant is injured by the collapse of a wooden bridge which is alleged to have been caused by a decayed condition of the timbers, the defendant is entitled to an instruction that, in order to charge him with liability, it is necessary for the plaintiff to show that the decay in the bridge, if it fell from decay, was known, by some notice or otherwise, to the president and directors of the road. *Warner v. Erie R. Co.* (1868) 39 N. Y. 468.

Compare *Toledo, P. & W. R. Co. v. Conroy* (1871) 61 Ill. 162, where the following instruction given for the plaintiff was declared to be erroneous: "In this case if the jury believe from the evidence that John Conroy was a fireman in the employ of the defendant, and was in the line of his duty on an engine crossing the bridge in question; and if they further believe from the evidence that the timbers of the bridge were decayed and unsafe and for that reason broke down, and that the death of John Conroy was occasioned by injuries received by the breaking of said bridge, and that the said John Conroy left next of kin,—then the defendants are liable and the jury should find for the plaintiff."

An instruction to the effect that "if the evidence shows that the plaintiff was injured through any defect in the construction of the pipes in consequence of their being out of repair or in an unsafe condition, then he is entitled to recover, if he used due care while attempting to blow out the pipe," is erroneous for the reason that it ignores the principle that to charge appellant it is essential to show knowledge, or that knowledge might have been obtained, by the use of reasonable diligence, of the defect in the pipe which caused the injury." *East St. Louis Pkg. & P. Co. v. Hightower* (1879) 92 Ill. 130.

In *Chicago & A. R. Co. v. Platt* (1878) 80 Ill. 441, an instruction was held erroneous because

it omitted to state that knowledge of the defect which was the efficient cause of the injury was a necessary ingredient of negligence on the part of the employer.

In *Columbus, C. & I. C. R. Co. v. Troesch* (1873) 68 Ill. 545, 18 Am. Rep. 578, an instruction which declares that the master impliedly warrants the fitness of his appliances, and ignored the question whether he knew or ought to have known of the condition of the appliances, was pronounced erroneous.

But such an instruction is not a ground for reversing a judgment for the servant, where other instructions are given which state the law accurately. *Toledo, W. & W. R. Co. v. Ingraham* (1875) 77 Ill. 309.

Where there is no evidence of knowledge, actual or constructive, on the master's part, a demurrer to the evidence is properly sustained. *Carruthers v. Chicago, R. I. & P. R. Co.* (1895) 55 Kan. 600.

A demurrer to the evidence should be sustained when the testimony fails to show any actual notice to any servant, whose duty it is to look after the place of work, or any negligence in not discovering the existence of the danger which caused the injury. *Burnes v. Kansas City, Ft. S. & M. R. Co.* (1895) 129 Mo. 11.

In *Humphreys v. Newport News & M. V. Co.* (1899) 33 W. Va. 135, it was held that a demurrer to the evidence should have been sustained where there was no testimony to show how long before an injury was received through the breaking of a rope it had been so weakened by wear as to be unsafe, nor whether the company had omitted the necessary inspection.

The complaint should be dismissed where the master had no knowledge of the defect, and there is nothing to charge him with knowledge. *Nelson v. Dubois* (1882) 11 Daly, 127.

Where there is no evidence from which the master's knowledge of the dangerous condition can be inferred, the plaintiff should be nonsuited. *Clough v. Hoffman* (1890) 132 Pa. 626.

Or a verdict directed for the defendant. *Melchert v. Robert Smith India Pale Ale Brewing Co.* (1891) 140 Pa. 448.

Where there is no evidence that a master employed incompetent persons to put in a steam-pipe, or, by the exercise of reasonable care, ought to have discovered that it was insecurely put in, the plaintiff should be nonsuited. *Hobbs v. Stauer* (1885) 62 Wis. 108.

A servant is properly nonsuited in an action to recover for injuries from the bursting of an emery wheel in the latter's works, where there is no evidence of improper construction or setting up the machine, nor of any defect in the wheel known, or which ought to have been known, to the master. *Simpson v. Pittsburgh Locomotive Works* (1890) 139 Pa. 245.

Evidence which merely shows that one of the defendants superintended the work of putting into place a steam-pipe from which the plaintiff's injury resulted is insufficient to support a finding that he knew the condition in which the pipe was left. *Hobbs v. Stauer* (1885) 62 Wis. 108.

A judgment for plaintiff should be reversed where no evidence has been given that a proper inspection was not made. *Essex County Electric Co. v. Kelly* (1894) 57 N. J. L. 100; *St. Louis, I. M. & S. R. Co. v. Gaines* (1885) 46 Ark. 555; *De Graff v. New York C. & H. R. R. Co.* (1879) 70 N. Y. 125. In the last case the court said:

"We may imagine several causes, (1), from an original defect in the iron, or (2), in its manufacture, or (3), by reason of weakness, and ordinary decay by use, or (4), by getting mis-

placed on the trip on which the accident occurred. There is no evidence that ordinary care and observation would have discovered all and either of these defects if they had existed, and they must have so found, as they could not have singled out a defect which ordinary care would have discovered, because the particular defect was entirely unknown."

In *De Graff v. New York C. & H. R. R. Co.* (1879) 76 N. Y. 125, the court, in setting aside a verdict on the ground that it was not proved what the defect was, nor that a proper examination had not been made, nor that an examination would have discovered the defect which caused the breaking, said: "Upon the next proposition, that the exercise of ordinary care would have discovered the defect, and that the defendant neglected to exercise such care, a careful examination has failed to satisfy me that the evidence was sufficient to warrant a verdict. In the first place, assuming a defect, there is no evidence what it was or the nature of it. The car was in a train going west, and it does not appear that anyone ever saw the chain afterwards, except the person who took the plaintiff's place after the accident, and he only looked at it with a lantern at a station, and saw that it was broken. There is some evidence, although slight, that the car did not belong to the defendant. There was an entire absence of evidence as to the nature and character of the defect, or the cause of the breaking."

In *Cherokee & P. Coal & Min. Co. v. Britton* (1896) 8 Kan. App. 292; a general verdict for a plaintiff injured by the fall of the roof of a tunnel was held to be inconsistent with a special finding (1) that there was no evidence to show that the rock was known to be loose, and (2) that the miners and other employees considered the place safe.

In an action by an employee against his employer for injuries caused by the negligence of a fellow servant, a special finding that no agent of the employer knew of the latter's unfitness and recklessness, will not defeat a general verdict in favor of the plaintiff, inasmuch as such a finding does not rebut the presumption that notice will be presumed, where the employee is so grossly and notoriously unfit that not to know of his unfitness is negligence. *Chicago, R. I. & P. R. Co. v. Doyle* (1877) 18 Kan. 58.

In *Atchison, T. & S. F. R. Co. v. Swarts* (1897) 58 Kan. 235, it was contended "that the evidence failed to establish negligence upon the part of the railroad company, and also that, by two special findings of the jury, it was acquitted of negligence. These findings are as follows: 'Q. Did it not (referring to the hole), by its appearance indicate that it had been in that condition for a considerable time? A. We cannot determine how long. Q. Did defendant have any knowledge of defect in the track or hole, if any there was, at the time of the accident? A. We do not know.' The court, however, declared that these answers, under former decisions construing others of a like kind, were to be taken as negative to the existence of the facts necessary to charge the company with liability, and were therefore equal in effect to an affirmative finding that the company had no knowledge of the hole in its track, and also that such hole had not been there for such length of time as to charge the company with negligence in allowing the same."

Pursuing the same plan as that adopted in the preceding section, we shall now proceed to cite a number of cases illustrating the effect of the general principle in its application to the various special duties of the master.

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2. As to place of work.

In *Feltham v. England* (1866) 1 L. R. 2 Q. B. 33, 36 L. J. Q. B. N. S. 14, 15 Week. Rep. 151, 7 Best & S. 676, one of the grounds of the decision was that no evidence was produced which showed that the defendant knew, or ought to have known, that certain piers, one of which fell and hurt the plaintiff, were insufficient for the use to which they were applied.

A railway servant, in order to recover damages for an injury caused by a defective road-bed, must show that the officers charged with the duty of seeing that it was in good condition had notice that it was defective, and having such notice neglected to repair it. *Houston & T. C. R. Co. v. Dunham* (1878) 49 Tex. 181; *S. P. Chicago & E. R. Co. v. Binkopaki* (1897) (Ill. App.) 2 Chicago L. J. Wkly. 438.

"An imperfect connection of the track may have existed in consequence of internal and invisible defects in the materials employed which have escaped the closest scrutiny and set at naught the exercise of the utmost care and diligence of the company." *Indianapolis & C. R. Co. v. Love* (1858) 10 Ind. 554.

In *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 151, the court said: "If the case before us is to rest alone upon the alleged negligence of appellant as connected with the alleged defective rail, then it must be shown that the rail was so defective when put in place by appellant, or, if it afterwards became worn and defective, that appellant knew of the defective and dangerous condition, or that it was defective and dangerous for such a length of time, that appellant might and ought to have known of it by the exercise of reasonable attention, care, and diligence."

A railroad company is not liable for an accident by which an employee's foot is caught by a splinter on the inside of a railroad track or rail, "unless it had notice of the defect, or, in the exercise of reasonable care, should have known of it, or have apprehended it to be dangerous." *Doyle v. St. Paul, M. & M. R. Co.* (1889) 42 Minn. 79.

Where there is no conflict of evidence as to the care and skill used in the construction and maintenance of a bridge, the inspection to which it was subjected, the adequate skill and competency of the employees engaged in that specified duty, the experience of defendant, both in the construction and duration of such structures, and the absolute want of any notice to defendant or any of its employees, of any defect, real or suspected, in a bridge which broke down, the conclusion is inevitable, that the defendant was not guilty of the want of such care in respect to its employees, as it was their duty to bestow upon its officers, and it is the duty of the court to take the case from the jury, and hold that, on the established facts, the plaintiff cannot recover. *Warner v. Erie R. Co.* (1868) 39 N. Y. 468, 474.

Where the evidence does not show that any particular method of moving the large driving wheels of locomotives is generally known and practised in machine shops, or known to the defendant himself, it is error to leave it to the jury to say whether the defendant was negligent in not instructing the plaintiff how such a wheel could be moved with safety. *Richmond Locomotive & Mach. Works v. Ford* (1897; Va.) 27 S. E. 509.

A railroad employee assumes the risk of a plank at a crossing gradually working loose and striking the footboard of an engine upon which he is riding, where the defective condition of the plank progressed unnoticed until the mo-

ment of injury. *Peoria, D. & E. R. Co. v. Hardwick* (1893) 53 Ill. App. 161.

In *Skidmore v. West Virginia & P. R. Co.* (1895) 41 W. Va. 293, a section hand while engaged with other section hands in clearing away a wreck under the supervision of a section boss and the overseer of the road was injured by the falling out of the bottom of an overturned tender in consequence of the fracture of the bolts which held it in its place. The court held that the plaintiff could not recover, for the reason that the supervisor or boss could not have discovered the existence of such a danger without finding some means of actually reaching the fractured bolts, and that they were manifestly ignorant of the existence of any such danger, inasmuch as they had been working in the place occupied by plaintiff when he was injured, a few moments before the accident occurred.

A railroad engineer is not negligent towards a switchman on a switch engine, so as to charge the company with liability for injuries to the latter, in running by an oil box near the track but far enough away to permit the engine to pass safely, unless he knows or has reason to believe that the switchman is in such a position that he may be injured in passing such box. *Louisville & N. R. Co. v. Bouldin* (1895) 110 Ala. 185.

A railroad company is not liable for injuries received by an employee engaged in the removal of trestles, due to the insecurity of timber apparently solid and fixed, over which the employee was obliged to pass, and which, giving way, threw him to the ground below, in the absence of knowledge, actual or constructive, of such insecurity on the part of the company. *Moore v. Pennsylvania R. Co.* (1895) 167 Pa. 495.

An action by an employee injured by the giving way of a wooden slat in a ladder which he was descending should be dismissed where the evidence does not indicate what the defect was or that the ladder was not safe when built, and does not show any defect in the slat or its fastening which would have been revealed upon inspection. *Schorning v. Knickerbocker Ice Co.* (1891) 38 N. Y. S. R. 27.

Where, in an action for personal injuries sustained by an employee by falling into a well-hole, there is no evidence that the lid of the latter was left in an unsafe condition at the time of the accident, by the defendant, or by anyone for such a length of time before the accident that the defendant ought to have known its condition, the verdict should be in defendant's favor. *Clough v. Hoffman* (1890) 132 Pa. 626.

A journeyman baker cannot recover against his employer for an injury caused by the falling in of a recently built oven, constructed by the lessor of defendant, and of whose defective condition defendant had no knowledge, actual or constructive. *Nason v. West* (1886) 78 Me. 253.

In order to charge the owner or operator of a coal mine with negligence because of the falling of loose rock or earth from the roof of the mine, he must have had previous knowledge of the defective condition of the roof, or "by the exercise of ordinary care and prudence," have been able to discover such defective condition. *Cherokee & P. Coal & Min. Co. v. Britton* (1896) 3 Kan. App. 292.

Owners of a coal mine are not liable for the death of an employee caused by the falling of a quantity of coal and slate from the roof of an entry or lateral tunnel, where the falling took place without the warning signs and dropping of coal that usually precede it, and those who made the usual and necessary tests deemed it suitable and safe, although it was deemed unsafe by some of the employees who kept their 41 L. R. A.

opinions to themselves. *Southwest Improv. Co. v. Andrew* (1889) 86 Va. 270.

Injuries received by a miner through striking his pick against a piece of giant powder in the loose rock thrown down by a blast, must be regarded as the result of an unforeseen and unavoidable accident, where the presence of the powder could not have become known to the employer's representative in the exercise of reasonable diligence. *Kelley v. Cable Co.* (1889) 8 Mont. 440.

A master is not guilty of personal negligence rendering him liable for injuries to an employee from an explosion of a blast which he was justified in believing had been before exploded, because he sent the employee to work about the hole which was being excavated, and sent another employee who had supervision of the work to another place, although the latter was apparently reluctant to leave the hole, the defendant having no reason to suppose that the safety of anyone was dependent on his continuing the work. *O'Neill v. O'Leary* (1895) 164 Mass. 387.

A master cannot be rendered liable on the ground of negligence by showing that the work which the servant was directed to do was essential to the safety of a ship on which the servant was employed by the master, and that he permitted the ship to leave port without its being done, and without having on board a skilled machinist to do it, and that it was outside the scope of the servant's employment, and that he was unfit to do it, unless it is also shown that the work was dangerous, and that the master knew or ought to have known that it was so. *Smyly v. Glasgow & L. Steam Packet Co.* (1868) 16 Week. Rep. 483.

A contractor for the building of a sewer is not liable for the death of a workman caused by the caving in of a bank, which resulted from the bursting of one or other of two water pipes running parallel with and within 2 feet of the sewer, filling the trench with water, where the existence of one of such pipes was altogether unknown to the defendant, and he was not aware that the other, although laid by him, was defective, and there was no negligence in the manner of bracing the bank. *Hoskins v. Stewart* (1890) 57 Hun, 380.

A railroad company is not liable for injuries to an employee from being exposed to poisonous gases generated by coal fires in its roundhouse, whose effect is enhanced by the admission of extreme cold air, where it was ignorant of the unwholesome and dangerous condition of the building, and could not by the exercise of ordinary care have known of the danger. *Maitland v. Cleveland, L. & W. R. Co.* (1896) 3 Ohio Leg. News, 289.

An employer is not liable for an injury to an employee sent to remove a cap from a force pump used in applying whitewash to premises, caused by whitewash blown into his face and eyes by the compressed air after he had removed the cap, where the pump was selected by a person having experience in the use of such apparatus, and was apparently in good condition. *Kelley v. Forty-second Street M. & St. N. Ave. R. Co.* (1890) 58 Hun, 93.

The owner of a vessel is not liable for the death of a member of the crew by falling into the water from an opening in the ship's side because of defective appliances to close it, in the absence of knowledge of the defect or of facts equivalent to such knowledge. *Geoghegan v. Atlas S. S. Co.* (1893) 3 Misc. 224.

A railroad company is not liable to an employee for injuries caused by defects in a bridge unless the company "was ignorant of its condition through its negligence or want of proper

care." *Faulkner v. Erie R. Co.* (1867) 49 Barb. 324.

An employer is not liable for an injury to a servant caused by the breaking of an electric-light pole due to a defect therein, where the most careful scrutiny would not have disclosed the defect. *Essex County Electric Co. v. Kelly* (1894) 57 N. J. L. 100.

An instruction is correct which tells the jury that the plaintiff can recover if he was placed under the orders of defendant's foreman and directed by him to ascend a ladder which the foreman knew, or, by the exercise of ordinary care, would have known, to be insecurely braced, and the plaintiff himself neither knew, nor by the exercise of ordinary care could have known, of such insecure bracing. *Herdler v. Buck's Stove & Range Co.* (1896) 136 Mo. 3.

In some cases the principle that an employer is not liable for exposing a servant to unknown perils in the place of work has been considered with special reference to the servant's want of capacity for performing the work he is directed to do.

Crowley v. Appleton (1888) 148 Mass. 98, was an action to recover for personal injuries occasioned to the plaintiff, while in the defendant's employ, by being placed by him in a position of peculiar danger. Evidence was given that the plaintiff was subject to epileptic fits, and was ignorant of the fact. The judge, after instructing the jury that the plaintiff must show that he was subject to such fits, that he did not know this, that the defendant did, and further that the defendant "knew or had cause to know that plaintiff did not know anything about it," amplified the last clause, stating that, whether the defendant knew that the plaintiff was ignorant of his malady might be proved by circumstantial, as well as by direct, evidence. The plaintiff excepted to this statement, and, without asking for any instruction as to the defendant's duty if only he "had cause to know" the plaintiff's ignorance, requested an instruction making the defendant responsible if the plaintiff was ignorant of, and the defendant was acquainted with, the malady, without regard to the inquiry as to whether the defendant knew or had cause to know the plaintiff's ignorance. Held, that the instruction as given was correct, and that the one requested was properly refused.

In *Lalor v. Chicago, B. & Q. R. Co.* (1869) 52 Ill. 401, 4 Am. Rep. 616, the declaration alleged that the deceased was employed about the depot grounds and freight house as a common laborer, specially for the purpose of loading and unloading the freight cars, at monthly wages, and for no other or different purpose whatever; that, while he was engaged in loading a freight car he was ordered by the superintendent, who directed affairs of the company about the depot, to couple a freight car with other cars attached to a locomotive, contrary to the special engagement of the deceased, and to do which he was unversed and inexperienced, which fact was well known to the superintendent; and that while so engaged, having to go between the cars for the purpose, the engine was so carelessly managed as to bring the cars together with great force, and while he was so between them, by means of which he was crushed to death. The court held the complaint not to be demurrable, saying: "The deceased engaged to perform work only ordinarily hazardous; he was compelled to do other work extrahazardous, by which he lost his life, the superintendent knowing he was unskilled and unacquainted with the manner of doing such work when he ordered deceased to perform it. Admitting the deceased was in the same general service as the

superintendent, his sphere, however, was a special one, and so subordinate as to compel him to yield implicit obedience to the command of the superintendent. The company was constructively present, by and through this officer, and must be charged accordingly. It was, then, by the direct command of the company, the deceased was exposed to this peril, and one out of the line of the business he had contracted to perform."

Compare also the ruling that the owner of a blast furnace is not liable for injuries to an employee from the inhalation of gas not sufficient in quantity to affect an ordinary man, because the lungs of such employee were over-sensitive from previous illness, where his employer had no reason to suppose that he was not sufficiently strong to endure the gas without risk. *Farlin v. Finfrouck* (1895) 85 Ill. App. 174.

3. As to machinery.

To support an allegation of negligence on the part of the employer with reference to insufficient strength or construction of some portion of a machine, and its being unskillfully applied to the purpose of sustaining a weight, "it is necessary, not only to show that the machine was insufficient and that this deficiency did not arise from any inherent, secret defect, but that it was known, or might by the exercise of due skill and attention have been known, to the employer." *Weems v. Mathieson* (1861) 4 Macq. H. L. Cas. 25.

As between a railroad company and its employees, the railroad company is not necessarily negligent in the use of defective machinery, not obviously defective, but it is negligence in such cases only where it has notice of the defects, or where it has failed to exercise reasonable and ordinary diligence in discovering them, and in remedying them. *Atchison, T. & S. F. R. Co. v. Wagner* (1885) 33 Kan. 666.

The right of the servant to recover for injuries incurred in the use of defective machinery depends on proof that the injuries were so incurred, and that "the master was aware of the defect, or that the use of reasonable care on his part would have disclosed the defect." *Covey v. Hannibal & St. J. R. Co.* (1885) 86 Mo. 635; *Following Elliott v. St. Louis & I. M. R. Co.* (1878) 67 Mo. 272.

A railroad company is not liable to a yard switchman familiar with the duties and dangers of coupling because of an injury resulting from a defective spring in a draw-bar, of which neither it nor any of its employees had knowledge, actual or constructive. *Atchison, T. & S. F. R. Co. v. Wagner* (1885) 33 Kan. 660.

The employer of a charwoman who cut her hand upon a piece of glass in a washtub was held not liable without proof that he knew or had reason to suspect that the glass was in the tub, where she herself procured the tub from the washroom and poured some of the water into it, although the employer's wife also brought water from a stove and poured it into the tub. *Flynn v. Beebe* (1868) 98 Mass. 576.

An employee assumes the risk of an accident resulting from a cause not discoverable in advance, when there is no visible defect in any part of the machinery, or knowledge of defect on the part of those using it, or of his employer. *Bradbury v. Kingston Coal Co.* (1893) 157 Pa. 231.

A master is not liable for injuries to a servant who fell into a vat of boiling dye, because of the breaking of a fork which he was using to press down the material in process of dyeing, where the defect could not be seen on examination, and the fork would have been considered by a careful man safe to use at the time. *Mc-*

Avoy v. Pennsylvania Woolen Co. (1891) 140 Pa. 1.

The mere fact that the brakes on a coal car were out of order at the time an employee thereon was injured is insufficient to render the employer liable, unless he had an opportunity for knowledge of such defects, or should have known of them. *Mixter v. Imperial Coal Co.* (1893) 152 Pa. 395.

A master is not liable for injury to an employee caused by the breaking of machinery or tools, due to a defect therein, unless he either knew or ought to have known of such defect. *Myers v. American Steel Barge Co.* (1896) 64 Ill. App. 187.

A shipowner is not liable where an eye-bolt countersunk in the deck of a ship, and apparently in sound condition, gives way owing to a fracture below the surface of the deck. *The Flowergate* (1897) 31 Fed. Rep. 762.

An employer is not liable for an accident to a servant resulting from the use of a defective tool, where it was originally in good condition, in the absence of notice that it subsequently became unsafe. *Louisville, E. & St. L. Consol. R. Co. v. Allen* (1893) 47 Ill. App. 465.

A master is not liable for the breaking of a rope, where it is not discolored and there is nothing whatever in its appearance to suggest a suspicion of its unsoundness. *Erskine v. Chino Valley Beet-Sugar Co.* (1895) 71 Fed. Rep. 270.

In *Bradbury v. Kingston Coal Co.* (1893) 157 Pa. 281, the breaking of a wire pin which caused an engineer to lose control of the throttle of his engine, resulting indirectly in an injury to a miner descending the shaft of a mine was held to be one of the ordinary risks of employment by the workman, where the pin was not known to be defective, but for seven years had continuously and successfully served its use without any change, repair, substitution, or visible defect, and gave no external indication of defect up to the time of the accident.

In the following cases the absence of constructive knowledge is relied upon in connection with two other defenses:

A railroad company is not liable for injuries to a fireman through the turning of a step upon the engine while he was carefully alighting from the moving engine, where the accident resulted from his unnecessarily leaving the engine while in motion, or the defect was not discoverable on inspection, and the employer had no notice thereof, or the accident was due to the failure of the engineer to discover or report that the step was out of order. *Texas & P. R. Co. v. Patton* (1894) 61 Fed. Rep. 259, 9 C. C. A. 437.

A street-car company is not liable for injuries to a boy in its employ engaged in driving horses attached to a car, by his falling upon the track, owing to the horses and those of a team met becoming excited and the negligence of a motorman handling such car, where he was not required or expected to ride upon the car, and the lines were not defective for driving upon the ground, and it had no notice or knowledge that the horses were likely to become excited. *Consolidated Street R. Co. v. Maier* (1893) 9 Ohio C. C. 268.

4. As to servants.

To render a master chargeable for retaining a careless servant, it must be shown that the master knew of the acts of carelessness, or was culpably ignorant thereof. *Huffman v. Chicago, R. I. & P. R. Co.* (1883) 78 Mo. 50.

Or, as the rule has also been stated, incompetence of an employee whose negligence causes the death of a fellow servant does not render

the employer liable at the time of the hiring, unless he knew that the servant was incompetent, or retained him in the service after notice of such incompetency. *Reiser v. Pennsylvania Co.* (1892) 152 Pa. 38.

"Railroad companies are not required to employ skilled engineers as firemen, and, if it is the prevailing custom of engineers to leave the firemen in charge of their engines when switching or similar work is to be done, then it is to be presumed that brakemen, when they engage or continue in their employment with the knowledge of the custom, assume the additional hazard which the custom involves, and can be entitled to a compensation from the company for injury caused by a fireman's incompetent management of an engine only when his fitness was below what ought to be required of firemen, and when the fact of unfitness was known, or ought reasonably to have been known, to the master mechanic or other like representative of the company." *Louisville & N. R. Co. v. Kelly* (1894) 24 U. S. App. 103, 63 Fed. Rep. 407.

The law presumes that the duty of the master in selecting proper servants was performed; and before a servant can recover he is bound to prove, not only that the fellow servant by whose negligence he was injured had previously been negligent in the discharge of his duties, but that the defendant knew of his negligence, or was negligent in not ascertaining it. *Wall v. Delaware, L. & W. R. Co.* (1889) 54 Hun. 454.

A steam-ferry company is not liable for the death of an officer of the machinery on a ferry boat, caused by the alleged negligence of the engineer and his starting the machinery without warning the deceased, on the ground that the engineer, although skillful and competent, was at times unreliable because of drinking liquor, unless the company knew or had the means of knowing of his habits and consequent unreliability. *Stevens v. San Francisco & N. P. R. Co.* (1893) 100 Cal. 554.

To the same effect, see *Kindel v. Hall* (1896) 8 Colo. App. 63; *Crew v. St. Louis, K. & N. W. R. Co.* (1884) 20 Fed. Rep. 87; *Stevens v. San Francisco & N. P. R. Co.* (1893) 100 Cal. 554; *Bogard v. Louisville, E. & St. L. R. Co.* (1885) 100 Ind. 491; *S. P. Lake Shore & M. S. R. Co. v. Stupak* (1890) 108 Ind. 1; *Cincinnati, H. & I. R. Co. v. Madden* (1893) 134 Ind. 462; *United States Rolling Stock Co. v. Wilder* (1886) 116 Ill. 100; *Smith v. E. W. Backus Lumber Co.* (1896) 64 Minn. 447; *Maxwell v. Hannibal & St. J. R. Co.* (1884) 85 Mo. 95; *St. Louis, A. & T. H. R. Co. v. Corgan* (1891) 49 Ill. App. 229; *Dow v. Kansas P. R. Co.* (1871) 8 Kan. 642; *Lawler v. Androscoggin R. Co.* (1873) 62 Me. 467; *Blake v. Maine C. R. Co.* (1879) 70 Me. 60, 35 Am. Rep. 297.

It has been held error to refuse an instruction to the effect that an employer is not liable for injuries due to the incompetence of a fellow servant unless he knew, or ought to have known, of such incompetence. *Louisville & N. R. Co. v. Kelly* (1894) 24 U. S. App. 103, 63 Fed. Rep. 407.

A locomotive engineer's opinion, that if he had obeyed the order of the yard master to place his engine on the main track when a coming train was past due he would have gotten into trouble, is inadmissible to show that the company was negligent in keeping the yardmaster in its employment, unless the case had been brought to the knowledge of its officers. *Michigan C. R. Co. v. Gilbert* (1881) 46 Mich. 176.

The Pennsylvania mine law of 1885, providing that a person employed at an engine shall be a sober and competent person, has not changed

the common-law rule that an employer's liability, in so far as it depends on the incompetence of a servant, is referred to the question whether he was aware of such incompetence or not. *Mulhern v. Lehigh Valley Coal Co.* (1894) 161 Pa. 270.

IV. Rule when the dangerous condition is due to the act of a stranger or of a fellow servant or to the operation of some abnormal physical force.

The cases cited in the last subdivision relate to perils arising out of imperfections which either existed at the time the instrumentalities were brought into use, or which supervened after such use began, as the result of a gradual or sudden deterioration in the quality of the instrumentalities themselves. The same principles are a fortiori, applicable where that dangerous condition is created by the positive act of some responsible agent, whether a stranger to the contract of service or not, or by the operation of physical forces beyond the master's control.

On the one hand, the fact that the abnormal conditions are due to the act of a stranger is no defense, where the master has full knowledge thereof, and the danger which is threatened, for a considerable time before the servant received his injury. *Erslew v. New Orleans & N. E. R. Co.* (1896) 49 La. Ann. 86, where a steam-railway company was held to be negligent in permitting an electric street-car company to so construct and maintain over its tracks a guy wire that it endangered the lives of its servants and employees.

It is the duty of a railroad company to see that its locomotive engines after their runs are left in a place of safety. If left where they are liable to be put in motion by the careless, negligent, or wilful act of outside parties, it is as much the duty of the railroad company to see that they are properly guarded to prevent accidents from occurring as it is to see that a sufficient number of employees are put on board the trains set in motion by its own orders. *Southern P. Co. v. Lafferty* (1893) 15 U. S. App. 193, 57 Fed. Rep. 536, 6 C. C. A. 474.

Hence, a railroad company is equally liable for suffering a structure to remain in dangerous proximity to its track, after notice of its position, as if its own agents had originally placed it there. *Chicago & I. R. Co. v. Russell* (1878) 91 Ill. 298, 33 Am. Rep. 54.

So, the failure of a railway company to discover and remove within a reasonable time a dangerous object overhanging or projecting near its track is its negligence, and will render it liable for injuries to a brakeman resulting therefrom, although the projection was placed there by the negligence of a fellow servant. *Texas & P. R. Co. v. Hohn* (1892) 1 Tex. Civ. App. 36.

In this case the refusal of a special charge that, if plaintiff was struck by timbers of a temporary scaffolding erected by the employees of defendant in order to rebuild or repair a tank, and no part of the permanent structure, then the jury would find for the defendant, because the negligence of the employees who constructed the temporary scaffolding was the negligence of fellow servants was held proper. The court said the company owed duties to its employees, not only in the construction or repair of the tank, but also in the keeping of its track cleared of dangerous obstructions. And that whether the negligence of which the workmen were guilty in putting the timber so near the track was originally imputable to the company or not (as a failure to observe its duty to furnish to its servants a reasonably safe place

at which to work), it would be culpable negligence in the company to allow so dangerous a contrivance to remain in such position after it had discovered its presence, or ought, by the exercise of proper care, to have done so.

So, a master may be liable for injury to a servant by an obstruction placed in a walk which the servant was required to use, by an independent contractor, if the master, or any servant whose duty it was to look after the safety of the way, had notice of it, or if it had been there so long that reasonable care in the inspection of the way would have disclosed it. *Burnes v. Kansas City, Ft. S. & M. R. Co.* (1895) 129 Mo. 41.

So, a railroad company is not relieved from liability for personal injuries to an employee, occasioned by the defective condition of a bridge, by the fact that such condition was caused by an unusual flood which could not have been ordinarily and reasonably anticipated, when it has had time, in the exercise of reasonable care and diligence, to discover the injury to the bridge and to prevent the accident. *Knahtia v. Oregon Short-Line & U. N. R. Co.* (1891) 21 Or. 136.

On the other hand, a railroad company is not liable for the unlawful acts of third parties in placing obstructions upon its track without its knowledge or consent, unless its negligence has in some way induced the placing of obstructions on the track. *Atchison, T. & S. F. R. Co. v. Slatery* (1890) 57 Kan. 490.

So, a master is not liable to his servant for injuries caused by a temporary obstruction placed on a walk which the servant was required to use, by one with whom the master had contracted for the performance of certain work, unless the master had notice of the obstruction, or it was necessarily required by the performance of the work. *Burnes v. Kansas City, Ft. S. & M. R. Co.* (1895) 129 Mo. 41.

So, a railroad company is not chargeable with negligence in allowing a team and wagon belonging to and used by other parties in drawing coal from its cars to stand so near the track that there is not sufficient room for a brakeman to stand between the wagon and a car after making a coupling, where such wagon had not previously been left so near the track except on one occasion, two weeks before, of which the company had no actual notice. *Connors v. Elmira, C. & N. R. Co.* (1895) 92 Hun, 339.

So, a railroad company is not liable for injury to an employee, due to the faulty construction of a cattle pen built by a third person owning land adjoining the right of way, in consequence of which cattle escaped upon the track and caused the wrecking of a train, although such pen projected a little upon its right of way by the mistake of the person building it, and without his knowledge or that of the company. *Newsom v. Kimball* (1897) 42 U. S. App. 282, 78 Fed. Rep. 94, 35 L. R. A. 135, 23 C. C. A. 669. On the contention that it was the duty of the railroad company to provide and maintain a safe roadway, and a safe place to work at, as well as safe instruments to work with, and that by permitting the use of a defective pen, and by hauling cattle thereto, and allowing them to be unloaded therein, the company failed in its duty to its employee, and rendered itself liable for the damages caused thereby, the court said: "This is, we think, an entire misconception of the well-established principle referred to, of the duty of the employer to the employed, in the particulars mentioned; and the endeavor to apply the same to this case, in the absence of proof that the roadbed was defective, the cars unsafe, or the train unskillfully or negligently run, is, though ingeniously presented, absolutely

untenable; and to hold these defendants liable for Carter's negligence, if negligent he was, would be to ignore all the authorities, and disregard the undisputed facts, as developed on the trial of this cause in the court below."

So, a yard master is not chargeable with negligence in failing to notice that cars have been shunted by an engineer of another company onto a track which is reserved for the cars of that company, and have been left dangerously close to another track, where the shunting was only completed a few minutes before the position of the shunted cars caused an accident. *Martin v. Louisville & N. E. Co.* (1894) 95 Ky. 612. The court said: "The yardmaster of the owner cannot during every minute of time see that those who bring cars upon the yard leave them in their precise and proper places. We do not doubt that if these 'dead' cars had remained in their dangerous position such length of time as would have afforded the yardmaster a reasonable opportunity of discovering the danger, and he had failed to take steps to protect the workmen, negligence would be attributable to him and through him to his principal. Only a few minutes, however, elapsed from the time of the lodgment of the cars on track No. 1 before the accident occurred, and we are not disposed to regard this agent as neglectful of his duties."

So, a railroad company is not subject to an action by a brakeman injured by coming in contact with a sagging wire maintained by a third person over its tracks, where it has not consented to nor taken any part in the stringing of the wire across its property, and there is no evidence sufficient to charge it with notice that the wire had been insecurely strung in the first instance, or that it was in such a position at the time of the accident as to be dangerous to trainmen. *Richmond v. New York C. & H. R. Co.* (1896) 8 App. Div. 382, Distinguishing *Vosburgh v. Lake Shore & M. S. R. Co.* (1884) 94 N. Y. 374, 46 Am. Rep. 148.

Where a servant is suing for injuries received through the collapse of a staging the supports of which have been weakened by a collision with a wagon driven by a person for whose acts the employer is not responsible, it is error to give an instruction authorizing the jury to find for the plaintiff if they believe the staging to have been improperly constructed, and that such improper construction contributed in any degree to his injuries. Such an instruction ignores the principle that the employer is not liable for the consequences resulting from the acts of third persons in breaking down the platform unless those consequences naturally followed from the manner in which the platform was constructed, and ought to have been foreseen in the light of attending circumstances. *Selleck v. Langdon* (1889) 56 Hun, 10.

The acceptance of the doctrine that the master has discharged his full legal duty as to the place of work when he has employed persons of competent skill and experience to keep it in such a condition as to be safe and fit for any of the purposes for which it may be necessary to use it is deemed to involve the corollary that any accident which occurs, owing to the want of proper repairs, is regarded as attributable to the negligence of a coservant unless the dangerous conditions have existed for so long a time as to show absolute negligence on the part of the master himself. *Cooper v. Hamilton Mfg. Co.* (1867) 14 Allen, 193.

"It is the duty of a railroad corporation to use reasonable care and diligence to keep its tracks in a safe condition for its employees to work upon. So far as the work of keeping its tracks in repair is left to its servants, it is its duty

to exercise reasonable supervision to see that the work intrusted to them is properly done. How far into details this supervision must go before the domain which belongs exclusively to the master is passed and the domain which may be left to servants is entered, depends upon what it is reasonable to require of a master who is charged with the duty of providing safe works, machinery, tools, and appliances for his employees. In some cases this may be a difficult question to decide. But undoubtedly a jury may find that a railroad corporation should so far supervise the work of its servants in repairing its tracks as to see that a pile of sleepers 3 or 4 feet wide is not left for a long time within 18 inches of the rails in the freight yard of an important station." *Babcock v. Old Colony R. Co.* (1890) 150 Mass. 467.

Hence the master is not liable for an injury attributable to a temporarily unsafe condition of the place of work which was produced by the act of a fellow servant, unless he has received actual notice of the existence of that condition or it has existed for such a length of time that the law will imply notice. *Loranger v. Lake Shore & M. S. R. Co.* (1895) 104 Mich. 80.

Cases of this type may also be considered independent of the doctrine of common employment or of the limits of the assignability of the master's duties, and his liability referred to the question whether he himself or his representative contributed by some concurrent negligence to the injury complained of. This negligence may consist in a failure to take such steps as prudence would indicate after he has obtained notice of specific dangers which exist as a result of the acts of the plaintiff's fellow servants.

Thus, a corporation is liable for personal injuries sustained by an employee by the fall of a shed in which he was at work because of the weight of debris and snow which its agents with knowledge allowed to remain upon the roof, although such debris was originally placed there by his coservants.

The master is not relieved in such a case by the fact that the shed was well built, or that he exercised no supervision over its construction, but employed good materials and skilled workmen in erecting it. *Johnson v. First Nat. Bank* (1891) 79 Wis. 414.

See further, on this aspect of such cases, XI. post.

V. Imputed knowledge of probable future events.

a. Introductory.

The liability of an employer, so far as it is dependent upon his knowledge, may, it is manifest, be referred entirely to the duty which is incumbent on him, as a prudent man, not merely to observe existing conditions, but also to forecast to a certain extent future occurrences.

In the first place, the whole body of rules which define the limits of his responsibility to his servant may be deduced from the principle by which he is charged with knowledge that if he allows the instrumentalities of his business to fall below a certain standard of efficiency, his servants who use or are brought into proximity with them in the course of their employment will probably be injured. This is merely to enunciate in a form appropriate to the special relation of master and servant the doctrine that a tortfeasor is presumed to intend the natural and probable consequences of his acts. To charge the employer with responsibility, the injury need not be anticipated in the particular case; it is sufficient if such an injury might be

reasonably expected to result in the long run from a series of similar negligences. *Clifford v. Denver, S. P. & P. R. Co.* (1886) 9 Colo. 333.

"It was not enough to entitle plaintiff to recover to show that his injury was in fact the natural consequence of the act or omission of the defendant, but it must have appeared that under all the circumstances it might reasonably have been expected that such an injury would result. A mere failure to ward against a result which could not reasonably have been expected is not negligence. (*Atkinson v. Goodrich Transp. Co.* (1884) 60 Wis. 141, 156, 50 Am. Rep. 352.) The plaintiff was not entitled to recover merely because the injury he had received was in consequence of the defendant's track and roadbed having not been maintained and kept in repair. In order to warrant a recovery it must have appeared that its failure in this respect was the result of negligence on its part, and that a person of ordinary intelligence and prudence might have expected as the result of such negligence, that such an injury would have occurred. It is only by proof of these indispensable facts that an unbroken connection between the wrongful act and the injury can be established and so constitute a continuous succession of events so connected as to make a natural whole, and show that the defendant's negligence and the injury of the plaintiff stand in the relation of cause and effect. The gist of the action is negligence on the part of the defendant, and such relation of cause and effect could be established only by thus showing that the negligent act or omission of the defendant caused the injury and was its proximate cause." *McGowan v. Chicago & N. W. R. Co.* (1895) 91 Wis. 147.

"An essential element of negligence is a knowledge of facts which renders foresight possible, and the circumstances necessary to be known before the liability for the consequence of an act or omission will be imposed must be such as would lead a prudent man to apprehend danger. All are bound to foresee what experience will teach them is likely to follow from the existence of a given state of facts. In a given case action must be dictated by experience." *Hope v. Fall Brook Coal Co.* (1896) 3 App. Div. 70, citing *McNish v. Peekskill* (1895) 91 Hun, 327, to the point, "where there is no knowledge of facts which would lead to an apprehension of danger, there can be no imputation of foresight or blameworthiness, and these two ingredients are necessary to constitute negligence."

"Negligence is the cause of an accident, in the legal sense, only when it is of such a character that men of ordinary prudence, judgment, and experience ought reasonably, in the light of the attending circumstances, to have foreseen that it was likely to produce such an accident." *Ryadorp v. George Pankratz Lumber Co.* (1897) 95 Wis. 622.

Where, therefore, a servant is injured by such an occurrence as the caving in of a ditch, the question for the jury is not whether the employer omitted to do something which would have prevented the accident, but whether he "exercised ordinary care and prudence in conducting the excavation in view of the probable consequences which would result from the falling of the overhanging earth while the servant was in the ditch." *Leonard v. Collins* (1877) 70 N. Y. 90.

In *Tissue v. Baltimore & O. R. Co.* (1886) 112 Pa. 91, 56 Am. Rep. 310, where the plaintiff was injured by the explosion of a dynamite magazine, the court said: "Ought the company's superintendent to have known that in placing the magazine where it was placed ne

was exposing the men engaged in operating the road, as well as others, to a danger to which they ought not to have been exposed? The question is not whether he did have knowledge of the peculiar properties of the material which he was intrusted to handle, for his ignorance in this particular would be no excuse for the company, but whether the agent thus intrusted ought to have been one who knew that dynamite was, from its nature, liable to accidental explosions such as could not be ordinarily foreseen or provided against. We would, indeed, be unwilling to assume that either Yardley or Armstrong knew that he was subjecting these laboring men to a danger so frightful. They may, like the men themselves, have entertained the common idea that dynamite could not be exploded but by the ordinary method of percussion. But, as we have said, this ignorance, if ignorance it was, will not excuse the company, for there was a duty resting upon it to know, as far as it was possible to know, the character of the material which it placed in the hands of its agents. In this we are not to be understood as pronouncing upon the chemical characteristics of dynamite, for about it we know little or nothing, or as charging negligence on the company or its agents. The act of putting the magazine where it was may have been prudent, or at least not unreasonably imprudent, and the explosion may have been the result of an accident which no ordinary human foresight could provide against, hence, one for which no one can be held responsible. But, however this may be, the matter is, under all the evidence, for a jury, and to a jury it must be referred."

In the second place, the master is bound to take notice of the fact that machinery and other inanimate appliances, after the lapse of a certain period of time, longer or shorter according to the nature of the material, will certainly deteriorate in quality, as the normal result of wear and tear incident to their use, and that animate appliances undergo a similar deterioration in a sufficient number of cases to render it his duty to conduct his business with a view to the probability that danger will occasionally arise from this cause. The obligations entailed upon the master by his presumed possession of the latter's description of knowledge will be treated in the subdivision relating to the duties which the law imposes on him in respect to active supervision and inspection. (Post, VII.) In the present subdivision we shall confine our attention to the effect of the doctrine which requires him to take notice of the probable consequences of his acts. As in the case of the knowledge of existing conditions, the rulings illustrate the affirmative as well as the negative aspect of the doctrine.

b. Accidents which might reasonably have been anticipated.

An employer is liable for all consequences which might have been foreseen and expected as the result of his acts or omissions. *Consolidated Ice Mach. Co. v. Kiefer* (1887) 26 Ill. App. 466.

The danger of having the cage of a freight elevator so hung that when it has reached the level of the highest floor of the building its top is within an inch of the beam from which the cable is suspended is obvious, and the employer is under such circumstances bound to foresee that an engineer operating the hoisting machinery from a position in which he is unable to observe accurately the height to which the cage has ascended will sooner or later make a miscalculation and allow it to strike the beam and

as a probable consequence break the cable. *Stringham v. Stewart* (1885) 100 N. Y. 516.

Consolidated Ice Mach. Co. v. Kiefer (1887) 26 Ill. App. 466, holds that if a structure erected by a brewing company is being used by its permission by an ice-machine company doing business on the same premises, it is a probable contingency that the employees of the ice-machine company will be obliged to work on or about the tank, and, if the structure is insufficient and unsafe, it is a consequence to be apprehended that the tank will fail, and in its fall carry down and injure those at work on or about it.

In *Ryan v. Fowler* (1862) 24 N. Y. 410, 82 Am. Dec. 315, the plaintiff was injured by the fall of a privy built out from her employer's factory, and the facts tended to charge the employer with actual knowledge of the irregular action of a wheel upon a wall in his factory and the probable consequence of the weakening and vibration of the said wall upon the safety of the privy. It was also proved that he personally directed a millwright to pry up the pillar-blocks into gear, and to put pegs and wedges between the blocks and the wall; and that he was personally cognizant of the acts of the millwright, which probably caused the privy to fall. One witness testified: "I told Mr. Fowler that it was a hard job to force up the block in that way. He said he thought it would do." The court said that, if the loosening of the foundation and structure of the privy was the consequence of acts directed by and known to the defendant,—of which the jury were the proper judges,—he was responsible for the injuries. "Not that he knew that these acts would, in fact, necessarily render the privy insecure, or would weaken or impair its foundation, but that such might be the consequence. He is chargeable with knowledge of the probable consequence of the acts he directed, or of which he was cognizant."

Failure of a railway company to place a wire strung across a side track high enough to avoid an employee or mechanic making repairs on the roof of a passenger car is negligence, if it can be reasonably anticipated by the company that at some time a passenger car may pass under the wire while such repairs are being made. *Stoltenberg v. Pittsburg & L. E. R. Co.* (1895) 165 Pa. 377. The rationale of the decision being that though the maintenance of the wire at the height in question was not negligence as regards brakemen working on the tops of freight cars, the company was bound to anticipate such a conjunction of circumstances as that which caused the accident.

A master is liable for the death of a servant caused by an explosion of escaping gas, where the place is unsafe and the event absolutely certain on account of the absence of the necessary appliances. *Nichols v. Brush & D. Mfg. Co.* (1889) 53 Hun, 137.

A jury may properly find an employer guilty of negligence if the evidence shows that workmen moving heavily loaded trucks across a platform were unnecessarily endangered by requiring them to be wheeled over a slight jog which was apt suddenly to stop their progress, and a careful man would have foreseen such danger. *Nelson v. Allen Paper Car-Wheel Co.* (1886) 20 Fed. Rep. 840.

A master is liable for injuries to a servant from the falling of an elevated footway which he used in his work, the support of which had been forced out of place by a passing wagon, when it was so constructed that such accidents were reasonably and fairly to be expected. *Selleck v. Langdon* (1889) 53 Hun, 19.
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A railroad company which has notice that the flanges of the wheels of a tender are so worn that there is danger of its running off the track is liable for injuries resulting by the wreck of a train which the evidence shows to have been caused by the derailment of the tender. *Illinois C. R. Co. v. Pirtle* (1893) 47 Ill. App. 438.

A railroad company is liable for the death of an employee by the breaking of an engine through a bridge whose piers have been displaced by ice driven against them by a storm greater than usual but no greater than a person acquainted with the climatic conditions of the country might have expected. *Carney v. Carquet R. Co.* (1890) 29 N. B. 425.

In *Hoskins v. Stewart* (1890) 57 Hun, 880, a case in which the peculiar circumstances which finally rendered the place of work unsafe were unknown to the defendant, the court remarked in the course of its opinion that the protection afforded the servant was adequate, judging from the fact that the trench had been safely used until the accident happened, that the cause of the accident was outside the danger which could reasonably have been expected, and the event was one which could not have been foreseen.

In *Southwest Improv. Co. v. Andrew* (1899) 86 Va. 270, the fact that the roof of a tunnel in a coal mine fell without the warning signs that usually precede it, was enumerated among the circumstances from which the employer's nonliability might be predicated, where the evidence showed that the usual tests had been made without disclosing any unsafe conditions.

In *Ryan v. Los Angeles Ice & Cold Storage Co.* (1896) 112 Cal. 244, 32 L. R. A. 524, the plaintiff had been injured by the explosion of a gas generator while he was tightening the nuts of the bolt in it, a kind of work which he was not hired to perform, and in which he had had no experience. The defendant contended that it was not liable unless such result should reasonably have been foreseen, but the court said: There was evidence tending to show that it was unsafe for a skilled engineer or machinist to tighten up these nuts while the pressure was on, though it may be conceded that the preponderance of the evidence was that it could be done by skilled men with reasonable safety; but there was little conflict in the evidence tending to show that it was dangerous for unskilled or inexperienced men to do it. In order to fix the liability of the master, it is not necessary that he should know that injury will inevitably follow, for that would exhibit express malice or intent to injure; nor that he knew or believed that it would probably occur, for that would be recklessness scarcely less criminal.

c. Accidents which could not reasonably have been anticipated.

An employer is not liable for the results of an accident such as no one could be expected to foresee. *Sjogren v. Hall* (1894) 53 Mich. 274; *Richards v. Rough* (1884) 53 Mich. 212; *Trinity County Lumber Co. v. Denham* (1892) 85 Tex. 56.

Employers "are not liable for accidents occurring by which injury ensues, when skill and experience are not able to foresee and avoid them." *Toledo, P. & W. R. Co. v. Conroy* (1873) 68 Ill. 560.

An employer is not liable for accidents so improbable and due to causes of such rare occurrence that his obligation to exercise reasonable care is fulfilled without providing against them. *McKee v. Chicago, R. I. & P. R. Co.* (1891) 89 Iowa, 616, 13 L. R. A. 817.

An employer is not bound to anticipate and provide against risks of accident to his workmen which are not apparent and do not become apparent until after the accident. *Nelson v. Allen Paper Car-Wheel Co.* (1890) 29 Fed. Rep. 840 (Blodgett, J., in charge to jury).

So, it has been said that a servant assumes the risk of injury from causes unforeseen and not within reasonable apprehension. *Mancuso v. Cataract Constr. Co.* (1895) 87 Hun, 519. [Here the risk was the presence of an unexploded charge in a rock in which plaintiff was ordered to drill holes, the fact of the charge being there not being due to any negligence on the employer's part.]

"After an accident has occurred it may be easy to see what would have prevented it; but that, of itself, does not prove nor tend to prove that reasonable or ordinary care would have anticipated and provided against it." *Consolidated Coal Co. v. Scheller* (1891) 42 Ill. App. 610.

Where an employee has provided a safe passageway for his men, who are engaged in transporting bundles of paper weighing 50 pounds, about twenty-five bundles being piled upon a truck, and the passageway has been used without injury, the master is not bound to anticipate and provide against accidents to his men from a defect which occurs from use of the way, which is not apparent and does not become apparent until after the accident has happened. *Nelson v. Allen Paper Car-Wheel Co.* (1890) 29 Fed. Rep. 840.

In *Kelley v. Forty-Second Street, M. & St. N. Ave. R. Co.* (1890) 58 Hun, 93, it was remarked in regard to the place of work, that under the circumstances there was no cause for apprehension, and therefore no negligence in not taking precautions.

In *Nolan v. Shickle* (1877) 3 Mo. App. 300, the theory of plaintiff was that a plank in a scaffold slid or worked off from its supports and that the injury was thus caused. And it was reasoned that, if the plank had been nailed to the scantlings, it would not have worked off. The court, however, said: "There is a plain distinction between the suggestion of a possible precaution by which an injury might probably have been avoided, and the adducing of evidence which shows that the injury was caused by negligence of the defendants. Probably scarcely a mishap occurs where the wisdom which comes after the event cannot suggest some expedient by which, through the exercise of a more abundant caution, the accident might have been prevented. It is for the plaintiff to show that the effective cause of the injury was the negligence of defendants, and to exclude the case from that class of occurrences which are often designated accidents, the word being used in this connection to characterize events the real cause of which cannot be traced or, at least, are not apparent. As the supreme court said in *Schultz v. Pacific R. Co.* (1893) 36 Mo. 82, in the absence of affirmative and positive proof of negligence, the simple fact of an accident and injury would rather be attributable presumptively to misadventure, inevitable fate, or other causes for which the defendant would not be liable.

"Ordinary care does not require that every possible contingency must be anticipated and guarded against, but only such as are likely to occur. That a railroad company should anticipate that a train may for some necessary purpose be stopped at a place other than the usual stopping places, is possibly true; but at what place, cannot be anticipated, and therefore they, in the exercise of ordinary diligence, are 41 L. R. A.

not required, as we have said, to plank every bridge or cattle guard and have the whole track so guarded as to prevent accidents to employees. The hazardous nature of the business is such that accidents occur for which the company is not responsible; and this is one of them." *Koontz v. Chicago, R. I. & P. R. Co.* (1884) 65 Iowa, 224, 226, 54 Am. Rep. 5.

An injury received by a trackwalker, who, while standing beside the track to allow a train to pass, was struck by a piece of coal which fell from the tender, belongs to the category of mere mischance or accidents out of the common course of things against which the company in the exercise of common care and prudence, or of such care as all other companies exercise in such case, is not bound to provide. *Schultz v. Chicago & N. W. R. Co.* (1887) 67 Wis. 616, 68 Am. Rep. 881.

Where a line of telegraph poles stood along the right of way of a railroad, and one of the wires struck the head of an unusually tall brakeman standing on the top of a freight car which was somewhat above the ordinary height, and the blow broke the insulator of the telegraph pole, causing the wire to fall and coil about the body of the decedent, who stood, in the line of duty, on a flat car on a side track, dragging him from the car and causing instant death,—it not being shown that the railroad company had omitted any precaution which prudent persons engaged in a like business would have taken, it is not liable. *Wabash, St. L. & P. R. Co. v. Locke* (1887) 112 Ind. 404.

The servant of a railway company who is injured by a rare and peculiar accident, such as being struck in the eye by a flake of iron knocked from a swage worked on by other servants and shown to have been in average condition, cannot recover damages from the company for such injury, his place of labor being elsewhere than at the place where the swage was located, but his call being to procure a bolt needed in his department. *McNally v. Savannah, F. & W. R. Co.* (1890) 86 Ga. 262.

In *Groff v. Duluth Imperial Mill Co.* (1894) 58 Minn. 383, the court held that even if the defendant was negligent in having a shaft with a set screw projecting so far as to be dangerous to a servant whose work required him to be in close proximity to it, there could be no liability for an injury received by a servant who was oiling the machinery at some distance away, where the chances of his falling against the shaft were so slight and remote that they could not reasonably have been anticipated.

Where an injury to a minor employee occurred from an accident which no human being could have thought of as possible to occur, resulting from an apparently safe act, it cannot be said that it arose from any lack of knowledge on his part, even though he received no instructions. *Hickey v. Taffie* (1887) 105 N. Y. 26. [Here an employee's finger caught in the button hole of a collar, and was dragged between the rollers of a mangel before it could be extricated.]

An employer is not liable for injuries to a boy who, while engaged in cleaning a machine not in motion, in whose use he has been fully instructed, is injured by the machine suddenly starting from an unexplained cause and catching his hand in the steel teeth projecting from iron rollers, where the machine is a safe and proper one in its construction, and such as is used in other factories of a like nature, and is not out of repair. *Ash v. Verlenden Bros.* (1893) 154 Pa. 246.

Placing wing fences at a cattle guard, 3 feet 10 inches from the rails at the bottom, and in

clining slightly outward at the top, is not negligence which will render a railroad company liable for the death of a brakeman while hanging low on the side of a freight car looking under it to discover what was causing stones to fly therefrom, where no such accident had ever happened before on the road or been anticipated, and no complaint had been made of the fences. The combination of circumstances from which the injury resulted in this case was possible but improbable. *McKee v. Chicago, R. I. & P. R. Co.* (1891) 83 Iowa, 618, 13 L. R. A. 817. Beck, J., dissented on the ground that it was an unjust discrimination to excuse the defendant because the accident was so improbable that the company could not be regarded as negligent in maintaining the fence so near the track, and to hold the plaintiff negligent because he did not know the danger. He also thought that it could not be said, as a matter of law, that such an occurrence as a brakebeam getting out of order and trailing along the track was such an unusual occurrence that it could not have been anticipated, and if such occurrence was one incident to the operation of the road, the company was bound so to construct its track, cars, and cattle guards, that trainmen might with safety make investigations in the only way in which that could be done, viz., by looking underneath the car from the position which would naturally be taken for that purpose. The view of the majority that the flying of stones from under a car did not indicate any unusual danger, and that as it was the duty of the brakeman to report to the conductor if he noticed that anything was amiss with the train, his conduct showed that he did not anticipate any danger, was also combated. The trailing of timbers under the car was thought to be a highly dangerous occurrence, and the brakeman, if he had reason to suspect that this was the cause of the flying of the stones, was performing his duty in promptly ascertaining what had happened.

In *Moore v. Great Northern R. Co.* (1897; Minn.) 69 N. W. 1103, the plaintiff, a brakeman, was injured while coupling cars, owing to the fact that a cloud of smoke of unusual density had settled on the track after the passage of a train. Upon this state of facts the court commented as follows: "When the foreman gave the order to back the train, and when it actually started, the smoke had not settled down, for the locomotive from which it came had not yet reached the bridges. Nor could the foreman anticipate that a greater or denser volume would settle there than was an every-day occurrence. And if he could have foreseen this, upon what hypothesis, or upon what evidence in the case, can it be maintained that it was negligence, either to start the train, or to keep it moving after it had started. Trains belonging to defendant and other companies passed through this yard every few minutes, many at a high rate of speed. There was no grade crossing on which to catch the traveler upon the public ways, and none but employees in the yard itself could be expected to be there; and they assumed the ordinary risks incident to the employment. There was no evidence that it had ever been the custom in this or any other yard to stop the operations of trains when smoke made them invisible, or obscured the vision so that objects upon the tracks could not be seen by the employees. In fact, it would paralyze the business of railroading if trains were to be stopped under such conditions. And this is especially true with reference to this particular yard, where, as we have seen, the smoke set-

led upon the tracks almost continuously as the trains went by."

In *Hope v. Fall Brook Coal Co.* (1896) 3 App. Div. 70, the plaintiff's contention was that the track where he was coupling cars was rendered dangerous "upon the instant" by an unusually thick cloud of steam from a defective valve, and that this vapor from the defective valve was of such density, irrespective of the vapor from the relief valve, as to greatly impair his vision, and the jury, accepting this explanation, had then drawn the conclusion that the vapor was the immediate or proximate cause of the plaintiff getting his hand between the buffers. The court, however, said: "This vapor was not the cause of the accident, but was a condition under which it occurred, and that condition was wholly unexpected and not likely to be foreseen;" also that "the discharge of steam is a usual or necessary concomitant of the use of the engine; and a switchman must be expected to be enveloped in more or less steam, irrespective of any defect in the valves."

An employer is not liable to an employee for injuries caused by a flying stick from some unexplained source getting between a pulley and a belt which another employee was adjusting thereon, and causing the belt to fly off, catch a plowshare lying upon the floor, and then in its movements catch such employee and draw him around the shaft. *Freeberg v. St. Paul Plow Works* (1892) 48 Minn. 99.

A railway company is not liable for personal injuries to a hand employed to help lay a railway track, caused by an attack upon the hands of such company, made by the employees of a hostile company in an attempt to prevent it from laying its tracks, where the employing company did not know, or have reason to believe, that any such attack was contemplated. *Kelly v. Shelby R. Co.* (1893) 15 Ky. L. Rep. 311.

A railroad company is not liable to an employee for an injury sustained by the throwing of a mail-bag from a train by a postal agent at a place where it had never been thrown off before, the train not being propelled, at the time, at an unusual rate of speed. *Muster v. Chicago, M. & St. P. R. Co.* (1894) 61 Wis. 325, 59 Am. Rep. 141, 49 Am. Rep. 41, note.

The failure of a foundryman to place a guard around the place where castings were broken by the dropping of a heavy weight upon them, to arrest flying pieces of iron, does not authorize a finding of negligence on his part rendering him liable for injuries to a servant struck by a flying piece of iron, while 25 or 30 feet away, where ordinarily the pieces of iron did not fly more than 10 feet, and had never been known to fly so far before. *Wood v. Helges* (1896) 83 Md. 257.

Ale brewers to whom no notice is shown to have been given of the previous bursting or exploding of bottles are not chargeable with knowledge of the actual fact of such exploding, and of the latent danger thereof to their employees. *Melchert v. Robert Smith India Pale Ale Brewing Co.* (1891) 140 Pa. 448.

A mine owner is not an insurer against unforeseen accidents which are liable to happen from the action of the weather, or the unanticipated slipping of earth, slate, coal, or stone from the wall or roofs of the mine. *Cherokee & P. Coal & Min. Co. v. Britton* (1896) 3 Kan. App. 202.

One of a bridge gang employed to make repairs of railroad bridges, assigned to the duty of pulling down an elevated watertank, cannot recover for an accident which could not have been foreseen, at least by anyone except him-

self and the other members of his gang, who were his fellow servants. *Easton v. Houston & T. C. R. Co.* (1889) 89 Fed. Rep. 65.

An employer is not liable for an injury to an employee caught in an open gearing 6 feet 4 inches above the floor, unless it appears that it was dangerous in such position, or that it might reasonably be anticipated that an employee might be injured thereby. *Eckles v. Chicago Ship Bldg. Co.* (1896) 63 Ill. App. 436.

The fact that only an hour before a heavy mass of gouge fell upon a mine from the roof of a tunnel, the foreman and the servant engaged in blasting had tested the place with a pick, and striven vigorously but in vain to bring down the mass, shows that its fall was not an occurrence which the mine owner could have foreseen and reasonably anticipated. *Finlayson v. Utica Min. & Mill Co.* (1895) 32 U. S. App. 143, 67 Fed. Rep. 507, 14 C. C. A. 492.

In *Del Sejhore v. Hallinan* (1897) 153 N. Y. 274, *Reversing* (1895) 36 N. Y. Supp. 1124, the plaintiff was killed by the fall of a mass of earth which slipped into a trench he was engaged in digging for a contractor. The mass was part of a strip of material a few feet in width between the trench where he was working and one which had been excavated for the construction of a sewer some years before, but the existence of which was not known to the defendant, except in so far as he might be deemed to have had constructive notice from the fact that there were several catch basins next the curb from which pipes led into the sewer. Defendant had provided appliances for shoring up the trench, and had instructed his employees to use them at once upon their discovering any crack in the sides of the trench to collapse. A careful watch had also been kept, and nothing had been observed which indicated the approaching catastrophe. Nor had the civil engineer appointed to superintend the contractor's work seen anything which indicated that the banks were liable to cave in. It was held that the defendant was not liable, as, under the evidence, the accident was of such a character that prudent men proceeding with reasonable caution would not ordinarily have foreseen or anticipated it.

For a similar ruling in a case in which the facts were almost identical, see *Burns v. Pethcal* (1894) 75 Hun, 437.

A weaver injured by a wire flying out of a carpet loom cannot recover of her employer, where it appears that there was no lack of inspection and no defects in the wire, and that in spite of the greatest care wires would fly out, to the knowledge of such weaver, whose duty it was to watch and replace them. *Daly v. Alexander Smith & Sons Carpet Co.* (1893) 69 Hun, 77.

A brakeman cannot recover for injuries received by being struck by a bolster on a passing car, which was designed to allow timbers longer than the cars room to play while rounding curves, and was properly devised and inspected, but suddenly worked out and struck the caboose where the brakeman was. *Knox v. New York, L. E. & W. R. Co.* (1893) 69 Hun, 93.

The owner of a blast furnace is not liable for injuries to an employee from the inhalation of gas not sufficient in quantity to affect an ordinary man, because the lungs of such employee were oversensitive from previous illness, where his employer had no reason to suppose that he was not sufficiently strong to endure the gas without risk. *Parlin v. Finfrouck* (1895) 65 Ill. App. 174.

Where defendant railroad company used on its car-wheels the same kind of oil that was

generally used upon cars, and had no knowledge, and by the exercise of ordinary care would not have obtained any knowledge, that any poisonous substance formed on the brasses in consequence of its use, an employee cannot maintain an action for being poisoned through handling the oil. *Kitteringham v. Sioux City & P. R. Co.* (1883) 62 Iowa, 285.

"In order to render an employer liable for an injury caused by an explosion occasioned by a defect known by him to exist in the boiler, the defect must be one which he could, by exercising skill, have ascertained to be likely to produce the explosion. There may be defects, and these may produce an explosion, and they may have been known, and yet they may have been such as no amount of care and caution on the part of the employer would have disclosed to be dangerous, and to be guarded against as dangerous." *Morris v. Gleason* (1877) 1 Ill. App. 510.

In *Kerrigan v. Hart* (1886) 40 Hun, 389, a laborer shoveling dirt stood between the tail of his cart and the edge of a bank. Owing to a defect in a hook in the harness, the horse got his head cramped, which made him back, forcing the laborer over the bank. It was held that on no theory could the master be charged with liability, the court saying: "Assuming the hook was not properly made, it is clear that the defect was not the proximate cause of the injury. No human foresight could anticipate that a horse would throw his head around so far as to catch his bridle upon this hook and back straight back and squeeze a man against a bank. That such a thing is possible is proved by the happening of the accident in this case, but that such a thing was probable or likely to occur is absurd."

A railroad company is not liable for injuries to an engineer occasioned by the unexpected going out of a lantern which was apparently in good order. *Elgin, J. & E. R. Co. v. Mainaney* (1894) 59 Ill. App. 114.

Another phase of the doctrine is that an employer cannot be held negligent for failing to take precautions against the acts of servants or third parties which there is no reason to anticipate.

Thus, the failure of an employer to repair a steam gauge attached to a boiler after notice that it was defective will not render him liable for injuries from the escape of steam from the safety valve, to an employee who went upon the boiler to examine where alterations could be made, believing such gauge to indicate the steam pressure, where he could not have anticipated that employees would go upon the boiler when under steam. *McCallum v. McCallum* (1894) 58 Minn. 288.

Nor is the owner of a sawmill in which is a saw the upper portion of which is covered by a sleeve which is raised by a jackscrew and levers so as to make an opening, through which a man's arm can be thrust, intended for the use of levers in regulating the tension, required, as matter of law, to foresee that an employee might thrust his arm through such opening and the sleeve fall because of a defective nut, where other openings have been provided through which one's arm could be put with safety. *Rysdorp v. George Pankrats Lumber Co.* (1897) 95 Wis. 622.

Nor is the owner of a chair factory guilty of negligence in leaving the opening into an elevator shaft unguarded at night, where it has no knowledge that anyone will go into the room opening into such shaft. *Jorgenson v. Johnson Chair Co.* (1896) 67 Ill. App. 80.

Nor is an employer liable for injury to a girl

of fifteen years from her hand dropping into an opening and coming in contact with a heated roller, because she became unconscious while her hand was resting over such opening, through having gone to work without food, where he has exercised proper care in respect to the machinery. *Montreal Steam Laundry Co. v. Demers* (1896) Rap. Jud. Quebec, 5 B. R. 191. The court based its decision on the principle that an employer who surrounds his servants with all the protection which human foresight can naturally suggest cannot be held responsible for injury resulting from physical weakness, or from any accident which the exercise of ordinary care on the part of the employee would have prevented.

In *Burke v. Syracuse, B. & N. Y. R. Co.* (1893) 60 Hun. 21, a railroad company employed in charge of a telegraph station at a single-track siding and highway crossing a robust boy of seventeen, who was familiar with railroad tracks and switches. It was his duty to report trains, receive and carry out telegraphic instructions, flag the crossing, and operate a "safety Wharton switch," which connected the main track with the siding. He had become familiar with the operating of this switch, which was simple, the switch, of itself, keeping the main track closed, and requiring the lifting of a heavy iron ball on a lever to open the siding. He had managed the switch for about two and a half months. Then on a certain occasion, when a train which should have been kept on the main track was approaching, he was suddenly seized with the thought that the switch was set wrong, and impulsively, and with a view of preventing a catastrophe, rushed to the switch and raised the lever, sending the train upon the siding, where it collided with a waiting train, causing the death of the engineer of the moving train, whose legal representative sued the company for damages. The court held the company not liable, saying: "Upon the occasion of the injuries no duty rested upon Clark to open the switch. His act in raising the ball and breaking the main track was voluntary, thoughtless, and mistaken. Nothing appears in the case showing that he had not physical power to perform all the acts and duties required of him at the station, or that he was not mentally fit for the position assigned to him by the defendant. Judged by the rule laid down in *Coppins v. New York C. & H. R. R. Co.* (1890) 122 N. Y. 557, the evidence fails to show a want of competency on the part of Clark to perform the duties required at the station. The observations made by the learned counsel for the respondent seem appropriate and pertinent where he says: 'The defendant could not make a psychological examination of Clark, or delve into the secret recesses of his brain to ascertain whether, at some future period, he would for an instant become the prey of a delusion and work destruction. It was no more bound to anticipate this unnatural occurrence than it would have been the act of Clark, had he in a moment of temporary aberration drawn a pistol and killed the plaintiff's intestate.'"

Especially is the master not bound to anticipate that the servant will act imprudently in exposing himself unnecessarily to a patent danger.

On this ground it has been held that a verdict for the defendant was rightly directed where an engine wiper placed his bare hand upon a splinter attached to the driving wheel of an engine, 6 inches long and projecting from $\frac{1}{2}$ to 1 inch beyond the tire, for the purpose of supporting himself in cleaning the engine, when the smooth surface of all the other parts of the 41 L. R. A.

engine were open to his use for the purpose. *McCain v. Chicago, B. & Q. R. Co.* (1896) 40 U. S. App. 181, 76 Fed. Rep. 125, 22 C. C. A. 99.

It is not the duty of an employer to anticipate that an inexperienced employee will put his hand under the cap covering the knives of a planing machine. *Huffer v. Herman* (1896) 66 Ill. App. 481.

In *Mad River & L. E. R. Co. v. Barber* (1856) 5 Ohio St. 541, 67 Am. Dec. 312, it is said of a hazardous employment that the employer does not insure against accident or those unforeseen perils which due and proper care and diligence cannot provide against. Injuries from accidents which the utmost stretch of human skill and foresight cannot provide against, are incident to all situations and conditions in life.

As the servant assumes all the risks of his employment which are not due to the master's negligence, it is obvious that another terminology based upon this doctrine may be used to express the effect of the general principle discussed in this subdivision. The rights and liabilities of the parties from this point of view are clearly explained in the following paragraph.

A railroad company is not negligent in leaving an ordinary push car a safe distance from the track and blocking it there in the ordinary method to prevent its moving toward the track, although some boys not connected with the company afterwards attempted to put it on the track and left it so close to the track that an employee riding on a switch engine was injured by collision therewith. A push car is not an object specially attractive to children in such a sense that the company is bound to take precautions against their meddling with it. *Atchison, T. & S. F. R. Co. v. Slattery* (1896) 57 Kan. 499.

Where a railroad servant has been injured by a sudden subsidence of the track, it is error to refuse to submit to the jury the special question, "Did the defendant have any reason to apprehend such a sinking of the roadbed and track thereon?"—where in a special question actually asked there is nothing which is calculated to elicit a finding upon that issue. A question in answer to which it is found that the defendant could by the exercise of ordinary care and prudence have discovered and repaired the cause of the accident before the accident occurred is not of itself sufficient, inasmuch as it leaves the question of proximity of cause untouched and still at large. *McGowan v. Chicago & N. W. R. Co.* (1895) 91 Wis. 147.

It should be noted that the master is liable where injury is caused by the concurrence of an accident with his negligence. *Musick v. Jacob Doid Pkg. Co.* (1894) 58 Mo. App. 332.

The cases which permit the employer to rely to a certain extent upon the efficiency of instrumentalities which have been tested by a prolonged use are other illustrations of the principles exemplified in the foregoing cases. (VI. f, 1, post.)

VI. *Circumstances charging an employer with knowledge of the condition of his instrumentalities.*

See also XVII. a, 6, post.

a. *Introductory.*

Want of knowledge may be imputed to an employer on the ground that a person who unites with the ordinary measure of intelligence which is imputed by the law to every responsible citizen the special skill and experience possessed by those engaged in the same

business could not, supposing him to have made a reasonably careful use of his faculties, have failed to ascertain the existence of the abnormal conditions to which the servant's injury was due.

"The master or the foreman whom he places charge of the business is presumed to be familiar with the danger, latent and patent, incident to that business. *Smith v. Peninsular Car Works* (1890) 60 Mich. 501.

"The employee will be presumed to be familiar with the dangers, latent as well as patent, ordinarily accompanying the business in which he is engaged." *Wagner v. H. W. Jayne Chemical Co.* (1892) 147 Pa. 475.

Compare Consolidated Coal Co. v. Haenni (1893) 146 Ill. 614, where it was said that a master or a superintendent whom he places in charge of the business is presumed to be familiar with the dangers, both latent and patent, which accompany the use of an apparatus for hoisting a large smokestack to be used in the business.

The obligation imposed upon him by this principle requires him to take notice, not merely of the operation of the various physical and mechanical laws by which the condition of his instrumentalities may be affected, but also of the manner in which those instrumentalities perform their functions from day to day, and to keep his eyes and ears open to any occurrences which indicate that they are not fit for the purpose for which they are used.

The duty incumbent on an employer to exercise care in furnishing reasonably safe appliances and substances to be used in his business requires him to take notice of the quality and fitness of the coal used on his engines. The condition of coal so inferior that it causes flames to burst through the furnace door is not a latent defect that cannot be discovered by ordinary diligence. *Missouri, K. & T. R. Co. v. Walker* (1894; Tex. Civ. App.) 28 S. W. 513.

The boundary line between the constructive knowledge which may be attributed to the master from this standpoint and from the standpoint of his duty in regard to the active examination of the instrumentalities is not always easy to define. But the exigencies of a logical classification seem to render it expedient that the duty to observe the daily operation of the instrumentalities, and to estimate the relation of certain extraneous scientific facts to that operation, should be distinguished from the duty to institute a minute investigation into the actual condition of those instrumentalities with a view to ascertaining whether they are or are not efficient. The necessity for some such differentiation is shown by the fact that the law will sometimes deduce an obligation to make an inspection from the fact that the employer, availing himself of the sources of information to which the former duty requires him to have recourse, has arrived at the knowledge of certain matters which would put a careful man upon inquiry.

The present subdivision, therefore, will be devoted to a review of the cases which deal with the various circumstances which bear upon the employer's liability for injuries caused by dangerous conditions, of which he is presumed to have notice, without taking any positive steps in the matter of inspection. His duty in regard to inspection will be considered afterwards.

b. *Notoriety.*

One method of establishing notice or knowledge of a fact is by proving the notoriety of the fact. *Crane v. Missouri P. R. Co.* (1885) 87 Mo. 589.
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Most of the cases which illustrate this principle relate to the reputation of servants, and are collected in subdivision IX. post. Here we shall merely refer to the rulings in which the principle is applied to charge the master with a knowledge of the condition of inanimate agencies.

In *Crane v. Missouri P. R. Co.* (1885) 87 Mo. 588, it was held that the trial judge had not erred in receiving evidence tending to show that a locomotive car made by a certain manufacturer had, on account of its being dangerous, been abandoned, not only by railroad companies generally, but by the defendant itself.

In *Toledo, W. & W. R. Co. v. Fredericks* (1874) 71 Ill. 294, a railroad company was held liable, where the proof showed that there was a very radical defect in the manner of the construction of a particular coupling which caused an injury, and that its reputation among the operatives in the yards was so notorious that its dangerous character ought to or could have been known by the exercise of reasonable diligence by the officers of the company whose duty it was to build and repair machinery.

So, also, in an action to recover damages caused by the explosion of a certain locomotive engine, the testimony of the employees of the company using it that among them such engine had always been considered unsafe is competent for the purpose of showing that the person having care of the machinery of the road knew, or might have known by reasonable diligence, that it was not safe. *Chicago & A. R. Co. v. Shannon* (1867) 43 Ill. 338, 339.

But proof of general notoriety, although generally admissible as tending to prove notice of a fact, when such notice is a material inquiry, is never competent to prove the fact itself. Hence it is not competent testimony, on the inquiry whether a certain low bridge over a railroad track had ever before been the means of killing a brakeman. *Louisville & N. R. Co. v. Hall* (1888) 87 Ala. 708, 4 L. R. A. 710. (See also IX., d, post.)

c. *Opportunities of master to observe defect.*

"Where it is proved that there was a defect, and that defect was obvious, and on its face showed that it had existed long enough before the injury to have been discovered by the master in the exercise of ordinary diligence, it is at once apparent that if the master did not know of it he might have known, and that he failed in his duty to inspect and know." *Ocean S. S. Co. v. Matthews* (1890) 86 Ga. 418.

Hence a vessel is liable to an employee of a stevedore for injuries suffered by the giving way of a shackle holding a block used in unloading the vessel, because of its unsafe condition from a previous excessive strain, where its unsafe character was evident. *The Para* (1893) 56 Fed. Rep. 241.

And a railroad company is chargeable with negligence toward its employees in sending out a car with the handhold necessary for the safe and prompt performance of the duties of a brakeman in coupling and uncoupling in an obviously defective condition. *Settle v. St. Louis & S. F. R. Co.* (1895) 127 Mo. 336.

A bolt in the brakebeam of a car which projects to an unnecessary extent is an obvious and palpable defect which the railway company is bound to remedy. Therefore it is not error to refuse an instruction that, if the car became defective in this particular after it was put in use, the company is not liable for injuries resulting from the defect, unless it neglected to have it remedied after it had notice of the same.

Wedgwood v. Chicago & N. W. R. Co. (1878) 44 Wis. 44.

A railroad company is liable for injuries caused by a deadwood worn so short as to make the work of coupling dangerous, such a defect being plainly visible on examination. *King v. Ohio & M. R. Co.* (1882) 14 Fed. Rep. 277.

In *Erskine v. Chino Valley Beet-Sugar Co.* (1895) 71 Fed. Rep. 270, the court used some language which would, if taken literally, justify the inference that it supposed that the converse of this principle also held good, for it denied the right of the plaintiff to recover on the ground that the defect in the appliance (a rope) was not "open to visual observation." Such a doctrine can scarcely be reconciled with the rule which imposes on the master the duty of active inspection. But presumably the decision was rendered upon the theory that this duty had actually been discharged a reasonable time before the rope gave way.

That the master is liable on the ground that the danger was obvious cannot be asserted where the evidence on behalf of a defendant company is to the effect, not only that the support made in a tunnel which collapsed was not obviously defective or imperfect, but that, in the opinion of the superintendent, it was amply sufficient, and that it was skillfully and mechanically constructed. *Kearney Electric Co. v. Laughlin* (1895) 45 Neb. 391.

Evidence that a machine had a tendency to throw the belt from the loose to the tight pulley, and thus to start up the machine, is sufficient to warrant a finding of negligence on the part of an employer in failing to provide reasonably safe machinery, and that a due examination of the machinery would have disclosed its imperfection. *Donahue v. Drown* (1891) 154 Mass. 21.

A mining company which put into service, where it must be connected with the same steam pipe that other larger and stronger boilers are connected with, an old boiler that had been repaired eleven months before, with the express purpose of using it for about six months for a special purpose which did not require its connection with other boilers or the use of high pressure, is liable for an injury to an employee caused by its explosion the first day after such connection. *Johnson v. Boston & M. Consol. Copper & S. Min. Co.* (1895) 16 Mont. 164.

A finding that defendant knew of the presence of a solution of potash in a waste pipe from which he directed plaintiff to remove an obstruction is sustained by evidence that defendant was present before and at the time of the accident to plaintiff caused by coming in contact with such solution, and had been personally concerned in directing the removal of the obstruction, although he denies having had any knowledge of its presence. *Dunn v. Connell* (1897) 21 Misc. 295, Affirming 20 Misc. 727.

The rule that the case is for the jury wherever the evidence is conflicting as to the question at issue involves the corollary that when there is some evidence of the defendant's knowledge of the defect which caused the injury, the plaintiff is entitled to go to the jury on the question of the employer's negligence. *Mellors v. Shaw* (1881) 1 Best & S. 437, 30 L. J. Q. B. N. S. 333, 7 Jur. N. S. 845. (This rule, of course, is to be understood with due reference to the construction now put by most courts upon the meaning of the word "some," a mere scintilla of evidence not being sufficient to justify the submission of the case to the jury. See *Bailey, Personal Injuries Relating to Master and Servant*, chap. XXVI.; 1 Beven, Neg. 148 et seq.)

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d. Length of time defect has existed.

See also IX. c. 4.

1. Generally.

In considering whether notice of the dangerous condition of an instrumentality would have been discovered if the master had been reasonably careful in the length of time during which that condition had existed is obviously a material question, and is constantly adverted to in cases of the type under review as a fact tending to show that his ignorance was excusable or culpable.

For convenience sake we shall collect at this place both the decisions in which the underlying idea is that the employer would or would not have learned of the defect merely by the passive use of his faculties of observation, and those which rely upon the theory that by a proper performance of his duty of active inspection he could have discovered the existence of the danger.

This circumstance has been relied upon to charge the master with liability in the subjoined rulings.

Where the master, instead of furnishing safe and suitable hoisting appliances, provided such as were obviously unsafe and unfit at and before the time of the injury, and had been so long enough for their unsafe condition to have been discovered by the master in the exercise of ordinary care, the presumption that he knew of their condition is proper. *Ocean S. S. Co. v. Matthews* (1895) 86 Ga. 418.

A railroad company is liable for injuries caused by a broken ladder-handle which had been broken long enough to be weather-beaten, and to appear as an old break. *Richmond & D. R. Co. v. Moore* (1883) 78 Va. 93.

No matter whose duty it may be to keep a foreign car in repair, or to prevent its coming into a railroad yard in a damaged and dangerous condition, if these duties were neglected and the car permitted to come into the yard for so many consecutive days that the company, in the exercise of a high degree of care, might have known of its damaged and dangerous condition in time to avoid any injury therefrom, it is liable to its employees for any damage occasioned thereby without any fault of theirs. *Chicago, B. & Q. R. Co. v. Avery* (1880) 8 Ill. App. 133.

An employer is not excused from liability for injuries to an employee caused by machinery being out of repair, by the simple fact that the condition thereof was not known to him, if it was obvious and had existed for such a length of time that he was chargeable with negligence in not knowing of it. *Monmouth Min. & Mfg. Co. v. Erling* (1894) 145 Ill. 521, Affirming (1892) 45 Ill. App. 411.

A railroad company which does not ascertain the condition of a caboose which has been repeatedly condemned and marked as out of repair, and has remained for a long time in that condition, thereby fails to exercise reasonable and ordinary care and diligence, rendering it liable for an injury to an employee resulting from such neglect. *St. Louis, I. M. & S. R. Co. v. Higgins* (1890) 53 Ark. 458.

It is error to take the case from the jury where the evidence tends to show that the machinery which caused the injury was defective, and that the defect had existed so long that the employer should have known of it. *Radmann v. Chicago, M. & St. P. R. Co.* (1890) 78 Wis. 22.

Where a defect is, in its nature, one which is open to observation, and there is evidence going to show that it has been suffered to exist for a considerable time, the jury may fairly infer.

knowledge on the part of the master. *Bridges v. St. Louis, I. M. & S. R. Co.* (1879) 6 Mo. App. 330.

Where both the evidence and the examination by the jury of timbers used for a scaffold tend to prove that their unsafe condition shortly before the injury should have been detected by the inspection of a competent person, and also tend to prove that this faulty condition had existed for such a length of time that, by reasonable care and diligence on the part of defendant, he could have ascertained the condition of the timbers, a verdict for the plaintiff will not be set aside. *Oberfelder v. Doran* (1889) 26 Neb. 118.

In an action for damages by a brakeman, evidence that plaintiff was employed by the defendant, and, while coupling cars, sustained an injury to his hand owing to the defective condition of the draft timber holding up the drawhead on one of the cars; that the bolt sunk down into the timber, and let the drawhead down 4 inches lower than it should be; and that the defect was old and not known to the plaintiff,—is sufficient to sustain a verdict against the defendant. *Seese v. Northern P. R. Co.* (1889) 39 Fed. Rep. 487.

Evidence that a railway-car derrick, by the breaking of which plaintiff's intestate—foreman of the car—was killed, and had been in unsafe condition for several years; that defendant had set it aside for repairs on several occasions, and knew, or by the exercise of ordinary care could have discovered, that the timbers underneath the floor were decayed and rotten, and that the car was unsafe,—is sufficient to sustain a verdict that defendant was guilty of negligence in furnishing the car to plaintiff's intestate. *Chicago & E. R. Co. v. Branyan* (1894) 10 Ind. App. 570.

The same general principle is also recognized in *Lake Erie & W. R. Co. v. McHenry* (1894) 10 Ind. App. 525; *Rice v. King Philip Mills* (1887) 144 Mass. 225, 59 Am. Rep. 80; *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 151; *Atchison, T. & S. F. R. Co. v. Holt* (1883) 29 Kan. 149; *Burnes v. Kansas City, Ft. S. & M. R. Co.* (1895) 129 Mo. 41; *Clough v. Hoffman* (1890) 132 Pa. 626; *Ashman v. Flint & P. M. R. Co.* (1892) 90 Mich. 567; *McDonald v. Chicago, St. P. M. & O. R. Co.* (1889) 41 Minn. 439.

On the other hand, the fact that the danger has arisen so recently that the master is not fairly chargeable with knowledge of its existence is relied upon in the following cases:

A railway company is not liable for damages resulting to an employee from the derailment of a train, caused by the spread of a reasonably safe track by the passage of another train, so immediately preceding the accident that the trackman could not have had notice of the defect in the track, but it is liable if the defect causing the injury was in rotten and unsafe ties. *Gulf, C. & S. F. R. Co. v. Pettis* (1888) 69 Tex. 689.

In *Consolidated Coal Co. v. Maehl* (1888) 31 Ill. App. 252, the defendant was held liable where the attention of the corporate officers had been called to the defect "some time previous" to the accident.

A railroad company is not liable for an injury to an employee caused by defects in the switch tracks in its yards, unless it had actual knowledge of such defects, or they had existed for such a length of time that knowledge might be inferred. *Atchison, T. & S. F. R. Co. v. Swarts* (1897) 58 Kan. 235.

To enable the plaintiff to recover damages for injuries caused by the fall of a pile of lumber, which, as the evidence tends to show, was 41 L. R. A.

safely piled in the first place, but became unsafe in subsequent removal from the pile, to recover for the injury sustained by the falling of the pile, "It is incumbent on him to prove that defendant, through some responsible officer or agent, had actual notice of the defect, or that it had existed for so long a time that he should have discovered it in the exercise of reasonable diligence," the court remarking that notice of subsequently accruing defects could not arise out of anything which the employer had to do with original construction. *Baldwin v. St. Louis, K. & N. R. Co.* (1885) 68 Iowa, 37.

A railroad company is not liable to an employee for injuries received in attempting to make a coupling, by stumbling over a pile of cinders on its track, or from a defective drawhead, where both the cinders and the defect are recent, and it has no knowledge thereof. *Welch v. New York C. & H. R. R. Co.* (1892) 43 N. Y. S. R. 958.

A railroad company is not chargeable with negligence by reason of a defect which suddenly appears in a tool or instrumentally furnished an employee, unless it has been remiss in testing the same or ought to have known of the defect. *Atchison, T. & S. F. R. Co. v. Napole* (1895) 55 Kan. 401.

A railroad company is not liable for the death of an employee resulting from personal injuries caused by a defective appliance furnished to him, unless the company knew of the defect, or it was of such a nature or had existed for such length of time that in the exercise of ordinary care the company should have discovered it. *Carruthers v. Chicago, R. I. & P. R. Co.* (1895) 55 Kan. 600.

The lessee of a building is not liable for a personal injury to his employee by the falling of a freight elevator because it had no safety clutch, where he was moving into the premises which had been in his possession for a short time only, and he did not know that there was no clutch, and its lack was not so obvious as to be readily seen on examination,—such as would ordinarily be made by one who is looking over premises with a view to living there. *Hansen v. Schneider* (1890) 58 Hun, 60.

A master is not liable for injuries to a servant from the fall of heavy iron castings, due to the dangerous position in which they were piled, where he did not know that they were in such a position, and they had not remained in such position for so long a time that he ought to have known. *Reed v. Boston & A. R. Co.* (1895) 164 Mass. 129; *S. P. Clough v. Hoffman* (1890) 132 Pa. 626; *Baldwin v. St. Louis, K. & N. R. Co.* (1885) 68 Iowa, 37; *Carruthers v. Chicago, R. I. & P. R. Co.* (1895) 55 Kan. 600; *Haskins v. New York C. & H. R. R. Co.* (1894) 79 Hun, 159.

In *O'Mellia v. Kansas City, St. J. & C. B. R. Co.* (1893) 115 Mo. 205, an instruction was approved which directed the jury to find for the plaintiff, if the defendant railroad company knew, or by the exercise of ordinary care might have known, that the footboard on an engine-tender which caused the injury was defective, sufficiently long before the accident to have enabled it to make repairs.

In *Wabash & W. R. Co. v. Morgan* (1892) 132 Ind. 430, an instruction to the jury as to notice on the part of the defendant of the defective engine, that they might find such notice to be proved, if it might be rightfully and reasonably inferred from the evidence given in the case, although there might be no direct testimony as to such notice, is held proper where there is an averment in the complaint that the defendant had long known of the dangerous and defective condition of the engine.

It is not error to permit defendant's foreman to testify as to what he knew of the condition of a scaffold three hours before it gave way, for, in the absence of evidence to the contrary, the presumption must be indulged that it remained in the same condition up to the time of the accident. *Doyle v. Missouri, K. & T. Trust Co.* (1897) 41 S. W. 255.

In *Chicago, B. & Q. R. Co. v. Avery* (1884) 109 Ill. 314, 322, a requested instruction that a railroad company is not responsible for injuries to its employees, caused by the ordinary wear and tear of cars, until it has been notified of the defects caused thereby, or has had time and opportunity to learn thereof, and to have the same repaired, was modified by adding "or such defects shall have existed for such a length of time as to give the proper authorities opportunity to learn of such defect in the due discharge of their duties." It was said this merely enlarged on the effect of the time of the continuance of the defect, in implying notice, and expressed the idea in the instruction as drawn, in a more wordy form.

In *Central R. & Bkg. Co. v. Kent* (1889) 84 Ga. 351, 355, a railroad washout due to a sudden and tremendous rainfall, unprecedented in that locality, caused injury to a locomotive engineer on a train that reached the place within an hour and a half or two hours after the rainfall. The court said: "If the company knew or could have known of this washout, by the exercise of ordinary and reasonable care and diligence, it would seem from the authorities that it would be liable to the plaintiff for damage he sustained. But if it did not know of it, and there was no negligence on the part of the company's servants in not knowing or trying to know, the company would not be liable.

2. *Rulings as to specific periods.*

What period must elapse before it is justifiable to regard the master as affected with knowledge of an existing defect in an instrumentality is, of course, usually a question of fact, to be decided, like other questions of that sort, by a jury.

"There is no arbitrary rule of law that charges the master with constructive notice of the negligent omissions of duty on the part of a servant, after the lapse of a certain time, under all circumstances. The doctrine of constructive notice is founded on just and reasonable consideration, and the mere lapse of time is not always the test of negligence on the part of the master." *Cameron v. New York C. & H. R. Co.* (1896) 145 N. Y. 400.

But it will be useful to collect the rulings in which appellate courts have expressed a specific opinion as to certain periods.

A railroad company which allowed a telegraph pole to stand for three years within 18 inches of passing cars, so that a brakeman was struck as he was climbing down the side of the car without any negligence on his part, is guilty of culpable negligence. *Chicago & I. R. Co. v. Russell* (1878) 91 Ill. 298, 33 Am. Rep. 54.

In *Monmouth Min. & Mfg. Co. v. Erling* (1894) 148 Ill. 521, the employer was held liable where a nut which kept an eye-bolt in place had been missing two weeks.

A jury is justified in finding that an employer is chargeable with constructive notice of a defect in a kettle used by an employee, through which pitch heated therein runs down into the fire below so as to cause an explosion, where the defect has existed for six or eight weeks. *Stapp v. Loewer's Gambrinus Brewing Co.* (1896) 1 App. Div. 405.

A jury is warranted in finding that a railroad

company which has had a foreign car in its yard for about one week is chargeable with notice of a defect in its coupling attachments which is readily discernible by a proper inspection. *Fay v. Minneapolis & St. L. R. Co.* (1883) 30 Minn. 231.

In *Chicago, St. L. & P. R. Co. v. Fry* (1891) 131 Ind. 319, it was insisted by plaintiff's counsel that the fact that a foreign car had been in the possession of the company for nearly two weeks was of itself sufficient to charge the company with notice, and was cited in support of this proposition. The court, however, pointed out that the case did not go to any such length, as the jury had found that the company had notice of the defect, and the court said in its opinion the "defect in the car was readily discernible upon proper inspection." *Fay v. Minneapolis & St. L. R. Co.* (1883) 30 Minn. 477.

Where there is evidence that an obstruction has remained near a railroad track for more than a year previous to the accident due to it, the case should be left to the jury. *Bessex v. Chicago & N. W. R. Co.* (1878) 45 Wis. 477.

A yardmaster is not guilty of negligence in failing to discover that the cars of another company which is allowed to use the yard are left too close to the track upon which a train is running so as to render his employer liable for an injury to an employee on such train, where the cars were placed in position only a few minutes before the accident. *Martin v. Louisville & N. R. Co.* (1894) 95 Ky. 612.

Knowledge of the defective condition of a switch will not be imputed to a railway company, when it was to all appearance safe for the passage of trains about one hour before it caused the derailment of a train. *Chicago & A. R. Co. v. Stites* (1886) 20 Ill. App. 648.

An employer is not liable for an injury to a servant caused by the falling of a post, on the ground that it was his duty to furnish a safe place for the servant to work, where the post had been put in place only two days before, and was well stayed and secured in its position, and there is no evidence that the employer had either actual or constructive notice of any defect or unsafe condition. *Mickee v. Walter A. Wood Mowing & R. Mach. Co.* (1894) 77 Hun, 559. On the former appeal, it had been held that, as there was no evidence to show that the post had been guyed or secured in any way, it was error to nonsuit the plaintiff. (1893), 70 Hun, 456.

That a mining company must have known that the roof of one of its tunnels was in a dangerous condition is not a necessary inference from the fact of its having been in that condition for two weeks before the accident. *Consolidated Coal Co. v. Scheiler* (1891) 42 Ill. App. 619.

Constructive notice of the presence of a block of wood on a rail upon which a transfer table travels cannot be inferred from evidence which tends to show that it had been placed there by some person unknown a few hours before it caused an injury. *Murphy v. Great Northern R. Co.* (1897) (Minn.) 71 N. W. 662.

In *Doing v. New York, O. & W. R. Co.* (1893) 73 Hun, 270, the plaintiff was held to be properly nonsuited for the reason that there was no evidence that a car had been out of repair a sufficient length of time to justify the jury in finding that the defendant knew of its condition, or was negligent in not ascertaining it. The court of appeals, however, said that, as the defendant had notice on Saturday that the car was out of order, the fact that an accident occurred from its use on the following Monday was some evidence of negligence.

e. Scientific facts; what knowledge of, imputed.

The following cases illustrate the ideas of various courts as to the extent of information which an employer must at his peril possess as to some common scientific facts. The bearing of his imputed knowledge of the universal law that inorganic instrumentalities will constantly tend to deteriorate while they are being used, will be considered in the subdivision relating to his duty of inspection. [VII. post].

"Latent defects are such as the master, by the exercise of care, might have discovered, and must not be confounded with hidden defects, which even great care on the part of the master would not disclose to him. To hold the master responsible for injuries resulting from hidden defects, as distinguished from latent defects, would in fact subject him to the liability of an insurer, yet, for errors in the principle of construction, or a want of knowledge of the strength of material, as determined by physical laws, the master may be held responsible, on the ground that such principles and laws may be ascertained by care, and it is the duty of the master to ascertain them." *Flynn v. Union Bridge Co.* (1890) 42 Mo. App. 531.

In *Twomey v. Swift* (1896) 163 Mass. 273, where the plaintiff was injured by the breaking of a plank in a scaffold on a cold and blustering day, there was evidence that the only materials furnished by the defendants were hemlock boards of the thickness of $\frac{1}{4}$ of an inch, and that these are not suitable material for the construction of stagings; that such boards are usually of coarse grain; that in cold wet weather they readily fill with moisture and freeze, and become very brittle; that they are not as strong as spruce or pine, or many other kinds of lumber, and are not commonly used for staging, particularly in cold weather. A verdict for the plaintiff was sustained, the court saying: "It probably is true that hemlock lumber may be selected large enough, and of such quality, as to make a reasonably safe staging in any season of the year, but there was evidence not objected to that a carpenter of ordinary skill might not know the great danger of using hemlock boards as supports in the construction of stagings."

In *Flynn v. Harlow* (1892) 46 N. Y. S. R. 872, it was testified that a floor which gave way was subjected to more than twice the weight that the superintendent of buildings testified would bring the strain up to a breaking point. The court said: "This was, clearly, such an oversight, on the part of the defendant, . . . of existing and well-ascertainable facts, as to constitute negligence. The defendant was not warranted in ascertaining the full capacity of the floor as to strength by actual use in piling materials thereon. He must be presumed to have had a fair and reasonable knowledge of the business in which he was engaged, which includes a knowledge of at least the approximate strength of the floor timbers he had placed in the building, and a knowledge of the approximate weight of twelve or thirteen thousand bricks and a quantity of mortar that he had accumulated upon the floor."

It is the duty of one employed to superintend the construction of a shed to know what weight the roof will bear, and to remove snow and rubbish, which, if permitted to accumulate, is likely to cause it to fall. *Johnson v. First Nat. Bank* (1891) 70 Wis. 414.

The fact that a girder did fall from the beams of a building in course of construction affords some evidence that it was lying in such condition and position upon the beams that it was liable to be precipitated below, where the plain-

tiff was at work, if a moving body came in contact with it; and where the servants of the defendant knew it was there, and were fully advised it was loose, and that the irons which supported it were frosty and slippery, the fact that it actually fell should not be excluded from the jury in the consideration of the question of the alleged negligence of the defendant. *Wight Fire Proofing Co. v. Poczekal* (1889) 130 Ill. 139.

It is an obvious deduction from mechanical principle that the oscillating motions produced by the operation of a pile driver upon a trestle bridge must be highly detrimental to the structure, and a corresponding degree of care in the matter of frequently testing its strength and stability is incumbent on one who hires servants for such work. *Bowen v. Chicago, B. & K. C. R. Co.* (1888) 95 Mo. 268. Compare *Ryan v. Fowler* (1862) 24 N. Y. 410, 82 Am. Dec. 315, epitomized in subd. V. b, ante.

The fact that turpentine, into which the servant of a manufacturer of household utensils is required to plunge spoons just taken out of boiling grease, has never caught fire, will not relieve the master from liability, as the danger of ignition is one which should have been anticipated by a person having the technical knowledge which the manufacturer must have possessed. *Latorra v. Central Stamping Co.* (1896) 9 App. Div. 145.

The owners of a quarry are not liable for injuries to an employee of a contractor to haul a load of stone from the quarry, from the breaking of a hook forming part of hoisting machinery furnished by them, where it was apparently sound and its defects could not have been discovered by an examination, and it was apparently sufficient for the purpose for which it was used, and had frequently been used for lifting blocks of the same size, and the breaking was caused by crystallization of the iron. *Lyons v. Knowles* (1893) (Cal.) 32 Pac. 883.

In *Moynihan v. Hills Co.* (1888) 146 Mass. 596, the fact that an iron rod had been subjected to a strain which tended to crystallize it was one of those which, when taken together, were held to justify the submission to the jury of the question whether the defendant was negligent.

In *Tissue v. Baltimore & O. R. Co.* (1886) 112 Pa. 91, 56 Am. Rep. 310, where the plaintiff was killed by the explosion of a dynamite magazine, the court stated the question for solution to be this: "Ought the company's superintendent to have shown that in placing the magazine where it was placed he was exposing the men engaged in operating the road, as well as others, to a danger to which they ought not to have been exposed?" and proceeded to discuss it as follows: "The question is not whether he did have knowledge of the peculiar properties of the material which he was intrusted to handle, for his ignorance in this particular would be no excuse for the company, but whether the agent thus intrusted ought to have been one who knew that dynamite was, from its nature, liable to accidental explosions such as could not be ordinarily foreseen or provided against. . . . There was a duty resting upon it to know, as far as it was possible to know, the character of the material which it placed in the hands of its agents. In this we are not to be understood as pronouncing upon the chemical characteristics of dynamite, for about it we know little or nothing, or as charging negligence on the company or its agents. The act of putting the magazine where it was may have been prudent, or at least not unreasonably imprudent, and the explosion may have been the result of an accident which no ordinary human foresight could provide against,

hence, one for which no one can be held responsible. But, however this may be, the matter is, under all the evidence, for a jury, and to a jury it must be referred."

A railroad company which constructs a line skirting a mountain range and crossing numerous gulches and ravines is bound to know that sand, gravel, and other materials will be washed down these channels during the rainy season, and will probably accumulate on the upper side of the track to such an extent as to cover it, unless openings are provided for the purpose of allowing the debris to pass under the roadbed. *Union P. R. Co. v. O'Brien* (1892) 4 U. S. App. 221, 49 Fed. Rep. 538, 1 C. C. A. 354. Affirmed (1895) 161 U. S. 451, 40 L. ed. 766.

The master is chargeable with knowledge of everything that may happen under a favorable conjunction of circumstances, as a result of familiar natural laws, even though such result be unusual. Thus, a railroad company is liable to an employee killed through its negligence in failing to guard against the danger of ice being forced upon its track at a point where the stream has several times risen to the top of the tracks in floods, and where the track has once been washed away, although no ice has previously been washed upon the track. *Scagel v. Chicago, M. & St. P. R. Co.* (1891) 83 Iowa, 380. In *Beardsley v. Minneapolis Street R. Co.* (1895) 54 Minn. 504, 506, the court said that the defendant was bound to know that, with a low dasher in front, the almost inevitable result of bucking would be to suddenly hurl the motoneer upon the ground in front of the car, and thus to greatly imperil his life.

The fact that the timbers supporting a wash-tub, being constantly in a damp condition, will be apt to grow rotten, is sufficient notice to an employer of the necessity for watchfulness and for frequent inspections with a view to ascertain whether those timbers are capable of sustaining the strain to which they are subjected. *Malone v. Hathaway* (1875) 6 Thomp. & C. 1, 3 Hun, 553. This case was reversed in (1876) 64 N. Y. 5, 21 Am. Rep. 578, but merely on the ground that the carpenter charged with the duty of looking after the structure was a fellow servant of the plaintiff.

1. Previous operation of instrumentalities.

1. Efficient operation, inference from.

In view of that tendency to deterioration already adverted to, which is characteristic of all the inorganic agencies of business, it cannot be affirmed, as a universal principle, that an employer is entitled to infer, from the previous efficient operation of his instrumentalities, that such operation will continue.

The mere fact, therefore, that machinery has been used with safety for years, and is not obviously dangerous, will not justify a presumption that it will continue safe, and that its use may be continued, without examining it to ascertain if its safety may not be impaired from wear. *Goodsell v. Taylor* (1889) 41 Minn. 207, 4 L. B. A. 673.

Indeed, it is evident that all the decisions cited in this and the next two subdivisions are based on the theory that he is bound to take notice that the chances of his instrumentalities remaining in a safe condition steadily diminish in proportion to the period during which they have been used. It is a well-recognized principle, however, that the fact of an instrument having been safely used up to the time that it caused an injury to a servant and under circumstances substantially equivalent to those which prevailed when the injury was received, will tend more or less strongly to prove that

the employer was not negligent in continuing to use it. It is so held in the following instances:

Where the machinery used in raising stone to a building became disconnected from lack of repair, but the employer is not proved to have had notice that it was out of order, and the apparatus had raised stones of ten times the weight of that which caused the injury. *Richardson v. Cooper* (1878) 88 Ill. 270.

Where a brakeman's clothes caught on a switch handle and threw him under a car as he was attempting to board the caboose after having thrown a switch, but the switch as constructed had been used five years without previous accident, and the natural inference from all the proof was that the accident was the result of a misstep, and not liable to occur again. *Bivins v. Georgia P. R. Co.* (1892) 96 Ala. 325.

Where the breaking of a wire pin caused an engineer to lose control of the throttle of his engine, resulting indirectly in an injury to a miner descending the shaft of a mine, but the wire pin had for seven years continuously and successfully served its use without any change, repair, substitution, or visible defect, and it gave no external indication of defect up to the time of the accident, and no defect therein was visible or known to the engineer, the mine inspector, or the employer. *Bradbury v. Kingston Coal Co.* (1893) 157 Pa. 231.

The question being whether the plaintiff's foot was caught by a splinter on the inside of a railroad track or rail, and as to whether the defendant is chargeable with negligence therefore, danger from such cause not being self-evident, it is competent for the defendant to show by experienced witnesses that such accidents have been unknown. *Doyle v. St. Paul, M. & M. R. Co.* (1889) 42 Minn. 79 (syllabus by court).

Compare *Burke v. Witherbee* (1885) 98 N. Y. 562, where a mine owner was held not negligent as regards his operatives in continuing to use a hook for fastening cars to the hoisting cable, where such an apparatus had been employed in different mines, and had "under varying conditions, upon countless occasions, uniformly answered its purpose without injury to anyone."

The same principle has also been recognized in *Lyons v. Knowles* (1893) (Cal.) 82 Pac. 883.

A similar rule prevails where third persons are concerned. *Laffin v. Buffalo & S. W. R. Co.* (1887) 106 N. Y. 140, 60 Am. Rep. 433, where the general principle covering all cases of this class was thus laid down: The omission to provide against an accident which ought to have been foreseen, or which might reasonably have been anticipated, is actionable negligence, but, as a general rule, when an appliance or structure not obviously dangerous has been in daily use for years, and has uniformly proved adequate, safe, and convenient, its use may be continued without the imputation of culpable negligence.

2. Prior occurrences indicating defects.

The true ground on which evidence of previous accidents should be admitted or rejected in actions for negligence is that it is competent for the purpose of showing that the defendant had knowledge of the probability of the recurrence of similar accidents, but not for the purpose of proving that a specific danger existed at the time the plaintiff was injured. *Malone v. Hawley* (1873) 46 Cal. 409, where evidence that an elevator had previously fallen from the same cause as that to which the plaintiff's injury is traceable was admitted to show that the employer knew it might at any time fall again.

Compare Findlay Brewing Co. v. Bauer (1893) 50 Ohio St. 560, where it was said that evidence of the occurrence of accidents before the time at which the plaintiff was injured, owing to the defective condition of a machine, is admissible as tending to prove that the employer had knowledge of its condition, though it is not competent for the purpose of showing negligence at the time of the injury. Such evidence, therefore, being admissible to establish one of the necessary steps in the plaintiff's case, should not be excluded.

Cases illustrating this principle are the following:

Knowledge of a railroad company that a derrick constructed by it is sometimes left unfastened so as to swing over the track in a manner dangerous to employees, makes it liable for injury caused thereby to a trainman, although it did not know that it was unfastened at the time of the accident, and it had remained unfastened for a short time only. *Gates v. Chicago, M. & St. P. R. Co.* (1892) 2 S. D. 422. The court remarked that the negligence for which the defendant was held liable consisted, not in the precise condition of the derrick at the time of the accident, but in its failure to use care to keep it fastened after receiving constructive notice of what usually occurred when it was not in use.

Allowing slabs to accumulate so as to form a mass 80 feet square and 40 feet deep, in a slab burner, thereby causing it to fall by reason of the excessive heat suddenly engendered, is negligence rendering one liable for the death of a servant killed by its fall, where he had knowledge of the consequences to be expected, from having allowed a similar pile to accumulate five years before, which caused the burner to shrink and bulge out and nearly collapse. *Faerber v. T. B. Scott Lumber Co.* (1893) 86 Wis. 226.

A master is liable for injuries caused by the giving way of a decayed plank in a platform at the very place where it joined a new piece inserted by him after a previous break. *Johnson v. Bellingham Bay Improv. Co.* (1896) 13 Wash. 455.

The duty to furnish a safe place for servants to work extends, in the case of an inexperienced workman who has had no opportunity to acquire any knowledge of his surroundings, to taking proper precautions to prevent the fall of a boulder protruding from a bank of earth at the side of a cellar in process of excavation, in which he is set to work shoveling away earth that has accumulated on the cellar floor, where such bank has an insufficient slope and portions of it have from time to time fallen upon the floor. *Byrne v. Brooklyn City R. Co.* (1894) 6 Misc. 441.

A railroad company is liable for injuries to a switchman from the derailment of an engine of extraordinary size at a curve of 14 degrees, constructed without elevating the outer or depressing the inner rail, where frequent derailments have occurred at the same place. *St. Louis Bridge Co. v. Fellows* (1893) 52 Ill. App. 504.

A railroad company is liable for the death of an employee engaged in coupling cars, who is struck by timbers projecting from a car owing to their having shifted after they had been reloaded because they had previously shifted, where no means were adopted to prevent such shifting. *Illinois C. R. Co. v. Reardon* (1894) 56 Ill. App. 642.

An employer may be held liable for injuries to one operating his elevator caused by its fall, where it had been in use eleven years, did not work well, had no counter weights, and parts

of the machinery contained old breaks, even though such breaks could be discovered only by taking it apart. *Bartley v. Trorlicht* (1892) 49 Mo. App. 214.

In *Beardsley v. Minneapolis Street R. Co.* (1893) 54 Minn. 504, the court held that the evidence abundantly justified the jury in finding that the defendant corporation was guilty of negligence in causing a car to be used, where it had frequently "bucked" before to the knowledge of those to whom defendant had intrusted its primary duty of seeing to the condition of its cars.

Negligence may be inferred by a jury from the continued use of a chain long after its weakness has been demonstrated by actual breakage. *Krogstad v. Northern P. R. Co.* (1891) 46 Minn. 18.

In *Ousley v. Central R. & Bkg. Co.* (1890) 93 Ga. 538, the court said: "A jury could infer that a draw-bar was defective, it having failed in its proper functions twice out of three attempts at using it. It would not be unreasonable to conclude that an implement which proves inefficient in two thirds of the instances of its use is not a fit implement to be supplied by a railway company to those of its employees who are engaged in such hazardous service as coupling cars."

A railroad company used an engine which, owing to a leak in the throttle valve, was accustomed to move automatically and without warning. The plaintiff, an engine-cleaner, was ordered to go into the pit under the engine to clean it, and while he was doing so it suddenly moved back 3 feet and cut off his fingers. The company was held liable under special findings, that the engine was dangerous and unsafe for use and had been so for some considerable time; that the officers of the defendant and the person in charge of it did not exercise ordinary care and prudence to know its condition although it could have been known by the exercise of ordinary care. *Atchison, T. & S. F. R. Co. v. Holt* (1893) 29 Kan. 149.

A city may be found negligent towards an employee in the court-house, if it permits boiler flues to be taken in through a high window with heavy frames, without looking after the condition of the frames when the work is finished, although after using other similar windows for a similar purpose the frames were so loosened as to need removal. *Chicago v. Edson* (1891) 43 Ill. App. 417.

Where it was discovered on the first day that a pile-driver was put into operation, that the wire rope supporting the hammer was apt, when slack, to get out of its place under the drum, it is for the jury to say whether the master's representative in charge of the work should not have ascertained that the rope had become broken and a dangerous object to touch with a mitted hand when liable to be set in motion without warning. *Steen v. St. Paul & D. R. Co.* (1887) 37 Minn. 310.

In *The Carolina* (1886) 80 Fed. Rep. 199, the district judge decided that, as a hoisting rope had, according to the preponderance of testimony, broken the day before the accident, the officers of the ship were chargeable with knowledge of its unfitness.

Where several witnesses have testified that they had heard steam escaping from a boiler for a considerable period before it exploded and there is evidence that an employee had been engaged several times in calking the seam from which the steam escaped, and that the defendant's officers had been frequently in and about the boiler room, the jury is justified in finding that the defendant knew of the existence of

the defect and was aware that the seam had been calked on different occasions. *Ballard v. Hitchcock Mfg. Co.* (1893) 71 Hun, 582, Affirmed without opinion in (1896) 145 N. Y. 619.

Evidence that tralmen had previously been injured by coming into collision with the same overhead bridge as that which injured the plaintiff is competent to show that the company had notice of the dangerous character of the structure. *Louisville, N. A. & C. R. Co. v. Wright* (1888) 115 Ind. 378.

Where the employer is charged with negligence in maintaining a structure so close to a tramway as to be dangerous to employees it is not error to admit evidence to the effect that, prior to the occurrence of the accident to the plaintiff, another servant had been caught between the structure and the tram-cars. *Salem Stone & L. Co. v. Griffin* (1894) 139 Ind. 141.

Evidence as to how an elevator by which an employee was injured behaved on former occasions,—that, at other times, when being operated by other persons, barrels, being lifted, had fallen and injured those operating it, or had simply fallen back, the conditions remaining substantially the same, tends to prove some vice in its construction that rendered its operation dangerous, and that the employer knew, or should have known, the fact. *Findlay Paving Co. v. Bauer* (1893) 50 Ohio St. 560. The court said: "Inspection itself may indicate some defect in a machine, affecting its safety or usefulness; but, as is most usually the case its defective character, whatever it may be, is more clearly observed in its operation. Experiment is the final and most conclusive test of its safety as well as of its usefulness; and the fact, that the carefulness of the party operating the machine may be involved in each instance, may affect the weight of the evidence, but not its admissibility, as such a limitation would exclude the result of every experiment offered in evidence, which would amount to a reductio ad absurdum."

The question whether a railroad company had notice of the dangerous condition of a switch is for the jury, where one of the switchmen has testified that it was out of repair, another that an engine always made a quick turn when it passed the point between the movable and the stationary rails, and another that the switch had worked hard on the morning of the day when the accident occurred. *Harter v. Atchison, T. & S. F. R. Co.* (1895) 55 Kan. 250.

The principle applied in the above cases is subject to the limitation that proof of a single defective or imperfect operation of any of such machinery or instrumentalities, resulting in injury, will not of itself be sufficient evidence, nor any evidence, that the company had previous knowledge or notice of any supposed or alleged defect, imperfection, or insufficiency in such machinery or instrumentalities. *Atchison, T. & S. F. R. Co. v. Wagner* (1885) 33 Kan. 606, Cited with approval in *Missouri, K. & T. R. Co. v. Young* (1896) 4 Kan. App. 219.

2. Defective operation of other appliances.

As a general rule it is clear that the failure of one appliance to work properly cannot be regarded as an occurrence which, of itself, is calculated to put an employee on inquiry regarding the condition of other appliances, however close may be the resemblance or connection between the former and the latter. To justify the inference that an employer is chargeable with notice through this channel, there must be something in the character of the previous accident which would create a suspicion in the mind of a prudent man that other parts of the defective

instrumentality or other similar instrumentalities may also be in a dangerous condition. The following cases will show the extent to which the courts have gone in the application of this principle:

Notice to a railroad company that cars on passing over a certain place in its track had a jumping or jarring motion is not notice to it of a latent internal seam in a rail at that place, which subsequently caused the rail to split and break, when the motion of the cars did not suggest the defect in the rail. *James v. Northern P. R. Co.* (1891) 46 Minn. 168.

An employer's knowledge that the operation of a machine is defective, owing to the fact that the piston bends and, so, sticks in the cylinder, does not charge him with liability for another defect of which he has no knowledge, consisting of the tilting back of the cylinder of its own accord while the employee was filling it and the descent of the piston into it. *Schuls v. Rohe* (1896) 149 N. Y. 132.

In an action by a servant against a railroad company for injuries resulting from pieces of a hammer used by him to drive spikes breaking off and striking him, evidence that other hammers broke at the same work and at the same time does not show negligence in their selection, where there was no apparent defect. *Georgia R. & Bkg. Co. v. Nelms* (1889) 83 Ga. 70.

On the other hand, it cannot be charged, as a matter of law, that the purchaser of a railroad, which has notice that one abutment of a bridge in such road is constructed of poor mortar crumbling at the touch, and is so poorly built as to require it to be partially taken down to repair it, has the right, as to its employees, to assume that the other abutment constructed at the same time and by the same contractor is free from defects, and that its trains may be operated by its employees thereon with safety. *Rogart v. Delaware, L. & W. R. Co.* (1895) 145 N. Y. 283.

In *Doyle v. White* (1896) 9 App. Div. 521, on the question of negligence in using a defectively welded eye bolt to hold a span wire on a trolley line, error was urged in excluding the following question: "Did any of these ring bolts break the day or a day or two previous to this accident?" And then the question: "Previous to that?" The appellate court said: "The question first excluded was entirely incompetent, because the breaking of a similar bolt upon the day of the happening of the accident did not tend to prove that the defendant had notice prior to the accident that the bolts were defective. The next question is not subject to this criticism, because it refers to a time previous to the happening of the accident. But the difficulty with this question was that there was nothing to show that there was any intent to prove the breaking of more than one of these eye-bolts. There was no claim made by the counsel that he intended to prove the circumstances under which the breaking occurred, or that it was of such a character as to call the attention of the defendant to any defect in the eye-bolts. . . . The breaking of one eye-bolt was not evidence of the character of the lot, it appearing from the facts testified to upon the trial that the weakness resulted from an imperfect welding which could not be detected by examination, and which was not a defect of manufacture which would necessarily or probably run through the lot of eye-bolts bought."

In *Mulvey v. Rhode Island Locomotive Works* (1885) 14 R. I. 204, injury was due to the breaking of an elevator chain which had broken

about six weeks before when, according to some of the evidence, although this was disputed, the person immediately in charge of the men using it notified the superintendent and asked for a new chain, but that, as none was supplied, he had the old one mended and used it again, though some of the links were worn. The ratchets, which should have caught and held the elevator did not work when the elevator fell either time. The court said: "We think the jury might find on this testimony that the corporation was negligent. There was certainly a debatable question of fact for the jury."

In an action by a stranger it has been held that a record of accidents which the trustees of a bridge belonging to a municipality require their officers to keep, is evidence against them for any legal purpose, and is competent to establish the fact that accidents of a character similar to that which caused the plaintiff's injury had happened at the same place. *Rogers v. New York & B. Bridge* (1896) 11 App. Div. 141.

Compare also the ruling in *Richardson v. Great Eastern R. Co.* (1875) L. R. 10 C. P. 486, 33 L. T. N. S. 248, *Reversing* (1875) L. R. 1 C. P. Div. 342, 24 Week. Rep. 907, that a railway company is not under the duty (as respects a passenger) of making a minute examination of the whole car "because defects have been discovered in some part of the cars which have no connection with the probable existence of defects in any other part of the cars."

g. Repairs and alterations.

Evidence that new ties were put into a track before the accident is not competent, upon the issue of a railroad company's negligence, unless it tends to show that the repairs were made at the place of the accident. *Knapp v. Sioux City & P. R. Co.* (1887) 71 Iowa, 41.

The fact that all drawheads of a pattern similar to that which caused the injury were being altered at the time of the accident tends to show that the railroad company was aware of the fact that they were dangerous to employees. *Gibson v. Pacific R. Co.* (1870) 46 Mo. 163, 2 Am. Rep. 497.

Evidence showing that, immediately after an accident, repairs were made in the fastenings of a switch-chain, is competent for the purpose of proving that a defect existed at the time of the accident, but does not show, nor tend to show, that the defendant had notice of the defect before the accident. *Harter v. Atchison, T. & S. F. R. Co.* (1895) 55 Kan. 250.

Evidence of a change in the dimensions of a waterway does not of itself prove negligence; it does not prove that the railway company had notice of the insufficiency of the culvert prior to the accident, nor that it might have had such notice by the exercise of reasonable diligence, nor that it did not exercise such diligence. At most it only tends to prove, by way of admission and as a fact, that the culvert was too small, and that the company obtained knowledge of the same, not before, but after, the accident. *St. Louis & S. F. R. Co. v. Weaver* (1886) 35 Kan. 412, 57 Am. Rep. 176.

To the same effect, see *Missouri, K. & T. R. Co. v. Young* (1896) 4 Kan. App. 219; *O'Donnell v. Baum* (1889) 38 Mo. App. 245.

As to the inference which it is permissible to draw in actions by third persons from the making of repairs or the taking of precautions after the accident, see generally 3 Elliott, Railroads, § 1177. As such repairs do not show that defects were known prior to the accident, they are not pertinent to the subject of this note. 41 L. R. A.

VII. Duty of active inspection of instrumentalities when first used.

See also XVII. a. 6, post; XVIII. a. 6, post.

a. Rule where the employer is himself the manufacturer.

A master who himself manufactures and supplies an instrument is chargeable with such knowledge of its defects as ordinary care during such manufacture would have disclosed. *Standard Oil Co. v. Bowker* (1894) 141 Ind. 12.

So, a railroad company is liable for an injury caused by a defect in the original construction of a piece of machinery, where the parts which gave way were constructed in its own shops and the defect in question must have been obvious to those engaged in the work. *Atchison, T. & S. F. R. Co. v. Carey* (1897; Kan.) 49 Pac. 662.

Ordinarily the builder, and not the employer, is liable for the insufficiency of a structure, but where the employer is himself an engineer of skill, knowledge, and experience it is for the jury to say whether, if he had made a proper use of his endowments, he might not have seen that the structure was too weak for the purposes to which it was applied. *Feltham v. England* (1855) 4 Fost. & F. 460, per Cockburn, Ch. J.

It is also clear that, where the evidence establishes negligence in the original construction of an appliance (here a coal chute), it is necessary to prove that the employer had notice of its dangerous condition. *Crown Coal Co. v. Hiles* (1892) 43 Ill. App. 310, *Citing Alexander v. Mt. Sterling* (1874) 71 Ill. 369, where the court said: "For the proper construction of this sidewalk, it is not denied the town authorities were responsible. They should see to it that such structures are properly made and reasonably safe, and they must be kept so. They being the projectors of them and the builders of them, are, in law, held to a knowledge of their original condition. It would be absurd to say, that they must have notice of the original defect, when they themselves are the authors of the defect. Why notice to a party of original defects in a work he is bound to make safe and reasonably free from defects? The town being in fault at the outset, no notice was necessary."

So, it has been laid down that the original or permanent structure furnished by a master must be safe, irrespective of any question of examination and repairs. *Stock v. La Boutilier* (1897) 19 Misc. 112, *Aff'd* (1896) 18 Misc. 349.

This distinction is also referred to in *Greenleaf v. Illinois C. R. Co.* (1870) 29 Iowa, 14, 4 Am. Rep. 181, where the court said: "If this car was wanting in the appliances referred to by plaintiff at the time of its construction, and so continued when put and used upon the road, it would not be necessary to show further notice or knowledge thereof on defendant's part, or that of its agents, in order, thus far, to fix liability. If, however, it was at one time safe and convenient, that is, had all the conveniences reasonably necessary for the safety of employees, and they were removed by accident or otherwise, then it should be shown that defendant either had notice thereof, or ought to have had, by the use of ordinary care, before an employee could claim liability on account of such defect."

A railroad company, it has been held, is properly held liable where a brakeman was killed owing to the fracture of a brakeroad in

which the evidence shows that there was a crack or flaw at the point where it passed through the clasp which is attached to the top of the car, and that the defect existed when the rod was originally placed in the car. *Hickman v. Missouri P. R. Co.* (1886) 22 Mo. App. 344. The report does not state whether the company was the manufacturer of its own cars or not, and it is, therefore, doubtful whether this case belongs to this or the following category.

It has even been said that if a car has become defective by use in the service of a company, notice of the defect is necessary to affect the company with liability, while if a defectively constructed car is used, notice is not necessary; and this rule is applicable to foreign, as well as to domestic cars. *Illinois C. R. Co. v. Harris* (1894) 58 Ill. App. 592, criticising instruction which made the defendant's liability depend on his knowledge, actual or imputed, of the fact that two foreign cars were so constructed that the buffers did not prevent the draw-bars from coming together. The court cited *Chicago, B. & Q. R. Co. v. Avery* (1884) 109 Ill. 814, and *Sack v. Dolese* (1891) 137 Ill. 129; but these do not support the broad principle laid down by the court—at least, if its words are to be taken in their literal meaning. It is submitted that this decision runs counter to the fundamental principle running through all cases of this type, that knowledge is one of the essential elements of negligence, and therefore cannot be correct.

The cases which merely involve dangerous qualities as contradistinguished from defects involve no difficulty. The employer must, at his peril, acquire a knowledge of the inherent characteristics of his agencies, and regulate his business accordingly. Hence whether he, when he furnishes for use an explosive like giant powder, is aware of its dangerous quality, or has not taken steps to acquire such knowledge, he is equally liable for injuries caused by it. *Smith v. Oxford Iron Co.* (1890) 42 N. J. L. 467, 36 Am. Rep. 535.

b. Rule where the employer is a mere purchaser of the appliance.

It is manifest that the employer must be liable, where the inefficiency of the appliance purchased is immediately due to his own or his agent's want of care. A jury is therefore justified in finding the defendant negligent where it appears from the evidence that his representative in ordering a chain omitted to inform the manufacturers for what use it was intended, "so that care in making it and testing it might be insured, and defects in it, if any, might be thus detected." *Consolidated Ice Mach. Co. v. Kiefer* (1887) 26 Ill. App. 466.

So, too, it is universally agreed that it would be unreasonable to require an employer to subject his instrumentalities to tests as minute as can and ought to be applied by a manufacturer.

Thus it has been held that an employer is not liable for injuries caused by a latent defect in a bar of iron purchased from a reputable house, and used in making a hook, when he orders the best quality, and the defect could not have been discovered without resorting to extraordinary tests. *Carlson v. Phoenix Bridge Co.* (1890) 55 Hun, 485. The court said: "The case shows that such iron is tested in its manufacture to make it homogeneous, and that such is known to be the practice at all well-established mills. . . . A minute examination and test would have detected the latent defect in the iron in this case, yet the institution of 41 L. R. A.

such an examination would evidence extraordinary vigilance and caution, and that is not ever exacted from a master in respect to the provision of implements for his servant. . . .

There is no conceivable defect which may not be discovered by some possible test. The law is designed for application to the ordinary affairs of business and every-day life. All men are not scientists, and all are justified in acting upon certain assumptions and appearances. . . .

We do not test a harness or a wagon which we order from a reputable dealer before we use the same, and there were no circumstances surrounding the manufacture of the hook in question which would induce a prudent man to depart from the usual course of procedure, and adopt special and extraordinary precautions."

This judgment was affirmed by the court of appeals (1892) 132 N. Y. 273, which said: "When articles are manufactured by a process approved by use and experience, and apparently properly finished and stamped, it is not usual for them to be tested again in quality, and such examinations are not generally required by law. . . . All the best iron and steel is made in a few large establishments. The evidence shows that all practicable tests are used during the process of manufacture, and the completed product represents the best articles that can be produced. It passes into the hands of dealers, and so reaches the consumer. If the best refined iron is required, the purchaser may assume that the tests necessary to produce that article have been properly made and the work properly done. He must see that the work that he undertakes to do is properly performed, but if the tool breaks from an internal defect in the material, not apparent from an external examination of the iron, or in the process of making the tool, the master is no more responsible than he would be if he had purchased it ready made in the market, or if it had been broken from an external apparent defect produced by use of which he was not chargeable with knowledge."

In *Ballard v. Hitchcock Mfg. Co.* (1889) 51 Hun, 188, evidence had been given tending to show that the iron out of which a boiler was constructed was of an inferior quality, a fact which could be discovered only by cutting or breaking the metal; also that the rivet holes in the sheets of the boiler were not drilled true, and that the rivets did not properly fit them. And that this defect was discoverable only by taking the boiler apart by removing the rivets. The court said: "It was not defendant's duty, before putting the boiler in use, to make these examinations or tests, and it held the instructions to be erroneous, because the jury were left at liberty to find that this duty devolved upon the defendant, and to determine for themselves what tests the defendant was bound to apply, and what inspection to make, to bring itself fully up to a discharge of the obligations it owed the deceased."

To the same effect see *Doyle v. White* (1896) 9 App. Div. 521. Employer was held not liable for an injury to an employee caused by a defect in an eye-bolt from a reputable manufacturer where the defect could not be detected by an external examination.

In *Stourbridge v. Brooklyn City R. Co.* (1896) 9 App. Div. 129, the court seems to have been of opinion that the jury was not justified in finding the defendant guilty of negligence in regard to inspection, where a cross-beam which broke under the servant's weight presented no external indications of weakness, had been purchased of a reputable dealer, was of such a size as to be capable, if of ordinary soundness and strength, of bearing a weight several times

greater than that of the servant, and it had been tested by striking it on the pavement and listening to the sound emitted, and by jumping on it or straining it between the spokes of wagon-wheels. But the case was finally made to turn on the theory that, if there was any negligence, it was that of a co-servant, not of the master.

In Indianapolis, *B. & W. R. Co. v. Toy* (1879) 91 Ill. 474, the court held that the defendant was not liable for an explosion of a locomotive boiler, made of the best material by first-class manufacturers, when its appearance did not indicate its unsafe condition, and it had not been used long enough to create any suspicion thereof, while its defect could not have been discovered by any of the tests usually employed for the purpose, but only by cutting through its walls.

The doctrine laid down in *Nashville & C. R. Co. v. Elliott* (1860) 1 Coldw. 611, 78 Am. Dec. 508, that a railroad company is answerable for an injury resulting from defects in machinery which existed at the time of its construction, and which the manufacturer might have discovered by the exercise of due care, although the company did not, either at the time of the purchase or afterwards, discover the defects by the application of the proper tests, has been overruled in *Nashville & D. R. Co. v. Jones* (1871) 9 Helsk. 27.

So, also, it would be unfair to hold an employer responsible for the lack of technical knowledge, which is ordinarily possessed only by persons in certain lines of business, and which it would therefore be unjust to expect other persons to possess.

Upon this principle it has been held that a master, not an expert, is not chargeable with negligence in not learning of a defect in machinery of such a character as not to be apparent to any but an expert. *Deane v. Roaring Fork Electric Light & P. Co.* (1895) 5 Colo. App. 521.

This aspect of an employer's liability was carefully considered in *Shea v. Wellington* (1895) 163 Mass. 364, where it was held that the owner of a quarry owes no duty to its employees to inspect exploders given to the quarrymen for use, where the manufacturers of them make repeated inspections in the process of construction, the exploders are as good as any made, no one but an expert could make a competent inspection, and no defect in one has been discovered after use for several years. Plaintiff claimed that on the day of the accident he saw one with a seam in it, or one which exposed the mercury, but there was no evidence that an exploder of this kind with a seam in it, or with any other defect of construction, had ever before been discovered by anybody. In the same case the principle of *Moynihan v. Hills* (1887) 146 Mass. 586, and the other rulings which dealt with the master's duty to supervise the instrumentalities of his business with a view to discovering whether it was necessary to replace or repair them, was held inapplicable. The court said these exploders "were not a part of the machinery or tools of the defendant. They were articles to be used in his business which were instantly consumed in use. It was his duty, so far as he could do it by reasonable effort, to see that none but safe and proper articles were furnished to his servants for such a use, but he was only called upon to do what was reasonable under the circumstances."

In *Reynolds v. Merchants' Woolen Co.* (1897) 168 Mass. 501, the bursting of the cylinder of a dusting machine a few weeks after its purchase from a reputable maker was in question. It 41 L. R. A.

was held that if "a machine is bought of a reputable maker,—in other words, if reasonable care is used in selecting the maker, and then reasonable care was used upon the delivery of a machine, in inspecting it, in setting it up, in putting it in operation,—it cannot be said that the defendant, or an employer, would be liable in such a case, although it might clearly appear, later on, that the maker of that machine was careless, and put in improper materials, or did imperfect and improper work. The law does not make the employer an insurer of the safety of his machines, nor a guarantor that due care shall be used by the manufacturer. It does require, however, that he shall use reasonable care to provide proper machinery."

In *Prentice v. Wellsville* (1893) 60 N. Y. S. R. 557, the undisputed evidence was that defective cartridges by which an employee was injured were manufactured and sold as Van Campen's Compound by the people who for several years had been the accredited manufacturers of that article. The court said: "There was no evidence of negligence on the employer's part in failing to discover, if such was the fact, that the compound was not precisely what it was purported to be. All other risks than that were incident to the employment in which the deceased voluntarily engaged, and, so far as they related to him, were assumed by himself."

In *Allison Mfg. Co. v. McCormick* (1888) 118 Pa. 519, where an explosion of paint used in painting the interior of a water tank was involved, the court held that the master may provide materials such as are ordinarily used in the same business, but is not required to secure the best-known materials, or to subject such as he does provide to a chemical analysis in order to settle by experiment what remote and possible hazard may be incurred by their use,—and said: "The material employed was a well-known and commonly used brand of paint. It was purchased from the manufacturer ready for use. The laborers were sent to do the work under the direction of the company's painter, who went with them, placed the men, and gave them their directions. The paint had been in use by the public for many years, and by the defendant company for ten or twelve, without accident of any description. It is not easy to see what more could have been expected from an employer."

In *Roughan v. Boston & L. Block Co.* (1894) 161 Mass. 24, a block having a hidden flaw broke a month or two after it was put in use, in doing the work for which it was designed, thereby injuring an employee. The employer sued the manufacturer for breach of warranty. The court said: "The plaintiff was not under an absolute obligation to his servant that the block should not break. . . . The block was one of that class of implements which the employer is expected to buy; and the care he is bound to use in providing it is in making the selection, and includes such inspection as will detect defects which can be found by a careful inspection. But this does not require him to find a possible hidden flaw the presence of which there is no reason to apprehend, and which is so concealed in the construction of the machine that it cannot be discovered by inspection, nor does it make him responsible for such a flaw in the block which he has purchased with due care. *Moynihan v. Hills Co.* (1887) 146 Mass. 586, 594."

The following exposition of the principles which determine the liability of a railroad company to a passenger may be usefully compared with the foregoing judicial statements of the doctrine which is applied in actions by servants: "There is no principle of law which places such

manufacturers in the position of agents or servants of their customers. The law does not contemplate that railroad companies will in general make their own cars or engines, and they purchase them in the market, of persons supposed to be competent dealers, just as they buy their other articles. All that they can reasonably be expected to do is to purchase such cars and other necessities as they have reason to believe will be safe and proper, giving them such inspection as is usual and practicable as they buy them. When they make such an examination, and discover no defects, they do all that is practicable, and it is no neglect to omit attempting what is impracticable. They have a right to assume that a dealer of good repute has also used such care as was incumbent on him, and that the articles purchased of him which seem right are right in fact. Any other rule would make them liable for what is not negligence, and put them practically on the footing of insurers. The law has never attempted to hold passenger carriers for anything which they could not avoid by their own diligence." *Grand Rapids & I. R. Co. v. Huntley* (1878) 38 Mich. 537, 31 Am. Rep. 521.

Similar principles are applied in favor of a person who engages the services of an independent contractor to erect a structure, the rule being that one who, having no knowledge of scaffold building, employs a builder whom he knows to be skillful and experienced to erect a scaffold for the use of his employees, does not owe them a duty of inspection, the proper performance of which would have disclosed the defect. *Devlin v. Smith* (1882) 89 N. Y. 470, 42 Am. Rep. 311, as explained in *Vosburgh v. Lake Shore & M. S. R. Co.* (1884) 94 N. Y. 374, 46 Am. Rep. 148.

Devlin v. Smith was followed in *Butler v. Townsend* (1891) 126 N. Y. 105, and the effect of the two cases has quite recently been stated to be that, where an appliance (as a float) has been constructed by a skillful and experienced builder, the master is not liable to his servant for injury resulting in its construction, and is at liberty to accept the same without inspection. *Wittemberg v. Friederich* (1896) 8 App. Div. 423.

The liability of a railroad company in regard to the inspection of the structures on a road which it has purchased was extensively discussed in *Vosburgh v. Lake Shore & M. S. R. Co.* (1884) 94 N. Y. 374, 46 Am. Rep. 148. The court rejected the contention that a railroad company acquiring by purchase an additional line already built and in operation, of which an existing bridge forms a part, owes no obligation to its employees running trains over such bridge, except to keep it as good as when it was bought, and has a right without negligence to assume the sufficiency of its original plan and construction; and denied the application of the doctrine of *Devlin v. Smith* (1882) 89 N. Y. 470, 42 Am. Rep. 311; for two reasons: Because the defendant here bought the bridge of another railroad company, and without any selection or choice of the builder such as was made in the scaffold case; and because the bridge, unlike the scaffold, was not a temporary but a permanent structure, intended for continuous use through the years. The court said: "Assuming, as we must, what the jury could have found from the evidence, that the bridge when purchased was unsafe and dangerous by reason of defects in its original plan and construction, and which defects were obvious to the eye of a skilled inspector, and easily and surely ascertainable by a structural analysis determining its factor of safety, it was negligence on the part of the defendant to continue its use in the face of such obvious defects without ascertaining their effect upon its strength and capacity. . . . The defects pointed out by the evidence were almost all obvious to the eye of a competent examiner. . . . The learned counsel for the appellant insists that the defendant did employ suitable and competent persons to inspect the bridge, who did make the usual and customary examinations, and that there is no dispute about that in the evidence. But it is plain that the inspection described in the proofs as customary is that made by a company which has built its own bridges. In such case it already knows the plan and mode of construction, and is already responsible for the lack of reasonable care in either the design or its execution. The subsequent inspection is directed only to its perfect repair, and to indications of weakness. But where the company does not know either the safety of the plan or the prudence of the construction because it has purchased it completed, and in use, and knows nothing of the skill or want of skill of the builder, an inspection which takes no heed of that inquiry when defects are obvious, and lack of safety is indicated and may be easily ascertained, is not sufficient. . . . Of course the test of actual, previous use goes for something. It might justify a continuance of that use until a competent inspection could reasonably be made, but would not justify a neglect when it was made to observe and remedy obvious defects and elements of danger, because existing in the original plan, and an omission to learn by a well-understood process whether in view of its apparent defects it had the ordinary surplus of strength.

With the principles enunciated in the above decisions may be compared the theory adopted in *Baldwin v. Chicago, R. I. & P. R. Co.* (1819) 50 Iowa, 680, that "the company receiving a loaded car from another company is entitled to the benefit of the presumption that such car had been properly constructed of suitable material and had passed the inspection of some one of ordinary skill in such matters, and was reasonably fit for the use to which it was devoted, when so received." (See, however, as to foreign cars, subd. VIII. g. 4, post.)

Some of the above cases seem scarcely reconcilable with the judgment in *Morton v. Detroit, B. C. & A. R. Co.* (1890) 81 Mich. 423, in which the extent of the defendant's duty to test the strength of a chain was discussed. The court first laid down the general rule that railroad companies "cannot be held responsible for hidden defects in tools or appliances, if they have used reasonable care in procuring them; but they are not absolved from the duty of testing or inspection because they have bought in the open market of reputable dealers, or employed competent workmen to construct them. If any defect exists which a careful test or inspection would have discovered, the master must be held to have knowledge of such defect, and to be responsible for it." The court then proceeded thus: "It is urged that the railroad company has done all it can do when it buys of reputable dealers material and machinery for use by its employees; that it cannot, when buying, inspect personally every link of a chain to see whether it is properly welded. But it can do this personally as well as it can personally do any act involved in the operation of its road. It not only can, but its duty requires that it shall, before it is placed on a car, cause every link of every chain used by its employees in places or under circumstances involving danger, in case the chain should break, to be care-

fully tested and inspected by someone competent to judge of its fitness, for the utmost strain that is likely to come upon it. If this duty had been performed in this case, the cold weld in the chain would very likely have been discovered, and the chain condemned as unfit for its intended use."

If a purchaser is entitled to take for granted that an eyebolt is sound because it is apparently sound (*Doyle v. White* (1896) 9 App. Div. 521), it is not very clear why a railroad company should be obliged to apply a straining test to a chain. The Michigan rule, it is submitted, is more consonant than that of the courts of New York, with the general principle which is thoroughly established in the latter state that the master's duty to furnish reasonably safe instrumentalities is nonassignable. In a case where the safety of human beings is at stake it does not seem to be demanding too much of a purchaser to require him to apply every test that is available to one in his position. The scope of the duty thus imposed will not seem unreasonable when we remember that it will be circumscribed on the one side by the principle that no expert knowledge is imputed to a master except what is usually possessed by persons in the same line of business, and, on the other side, by the consideration that the duty of inspection would virtually be reduced to an absurdity if the employer were chargeable with notice of those latent and inherent defects which can be discovered only by an internal examination which it is in most cases impossible to make without seriously weakening the instrumentality or even totally destroying its usefulness until it has undergone a process of reconstruction. The standard of care thus indicated seems to be that which is recognized in the recent ruling by the Supreme Court of the United States, that "if a railroad company, after purchasing an engine [from a manufacturer of recognized standing], made such reasonable examination as was possible without tearing the machinery to pieces, and subjected it fully to all the ordinary tests which are applied for determining the efficiency and strength of completed engines, and such examination and tests disclosed no defect, it cannot, in an action by an employee of another company, be adjudged guilty of negligence because there was a latent defect, which subsequently caused the destruction of the engine and injury to him." *Richmond & D. R. Co. v. Elliott* (1893) 149 U. S. 268, 37 L. ed. 723.

The question to what extent the employer may rely upon the skill of the manufacturers is immaterial, where the employer is put upon inquiry as to the condition of an appliance by the report of an employee. Thus, in *Delaney v. Hilton* (1883) 18 Jones & S. 341, it was held that the servant could maintain an action for injuries caused by the breaking of a chain of an elevator bought from first-class machinists, where the engineer had previously stated to the employer's manager that the chain was not strong enough. [Sedgwick, Ch. J., dissented on the ground that the engineer's statement was merely the expression of an opinion, and that the employer was entitled to rely on the judgment of the machinists.]

VIII. *Duty of active inspection of instrumentalities while in use.*

a. *General principles.*

"Negligence on the part of the employer may consist of acts of omission or commission, and 41 L. R. A.

It necessarily follows that the continuing duty of supervision and inspection rests on the corporation. For it will not do to say that having furnished suitable and proper machinery and appliances the corporation can thereafter remain passive. The duty of inspection is affirmative and must be continuously fulfilled and positively performed." *Brann v. Chicago, R. I. & P. R. Co.* (1880) 53 Iowa, 595, 36 Am. Rep. 243.

"Not only is it the master's duty to furnish appliances reasonably safe for their use, but he is charged with knowledge of the tendency of such appliances to deteriorate with time, and to wear out with use. His duty is a continuing one, and requires him to keep constant supervision over such appliances, and to exercise at least ordinary care to maintain them in such condition as will make their use safe. Neglect of this duty whereby appliances become unsafe, is actionable, and the derelict master must respond in damages to those injured by reason thereof, who are themselves without fault." *Louisville, E. & St. L. Consol. R. Co. v. Uts* (1892) 133 Ind. 265.

"Ordinary care requires that the master shall take notice of the liability of the parts of his machinery to decay from age, or wear out by use." *Indiana Car Co. v. Parker* (1884) 100 Ind. 181; *Chicago R. Co. v. Brannan* (1894) 10 Ind. App. 570.

There is no error in refusing a request to charge that when an appliance or machinery not obviously dangerous has been in daily use for a long time, and has uniformly proved safe and efficient, its use may be continued without the imputation of imprudence or carelessness. *Houston v. Brush* (1894) 66 Vt. 331. The court said: "It is a well-known fact that in time it [a derrick] will become out of repair and unfit for use. It is not the duty of the servant who is required to use it, to know at his peril when such time occurs. Such, however, is the duty of the master, and ordinary care must be used to ascertain whether it is fit to be used, and what is such care must be measured by the character of the business, and the risks attending its prosecution. Negligence on the part of the master may consist of acts of omission or commission, and it necessarily follows that the continuing duty of inspection and supervision rests on the master. It will not do to say that, having furnished suitable and proper machinery and appliances, the master can thereafter remain passive so long as they work well and seem safe. The duty of inspection is affirmative, and must be continuously fulfilled and positively performed. Anything short of this would not be ordinary care. *Buzzell v. Laconia Mfg. Co.* (1861) 48 Me. 113, 77 Am. Dec. 212, and note, p. 220; *Brann v. Chicago, R. I. & P. R. Co.* (1880) 53 Iowa, 595, 36 Am. Rep. 243."

"The legitimate obligation imposed upon the company by its contract with a passenger or employee is that its engine and apparatus are then suitable, sufficient, and as safe as care and skill can make them, and that the company will be responsible for any injury resulting from defects therein which might have been discovered by the company or its agents by the proper care and skill in the application of the ordinary and approved tests." *Nashville & D. R. Co. v. Jones* (1871) 9 Helsk 28.

"The servant has no more control of the repairs than of the purchase, no more responsibility for the one than for the other. The use of it is for him, and the risk of that use, whatever it may be, he assumes. That comes within his contract, but as part of the same

contract the employer provides the means of carrying on the business; and as a matter of course he assumes the responsibility that his work shall be done with due care; and as the responsibility continues so long as the means are used, so must the same care be exercised in keeping the required means in the same safe condition as at first." *Shanny v. Anuroscoggin Mills* (1876) 66 Me. 420.

The duty of railroad companies to furnish and maintain reasonably safe and suitable machinery and appliances is not discharged by simply furnishing them, but they must be frequently and carefully inspected for the purpose of maintaining their safety and suitability. *Richmond & D. R. Co. v. Burnett* (1892) 88 Va. 538.

A master is in duty bound to a servant to exercise reasonable care and skill to provide safe machinery and appliances, and to keep the same in safe condition, including the duty of making inspection and tests at proper intervals. *Comben v. Belleville Stone Co.* (1896) 59 N. J. L. 226.

A master is bound to "examine and inspect from time to time all the appliances which he furnishes his servant, if the safety of the latter depends upon their condition, and to use ordinary care and skill to discover and repair such defects as are calculated to imperil the servant in his employment." *Chesson v. John L. Roper Lumber Co.* (1896) 118 N. C. 59.

The master, being under duty not only to furnish safe and suitable appliances to his employees but to keep them in that condition, is bound to know the condition of his property so far as proper inspection will enable him to know it. *Ocean S. S. Co. v. Matthews* (1895) 86 Ga. 418.

A master is bound to use ordinary care in ascertaining the existence of latent defects in appliances which are to outward appearances safe. *Southwestern Teleph. Co. v. Woughter* (1892) 56 Ark. 208.

In *Oberfelder v. Doran* (1889) 26 Neb. 118, the court declined to accept the theory of the defendant's counsel that he was not obliged to make a proper examination and inspection of certain timbers from time to time, to ascertain whether they were still safe and sufficient to do their work, and declared that it was his duty to make such inspection, whether the defects which led to the injury were in the original construction or arose at a later period.

b. Inspection must be efficient.

"A master is chargeable with notice of a disorder or deficiency in anything which it is his duty to his servant to keep in reasonably safe condition, if a proper inspection would disclose its existence." *Chesson v. John L. Roper Lumber Co.* (1896) 118 N. C. 59.

"It is a general rule that any employer, whether corporate or not, must take care that there is no negligence in procuring safe machinery, appliances, etc., and the employer, whether corporate or not, must see that the machinery is kept in proper repair; at least reasonable and proper vigilance must be exercised to see that it is in proper condition for the purposes for which it is being used. Where business is carried on by such machinery as is used in operating the railroad it is the duty of the railroad company to keep the machinery in such condition as from the nature of the business and employment the servant has the right to expect it will be kept, and where the company fails to do so through the exercise of ordinary care it is liable for injuries arising from its neglect." *Atchison, T. & S. F. R. Co. v. Holt* (1883) 29 Kan. 149.
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"A railway company must have its repair shops to maintain its tools, rolling stock, etc., in good repair, and it must have its inspectors, not only at its terminal, where a general overhauling of property is had, but at convenient stations along its line, to detect such injuries as may have been received en route. And should such company knowingly employ and retain persons incompetent for the performance of this high service, it would be liable to the person injured, though such person were the fellow servant of the inspector." *St. Louis, I. M. & S. R. Co. v. Rice* (1889) 51 Ark. 467, 4 L. R. A. 173.

In *Coffee v. New York, N. H. & H. R. Co.* (1891) 155 Mass. 21, the plaintiff offered to show that the train from the south, of which the car in question had formed a part, was not inspected on the day of the accident, and that there was a custom by which no inspection was made of cars coming from the south. The court held that the exclusion of this evidence was error, saying: Proof of an omission of duty or negligence, on the part of the inspectors on a single occasion, would properly have been excluded on the ground stated in *Mackin's Case*, ubi supra (1883) 135 Mass. 201, 46 Am. Rep. 456, that the inspectors were fellow servants with the plaintiff, but that evidence of the custom to make no inspection of such cars would have a tendency to show the rules, instructions, and superintendence under which the inspectors were acting, and would be proper for the consideration of the jury, as foundation for the argument that such rules, etc., were insufficient to provide proper inspection.

A railroad corporation is liable to one of its employees for an injury occasioned to him by being struck by a bridge guard, if the guard is out of its proper position, and this is caused by the wearing out of a rope attached to the guard, and the corporation has not made suitable provision to have notice of, and to remedy, the defect liable to be occasioned by its use. *Warden v. Old Colony R. Co.* (1884) 137 Mass. 204.

"When two cars come together which are of different gauge the drawheads are more apt to pass each other, and hence in trains made up of cars of different gauge it is obviously more important that the bumpers should be well looked to, so that they may afford the protection for which they are intended." *Gottlieb v. New York, L. E. & W. R. Co.* (1885) 100 N. Y. 462.

The company cannot avoid its liability on the plea that the defect was not apparent on a previous inspection of the car, where it had no rules requiring the inspection of the stakes and load, and the inspection given was casual. *Bushby v. New York, L. E. & W. R. Co.* (1887) 107 N. Y. 374.

Where the evidence tends to show that, considering the number of cars to be examined there were not enough inspectors to make a proper inspection of the cars passing through a certain junction; that the thoroughness of the work depended upon the amount of time they had at their disposal and the labor to be done; that better inspection was required at such a station than at way stations,—it is a fair inference that the inspectors did not have sufficient time at their disposal to discover the defects in cars and machinery examined by them. *Missouri P. R. Co. v. Dwyer* (1886) 36 Kan. 58. Respecting a custom or practice of the inspectors to do nothing more than to make a casual examination of brake-staffs which were straight and apparently all right, by which it was not probable a crack or break of the kind stated would be observable, the court said: "Upon the grounds of public policy a practice or custom

which would permit the inspectors to let a car be operated with a defective brake-staff when by the exercise of reasonable and proper care on their part the defect could have been discovered and remedied, can hardly be sustained as a valid custom. (*Atchison, T. & S. F. R. Co. v. Holt* (1888) 20 Kan. 149; *Berg v. Chicago, M. & St. P. R. Co.* (1890) 50 Wis. 419.) If a brake-staff is not to be examined for visible defects or cracks until it is bent or broken, inspection would be almost useless; in any event it would be no protection for the safety of the employees using the brake."

The establishment by a railroad company of a rule for the inspection of loaded cars before they are sent out is not proved by the testimony of an employee having charge of the business at a station, that he considered it a part of his duty to make such inspection and so instructed the men under him, and that it was his custom to give such instructions,—especially where it is possible the fault of such person in failing to inspect such car caused the accident for which recovery is sought, and he is contradicted by two witnesses. *Byrnes v. New York, L. E. & W. R. Co.* (1893) 71 Hun, 200.

On the other hand, a railroad company which has performed its duty of inspecting a car "with ordinary care is not liable for an injury to an employee caused by the defect which existed, but was not discovered, at the time of inspection, unless it had knowledge of such defect." *Louisville, N. A. & C. R. Co. v. Bates* (1896) 146 Ind. 564.

A street-car company may properly be held liable for injuries due to the "bucking" of a car caused by the old and worn-out condition of one of the electrical fields, when, through either negligence or ignorance of those in charge of this department of its business, or through its own neglect to furnish them with proper instrumentalities for the purpose, no proper tests had been applied to ascertain the condition of these fields, and no proper care had been exercised in renewing or replacing such as had been worn out. *Beardsley v. Minneapolis Street R. Co.* (1893) 54 Minn. 504.

Where an inspection of a locomotive lever, which causes injury by jumping out of the notch in which it is placed when reversed, is made merely by an examination of the part, and not by a practical test with the engine in motion, the fact that no defect is thus disclosed is not conclusive, and it is properly left to the jury to say whether the lever became detached by reason of the carelessness of the engineer or of some defect. *Burlington & M. R. Co. v. Wallace* (1889) 28 Neb. 179.

It is error to nonsuit a plaintiff, whose intestate was killed through the fall of a quantity of wheat from the sides of an elevator bin, where the liability of the wheat to accumulate, and the consequent peril to those working in the bin, were well known to the defendant's vice principal. It is for the jury to say whether there was a proper inspection before the intestate was sent inside the bin, and whether the omission to make suitable regulations prescribing the conditions under which servants should be permitted to go to work in such a place caused the accident. *McGovern v. Central Vermont R. Co.* (1890) 123 N. Y. 280.

In *Connors v. Durite Mfg. Co.* (1892) 156 Mass. 163, the question was as to negligence in continuing to use a defective engine, bought second-hand, about two months before the accident, after use for twelve or thirteen years. It had been partially overhauled by the seller before it was set up in the defendant's factory; 41 L. R. A.

and a few weeks after it was set some repairs were made upon it by an employee of the seller, at the request of the defendant. This employee, however, did nothing to the throttle-valve, and did not examine it to see if it leaked, although he testified that he noticed that the cut-off valve had a tendency to hang, and not to shut off as intended, and that this defect, in combination with a leaky throttle-valve, would make it possible for the engine to start after it was at rest. There was also evidence that the wear and tear which would produce the condition of things which caused the defendant to send for the employee of the seller of the engine would tend to cause a leaking throttle-valve. Down to the time of the accident no inspection was made of the throttle-valve, although this could readily have been done. The court held that the mere fact of the engine's having been overhauled and repaired did not necessarily exempt the defendant from liability,—citing *Myers v. Hudson Iron Co.* (1889) 150 Mass. 125, where the defendant, to show due care on its part, relied on the fact that, three weeks before the accident which was the subject of inquiry, a machinist had been employed to put the machine in good order, and quoting the following sentence from the opinion of the court in that case: "But if he failed to do so, and if after the completion of his work defects remained, the defendant was responsible, although it may have had reason to suppose him well qualified for his duty."

The inspectors employed must be reasonably competent for the performance of their duties. But a railroad company is not liable for the death of an engineer by the explosion of a boiler because it employs to test the boiler for broken stay bolts an inspector who is partly deaf in one ear, but whose hearing is good enough to determine whether a bolt struck with a hammer is sound or broken. *Chicago & A. R. Co. v. DuBois* (1896) 65 Ill. App. 142.

The staff of inspectors must also be sufficient in number. Thus, it is the duty of a railway company to keep at command a force of servants sufficient in number and capacity to discover defects in its bridges and apply the proper remedy. *Toledo, P. & W. R. Co. v. Conroy* (1873) 68 Ill. 561.

But evidence that a sufficient force of car inspectors was not employed, and that one of the inspectors sometimes got drunk when on duty, is not sufficient to authorize a recovery against the company for an injury to a brakeman caused by a defective appliance on a car, where it is shown that the train was actually inspected. *St. Louis, I. M. & S. R. Co. v. Gaines* (1890; Ark.) 13 S. W. 740.

Inspection, however, is merely a means towards an end, and if knowledge of a defect such as the inspection was designed to reveal has reached the master or his representative through some other channel, the mere fact that inspection has been duly provided for will not absolve the master.

Thus, the fact that a railway company employs an inspector to examine lumber out of which handles for its handcars are constructed does not relieve it from liability for an injury caused by placing unsuitable material in a handle, where the agent to whom it has intrusted the business of making and placing the handles in the cars has notice of the defect. *Indiana, I. & L. R. Co. v. Snyder* (1894) 140 Ind. 647.

So, a master is liable for injuries to a servant, caused by an elevator known to him, but not to the servant, to be dangerous, though an inspection is provided for,—especially when the

servant is told by the master's engineer to use it as it is. *Hart v. Naumburg* (1888) 50 Hun, 392.

c. What degree of care must be exercised in the inspection.

See also cases cited under III., *supra*.

All the general statements in which the courts have essayed to define the degree of care which is incumbent on an employer in regard to inspection are merely variations on the theme of the fundamental principle that the inspection must be such as a man of average caution would make under the circumstances. But it will be useful for purposes of illustration to collect a number of the expressions used by judges in dealing with cases of this type.

The degree of care exacted of the master in respect to the maintenance of appliances is the same as that exacted in respect to furnishing them. *Chicago, K. & W. R. Co. v. Blevins* (1891) 46 Kan. 370.

An employer is bound from time to time, as occasion may require, to have the machinery which he uses subjected to a reasonably careful inspection for the purpose of ascertaining whether the wear and tear incident to its use have rendered it unsafe. *Murphy v. Phillips* (1870) 24 Week. Rep. 647, 35 L. T. N. S. 477.

"It cannot be contended that a test ought not to be adopted, if it be a useful one and may reasonably be expected to bring about the result, because it is not absolutely fixed." *Channell, B., in Manser v. Eastern Counties R. Co.* (1861) 3 L. T. N. S. 585.

Where a servant has been injured by an appliance put into use after it has been repaired, the inquiry whether the employer has been negligent in the premises involves the consideration of the question whether a reasonably practical test has been employed for the purpose of ascertaining its condition. *Scherer v. Holly Mfg. Co.* (1895) 86 Hun, 37.

"The result to be attained [by the master] is reasonable safety considering the consequences of a failure." *St. Louis Bridge Co. v. Fellows*, (1893) 52 Ill. App. 504.

A master is bound to use only such care as the circumstances reasonably demand, to see that appliances furnished to the servant are reasonably safe for use, and that they are afterwards maintained in such reasonably safe condition. *Lincoln Street R. Co. v. Cox* (1896) 48 Neb. 807.

A servant takes the risk of such secret defects as cannot be discovered by the use of ordinary diligence, and no more. *Jones v. Shaw* (1897) (Tex. Civ. App.) 41 S. W. 690.

"It is the duty of the master to exercise reasonable care to furnish reasonably safe places in which, and appliances with which, the servants are to work, and to exercise the same care to keep them in such condition." *Pennsylvania Co. v. Witte* (1890) 15 Ind. App. 583, Rehearing Denied in (1896) 44 N. E. 377.

The implied agreement of a master is that the implements and machinery furnished for the use of his servants "are sound and fit for the purpose intended, so far as ordinary prudence can discover." *Lake Shore & M. S. E. Co. v. McCormick* (1881) 74 Ind. 440.

An employer is chargeable with notice of defects which might have been known "by the use of such care as a person of ordinary prudence, would have used under similar circumstances." *Missouri P. R. Co. v. Henry* (1889) 75 Tex. 220.

The master does not insure the safety of appliances furnished by him, but is only bound to reasonable care in their selection, and inspection, if inspection is needed. *Brown v. Hershey Land & Lumber Co.* (1890) 65 Mo. App. 162. 41 L. R. A.

When a railroad company has erected a structure to be used in its ordinary and accustomed business, without fault as to plan, mode of construction, and character of materials, so that it was originally sufficient for all the purposes for which it is used, employs skilful and trustworthy agents to supervise, examine, and test it, and that duty is performed with frequency and with such tests as custom and experience have sanctioned and prescribed, it has exercised such care and skill as the law exacts of an employer in reference to his employee, and no liability can attach to the company for a defect in such structure by which an employee has sustained an injury unless there has been actual notice or knowledge that defects existed which, unless promptly remedied, would be liable to produce serious or fatal consequences. "A broader liability than this cannot be imposed without . . . breaking down and obliterating the distinction which exists between the responsibility incurred to a passenger and an employee. . . . A different and more stringent rule . . . would impose an intolerable burden upon a board of directors." *Warner v. Erie R. Co.* (1868) 39 N. Y. 468.

"The managers of railroad companies are engaged in conducting for profit a business which at the best is hazardous to human life. In providing sound tools and safe appliances for the use of their employees, their plain legal duty, to say nothing of the dictates of humanity, requires great vigilance. They cannot be heard to excuse themselves from taking all reasonable care on the ground that care involves labor or expense." *Morton v. Detroit, B. C. & A. R. Co.* (1890) 81 Mich. 423, Citing *Beauchamp v. Saginaw Min. Co.* (1883) 50 Mich. 103, 45 Am. Rep. 30.

In *Warner v. Erie R. Co.* (1868) 39 N. Y. 468, it was held, in respect to the safety of a railroad bridge, that the care and diligence which directors were required to bestow was that reasonable care, skill, and foresight over the affairs of the corporation which reasonable and prudent men occupying such positions ordinarily exercise under the same circumstances.

The subjoined list of phrases will indicate sufficiently the standard of diligence which the courts have had in view in determining whether the employer has discharged his duty as to inspection.

"Reasonable care and prudence." *Washington & G. R. Co. v. McDade* (1889) 135 U. S. 554, 34 L. ed. 235.

"Reasonable care." *Brown v. Hershey Land & Lumber Co.* (1890) 65 Mo. App. 162; *Tierney v. Minneapolis & St. L. R. Co.* (1886) 33 Minn. 311, 53 Am. Rep. 35; *Moore v. Pennsylvania R. Co.* (1895) 167 Pa. 495.

"Ordinary care." *Smoot v. Mobile & M. R. Co.* (1880) 67 Ala. 13; *Gulf, C. & S. F. R. Co. v. Stillphant* (1888) 70 Tex. 623; *Illinois C. R. Co. v. Hilliard* (1896) 18 Ky. L. Rep. 505; *Gulf, C. & S. F. R. Co. v. Wells* (1891) 81 Tex. 685; *Lake Shore & M. S. R. Co. v. Corcoran* (1895) 3 Ohio Dec. 641; *Burnes v. Kansas City, Ft. S. & M. R. Co.* (1895) 129 Mo. 41; *Atchison, T. & S. F. R. Co. v. Holt* (1883) 29 Kan. 149; *Williams v. St. Louis & S. F. R. Co.* (1893) 119 Mo. 316; *Greenleaf v. Illinois C. R. Co.* (1870) 29 Iowa, 14, 4 Am. Rep. 181; *Consolidated Coal Co. v. Scheller* (1891) 42 Ill. App. 619.

What is "ordinary care" must be measured by the character of the business and the risks attending its prosecution. *Brann v. Chicago, R. I. & P. R. Co.* (1880) 53 Iowa, 595, 36 Am. Rep. 243.

"Ordinary diligence." *Quintana v. Consolidated Kansas City Smelting & Ref. Co.* (1896; Tex. Civ. App.) 37 S. W. 369.

"Ordinary and reasonable care." *Carlson v. Phoenix Bridge Co.* (1890) 55 Hun, 485.

"Reasonable and ordinary care and foresight." *Covey v. Hannibal & St. J. R. Co.* (1885) 86 Mo. 635.

"Reasonable and ordinary care and prudence." *Gibson v. Pacific R. Co.* (1870) 46 Mo. 163, 2 Am. Rep. 497.

"Ordinary care and skill." *Chesson v. John L. Roper Lumber Co.* (1896) 118 N. C. 59.

"Reasonable and proper vigilance." *Atchison, T. & S. F. R. Co. v. Holt* (1883) 29 Kan. 149.

"Ordinary care and diligence." *Warner v. Erie R. Co.* (1868) 39 N. Y. 468.

"Ordinary care, skill, and diligence." *Trinity County Lumber Co. v. Denham* (1892) 85 Tex. 58.

In *Brymer v. Southern P. Co.* (1891) 90 Cal. 493, an instruction had been asked for which described the employer's standard of duty as being the exercise of "reasonable and ordinary care, skill, and diligence." The court said: "When the employer exercises all the care and caution which a prudent man would ordinarily take for the safety and protection of his own person under the same circumstances, he cannot be held liable for the consequences of a defect in the machinery or appliances used. This is the sense in which the expression 'reasonable and ordinary care, skill, and diligence' in procuring and furnishing suitable and safe machinery and appliances, was used in the instruction asked, as we understand it; and is equivalent to the rule as stated in many of the authorities, viz., that the employer is liable only when he had knowledge of the defect, or failed to exercise reasonable diligence in procuring suitable machinery, or in the inspection of it, to discover any defect that might exist."

The liability of the master may also be expressed by a slightly different phraseology which couples some qualifying epithet with the word which denotes the process of inspection itself. The following instances of such phraseology are rather wanting in precision, the conception of due care being in a sense latent, but the meaning is clear.

"Ordinary inspection." *Cowan v. Chicago, M. & St. P. R. Co.* (1891) 80 Wis. 284; *McKnight v. Chicago, M. & St. P. R. Co.* (1890) 44 Minn. 181; *Atchison, T. & S. F. R. Co. v. Penfold* (1896) 57 Kan. 148; *Flood v. Western U. Teleg. Co.* (1892) 43 N. Y. S. 802.

"Proper inspection." *Sack v. Dolese* (1891) 137 Ill. 129; *Northern P. R. Co. v. Herbert* (1885) 116 U. S. 642, 29 L. ed. 755; *Benzing v. Steinway* (1886) 101 N. Y. 547; *Louisville & N. R. Co. v. Binlon* (1894) 107 Ala. 645.

"Proper examination." *Mayer v. Libmann* (1897) 16 App. Div. 54; *Johnson v. Richmond & D. R. Co.* (1879) 81 N. C. 453.

"Reasonable inspection." *Linton Coal & Minn. Co. v. Persons* (1894) 11 Ind. App. 264; *Parsons v. Missouri P. R. Co.* (1887) 94 Mo. 288.

"Reasonable examination." *Mulligan v. Crimmins* (1894) 75 Hun, 578.

"Proper tests." *Beardsley v. Minneapolis Street R. Co.* (1893) 54 Minn. 504.

In the following expressions of the same type as the foregoing the standard of due care again emerges:

"Careful inspection." *Spicer v. South Boston Iron Co.* (1885) 138 Mass. 426.

In *Richmond & D. R. Co. v. Burnett* (1892) 88 Va. 538, respecting an injury caused by a defect in the chain on the brake of defendant's cars, "a careful inspection" of the chain and brake was held necessary, and the jury so instructed. "The duty to give this instruction," said the court, "was all the more incum-

bent in view of the rule of the defendant company requiring the brakes, etc., of all cars transferred to their track to be inspected. If inspected at all, the inspection must of necessity be a 'careful' one, else it would be valueless for the purposes in view."

"Reasonably careful inspection." *Parsons v. Missouri P. R. Co.* (1887) 94 Mo. 288.

"Careful and prudent examination." *Perry v. Rogers* (1895) 91 Hun, 243.

"Reasonable, proper, and careful examination." *Illinois C. R. Co. v. Hilliard* (1896) 18 Ky. L. Rep. 505.

"Careful tests." *Morton v. Detroit, B. C. & A. R. Co.* (1890) 81 Mich. 423.

"Reasonable and usual tests." *Smith v. Chicago, M. & St. P. R. Co.* (1877) 42 Wis. 520.

"Careful and skillful application of the ordinary and approved tests." *Nashville & D. R. Co. v. Jones* (1871) 9 Helsk. 28.

"Ordinary care and diligence, which is the acknowledged measure of the master's obligation, does not require the application of unusual tests, nor the employment of the utmost possible safeguards." *Warner v. Erie R. Co.* (1868) 39 N. Y. 468.

"The legitimate obligation imposed upon the company by its contract with a passenger or employee is that its engines and apparatus are then suitable, sufficient, and as safe as care and skill can make them, and that the company will be responsible for any injury resulting from defects therein which might have been discovered by the company or its agents by the proper care and skill in the application of the ordinary and approved tests. If the defects are such that they could not be discovered by the company or agents after a careful and skillful application of the ordinary and approved tests, then the company cannot be held responsible, although it may appear that the defects might have been discovered by the manufacturers by applying the proper tests." *Nashville & D. R. Co. v. Jones* (1871) 9 Helsk. 28, 42.

The general rule is that the question whether the master has fulfilled his duty in regard to inspection is for the jury. *Coffee v. New York, N. H. & H. R. Co.* (1891) 155 Mass. 21; *Caruthers v. Chicago, R. I. & P. R. Co.* (1895) 55 Kan. 600; *Coontz v. Missouri P. R. Co.* (1894) 121 Mo. 652; *Missouri, K. & T. R. Co. v. Young* (1896) 4 Kan. App. 219; *Standard Oil Co. v. Bowker* (1894) 141 Ind. 12; *Consolidated Ice Mach. Co. v. Klefer* (1887) 26 Ill. App. 466; *Toy v. United States Cartridge Co.* (1893) 159 Mass. 313; *Dedrick v. Missouri P. R. Co.* (1886) 21 Mo. App. 433; *Brann v. Chicago, R. I. & P. R. Co.* (1880) 53 Iowa, 595, 36 Am. Rep. 243; *Fuchs v. Wm. H. Sweeney Mfg. Co.* (1890) 84 N. Y. S. R. 925.

In *McKnight v. Chicago, M. & St. P. R. Co.* (1890) 44 Minn. 141, the court said: "If the plaintiff's testimony was truthful,—and his credibility was for the jury to pass upon,—it justified the conclusion that the defendant was chargeable with negligence in suffering the car to remain in use with a defect, visible upon ordinary inspection, of such a nature as to endanger the safety of those who would certainly come into close proximity to it in the dangerous operation of coupling cars. The nature of the break in this iron, its precise location, and the degree of probability that it might catch the clothing in the process of coupling, were all more apparent to the jury and to the trial court than they are to us; for a full sized and accurate model of the draw-head was presented on the trial, the place and shape of the fracture were shown to the jury, and the natural position of one's hand and arm in making

a coupling were shown with the aid of the model. We certainly cannot say that the defect was not of an apparently dangerous character, and that this feature of the case did not justify the conclusion of negligence."

The negligence of the employer is a question for the jury, where it is in evidence, on the one hand, that the iron of a chain supporting an elevator was worn down in the link which broke to one third of its original thickness, and at another place had been worn even thinner; and, on the other hand, that the chain was new when it was put up, and that, after it broke, a slight flaw was found at the place of fracture, which could not have been discovered at the time its use began. *Hackett v. Middlesex Mfg. Co.* (1869) 101 Mass. 101.

The case is not the less one for the jury for the reason that the preponderance of the testimony, whether measured by the numbers of the witnesses, or the comparative credit which the court may think to be due to each, is in favor of one litigant. Thus, it has been held that the case must be left to the jury where there is much testimony showing that a car stake was apparently sound, and that there was no defect about it which could be discovered by a reasonably careful inspection, but one witness testifies that the outside of the stake was "spongy and like a cork where it had been shaved off with an ax." *Bushby v. New York, L. E. & W. R. Co.* (1885) 37 Hun, 104.

The question whether the master failed to perform his duty as to inspecting cannot be taken from the jury where one witness testifies that one of the usual methods of ascertaining the soundness of the appliance under consideration was omitted, although other witnesses who appear to be entitled to greater credit testify that the best tests were employed, and that the imperfection which caused the injury could not have been discovered by reasonable care and diligence. *St. Louis, I. M. & S. R. Co. v. Harper* (1884) 44 Ark. 524.

In *Louisville, N. A. & C. R. Co. v. Bates* (1896) 146 Ind. 564, a special verdict was set aside on the ground that it did not find facts sufficient to sustain judgment. "This court cannot," it was declared, "say, as a matter of law, that the car could not have been inspected properly in less than five minutes, or that it was necessary to use tools or other manual tests." Neither are their any facts found from which we can determine whether the standard of inspection designated as an 'efficient and proper inspection and examination thereof,' and 'a reasonable and ordinary inspection thereof,' is the one required by law. In making an inspection, it is the duty of the inspector to use the usual and ordinary tests, such tools as persons of ordinary prudence use, if any, under like circumstances. No man is held to a higher degree of skill or care than a fair average of his trade or profession, and the standard of due care is the conduct of the average prudent man. If the inspection is made in the usual and ordinary way, the way commonly adopted by those in like business, it cannot be said that it was done negligently. In determining whether an inspection was made with ordinary care, a jury can only find facts showing whether the same was made in the usual and ordinary manner, the one commonly adopted by men of ordinary care and prudence, engaged in the same business under like circumstances. If it was so performed it was made with due care, and a jury cannot be permitted to say that it was negligent. They cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of a commu-

nity. *Titus v. Bradford, B. & K. R. Co.* (1890) 138 Pa. 618; *Delaware River Ironship Bldg. & E. Works v. Nuttall* (1888) 119 Pa. 149; *Tuttle v. Detroit, G. H. & M. R. Co.* (1887) 122 U. S. 194, 80 L. ed. 1116. The finding 'that to have made an efficient and proper inspection and examination thereof would have taken fifteen minutes' is a mere conclusion. The standard thus fixed by the jury may be predicated upon the proposition that such searching and critical inspection must be made as would insure absolute safety to the employees. This, as we have shown, is not required. Facts, not conclusions, must be stated. The special verdict should state such facts as would show whether the inspection made was such as is usually made under like circumstances by inspectors of ordinary care and prudence, and this would include all facts showing whether the inspection was such as the time, place, means, opportunity, and the requirements and exigencies of the traffic will permit."

Where an injured servant has given evidence to show that a machine which he was cleaning would sometimes start of itself through the shifting of a belt from a loose to a fixed pulley, a jury may properly find that a due examination would have disclosed its imperfection. *Douahue v. Drown* (1891) 154 Mass. 21.

d. As affected by the length of time used.

The basis of the duty of inspection being the tendency of appliances to deteriorate while in use, it is manifest that the necessity for vigilance on the employer's part constantly increases the longer that use continues. After the end of fifteen years a common wooden trestle bridge, uncovered and unpainted, must be expected to be in a state of decay, demanding the utmost vigilance of the company. *Toledo, F. & W. R. Co. v. Conroy* (1878) 68 Ill. 561.

In *Warner v. Erie R. Co.* (1868) 39 N. Y. 468, a bridge fell after about nine and a half years' use. The evidence showed that bridges of similar construction and materials upon the defendant's road had stood over ten years, and were considered, and to all appearances were, sound and safe; some had stood over fourteen years, and one over seventeen years, in the same condition. Although some of the witnesses for the plaintiff testified that they would not consider such a bridge as safe beyond the period of seven or eight years, yet the court said that if, upon adequate and repeated inspection and the application of appropriate tests, no defect was exhibited, a mere opinion as to the length of time such a bridge might be expected to stand would have no appreciable weight in the scale of evidence. It was held that there was no conflict of evidence as to the care and skill used in the inspection as well as the construction and maintenance of this bridge and the absolute want of any actual notice of any defect, real or suspected, therein and that it was the duty of the court to take the case from the jury, and hold that, on the established facts, the plaintiff could not recover, but that, at all events, the defendant was entitled to the instruction the counsel asked, to wit, that, in order to charge the defendant, it was necessary for the plaintiff to show that the decay in the bridge, if it fell from decay, was known, by some notice or otherwise, to the president and directors of the road.

In *Lehigh Valley Coal Co. v. Kiszal* (1897) 53 U. S. App. 265, 80 Fed. Rep. 470, 25 C. C. A. 566, the defendant called witnesses to testify in regard to the usual duration of the life of a

boiler. One said: "I have known some of them [the Hazelton boilers] to last eighteen or twenty years." Another said that they lasted from twenty to twenty-two years. Another said: "I have known them to last twenty years." The exploded boiler was eighteen years old. Experts thought the crack and the resulting explosion were due to the unequal expansion of the bottom and the top of the boiler, caused by too sudden and hot a fire when the boiler was cold and the masonry was still damp, and there was not enough water in the boiler. The court said: "Upon this state of the evidence, especially in regard to the time when a boiler must be expected to wear out, the question of an unsoundness which ought to have been ascertained by the defendant's agents or representatives could not be taken from the jury. . . . The question of a defendant's liability for the defects of old machinery turns upon the continued exercise of due care, for its duty to its employees is only discharged when its agents whose business it is to supply such instrumentalities exercise due care, as well in their purchase originally as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employees." *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. 612. It was a question of moment in this case whether, if this boiler was defective, its condition, after eighteen years of use, ought not to have been previously ascertained by the defendant."

In *Baker v. Allegheny Valley R. Co.* (1880) 95 Pa. 211, 40 Am. Rep. 634, the court, after referring to the rules which absolve an employer from liability if the servant knew or ought to have known of the defect which caused his injury, proceeded as follows: "But do these rules apply to such an instrument as a rope used in a derrick which is employed in raising heavy weights? No doubt a perfectly new rope, and one to all appearances sound, may break, and the master would not be responsible for the consequence, having furnished a rope of the proper size for the purpose, to all appearance sound. But there was evidence in this case, sufficient certainly to make a question for the jury, that such a rope after having been used for a year or more, and exposed during that time, as the one in question seems to have been, was no longer a safe rope, even though it did not outwardly exhibit any signs of decay. The master is bound to know that a rope under such circumstances will only last a limited time. It will not do for him to furnish a sound rope and then fold his arms until by actually breaking it is demonstrated to be insecure. It will not do to say that the servant is bound to know this as well as his master, and to warn him that after such a time he ought to procure a new rope. Is the servant bound to notify the master of that which he knows or ought to know himself without such information? He knows how long the rope has been in use. The servant may not know. In this case the deceased did not know. It appears to have been the first day that he worked on the derrick. There was nothing to attract his notice in the outward appearance to show how long it had been in use. It is the duty of employers to renew instruments of this character at proper intervals. The expense would certainly not be great, and a due regard to the lives of their servants imperatively demands it."

The court will not assume, as a matter of law, that the decay of the timbers of a bridge, being necessarily gradual, could always be ascertained by the use of due diligence. That is

wholly a question of fact, and instructions withdrawing it from the jury are erroneous. *Toledo, P. & W. R. Co. v. Conroy* (1871) 61 Ill. 162.

e. Frequency with which inspections should be made.

Consult also the cases in VI., d, supra.

1. Generally.

How often an inspection should be made depends entirely upon the character of the instrumentality and the length of time during which it may reasonably be presumed that it will remain in that normal condition in which it must, for the purposes of the inquiry, be supposed to have been found at the last preceding examination. The rules laid down by the courts on the subject must, therefore, necessarily be quite vague and general.

A railroad company is bound to examine a locomotive after it has been in service as long as it can with safety be used without examination and overhauling. *Sloux City & P. R. Co. v. Finlayson* (1884) 16 Neb. 578, 49 Am. Rep. 724.

The duty of an employer who keeps a boiler in a building in which employees are at work is to use such reasonable care to inspect it from time to time as may be necessary to enable him to see that it is in a reasonably safe condition and free from defects rendering it unsafe to use. *Egan v. Dry Dock, E. B. & B. R. Co.* (1896) 12 App. Div. 556.

"Engines and other appliances used in operating railroads are liable to wear out, to break, become defective and dangerous, and a railroad company employing such agencies is charged with notice of this fact, and consequently is bound to exercise a degree of watchfulness over them commensurate with the nature of the business in which they are employed, and the consequences incident to neglect. Therefore, if a company fails to make frequent examinations of its engines, machinery, and appliances, or fails to take other measures of precaution necessary to prevent such appliances and machinery from becoming defective and dangerous from natural causes; and if from such defects which might have been known by the use of ordinary care or diligence, an employee suffers injury without his fault, negligence may be predicated thereon, as such omission would be regarded as negligence." *Atchison, T. & S. F. R. Co. v. Holt* (1883) 29 Kan. 149, 152. In this case the plaintiff was held entitled to recover for an injury by an engine that had been unsafe and dangerous for "some considerable time" before the day of the injury, which could have been known to the company by the exercise of ordinary care; while he himself was not aware that the engine was defective.

In *Knapp v. Sloux City & P. R. Co.* (1887) 71 Iowa, 41, it was said that a railroad company owes its engineers the duty of making a "frequent" inspection of its tracks.

"It is the duty of a railroad company to furnish reasonably safe cars for the running trains, and to have them inspected with reasonable care at proper intervals." *Daniels v. Union P. R. Co.* (1890) 6 Utah, 357.

The obligation to make a thorough inspection is especially strong where an appliance has been injured in the parts open to view, and there is a strong probability that the same accident may have weakened it in other places. Thus, where the lever of a hand-car breaks, and it proves to have been cracked underneath one of its rings by the shock of a severe collision which it had undergone the day before, the

railroad company is liable for damages if it appears that the foreman in charge of the car did not subject it to an examination sufficiently thorough to disclose injuries which were not patent. *Solomon R. Co. v. Jones* (1883) 30 Kan. 601.

So, the failure to suitably inspect the coupling of an engine after it has been subjected by a collision to a strain which is likely to injure it is an omission on the company's part which will justify a jury in holding it guilty of negligence. *Norfolk & W. R. Co. v. Nunnally* (1892) 88 Va. 548.

A similar principle is applicable where machinery is operating in such a manner as to create a reasonable suspicion that it is in some respect defective. Thus, an employer whose attention is called to a clicking noise made by a machine used by an employee, which would not have been made if the machine had been in proper condition, owes such employee the duty of carefully inspecting the machine to determine if it is defective, and of repairing it in case it is found to be defective. A mere casual examination by the foreman is not a fulfillment of the duty. *Kaplan v. New York Biscuit Co.* (1896) 5 App. Div. 60. Compare the cases in VI. f, 2, supra.

The duty of a master to inspect appliances furnished to his servant, though continuous, does not require a continuous inspection from moment to moment, but only such as is reasonable under all the circumstances. *Krampe v. St. Louis Brewing Asso.* (1894) 59 Mo. App. 277.

A master who chooses to adopt inferior appliances and methods in his business must use proportionately greater care to see that the servant is not injured, and must make more frequent examinations. *Eddy v. Aurora Iron Min. Co.* (1890) 81 Mich. 548, where it was held that a mine owner who employs a method of bracing and support for timbers and staging which renders the piece more subject to be displaced by blasts than other methods in use, must adopt such frequent inspection as is necessary to prevent accident from the collapse of the roof.

A railway engineer assumes the risk of a derailment of his engine by a cow which becomes fastened in a railroad bridge without any fault on the part of the company, where its tracks and bridges are examined at reasonably frequent intervals. *Manson v. Eddy* (1893) 3 Tex. Civ. App. 148.

A railroad company is not required to keep a constant watch through its track inspector upon every part of the road, but only inspection at reasonable intervals. It cannot be held liable for an injury to a brakeman who is tripped up by a small coil-spring, left in a side track by a car repairer and almost covered by grass, where the employees working on the track had never seen it, and there is no evidence to show how long it had been lying between the rails. *Williams v. St. Louis & S. F. R. Co.* (1893) 119 Mo. 316.

Where a death results from the fall of a derrick on an iron ship in consequence of the breaking of a bolt, which at the time was defective to the extent of two thirds of its section, but the defect was not visible unless the bolt was drawn out of its socket, a verdict for the defendant was rightly directed, where the plaintiff produced no expert testimony to show what is usual or requisite in reference to inspections of ships of the class in question, or for what period a bolt like that which gave way would, in the ordinary course, remain in repair and be adequate to its work. *Neither a* 41 L. R. A.

court nor a jury can, otherwise than by speculation, form an opinion as to how often such an appliance should be examined, unless they are enlightened by the evidence of a skilled witness. *Hanrahan v. Ardnamult S. S. Co.* (1887) Ir. L. R. 22 C. L. 55.

A court cannot, as a matter of law, say when, where, and how often an inspection of a foreign car shall take place, or that it should not have been done at some time while the car was under the defendant's control. *Brann v. Chicago, R. I. & P. R. Co.* (1890) 53 Iowa, 595, 38 Am. Rep. 243.

Where the evidence is that a defect is the result of gradual wear the reasonable inference is that it has existed for some time, and it is for the jury to say whether the master was derelict in regard to his duty of inspection. *Paine v. Eastern R. Co.* (1895) 91 Wis. 840.

2. *Rulings as to specific periods.*

In some instances, however, the courts have undertaken to declare with greater precision how often the inspections must take place in order that the master may be deemed to have performed his duty in that regard. The following decisions will serve as illustrations of judicial ideas upon this subject, expressed sometimes with and sometimes without reference to the opinion of a jury.

"Of whatever material bridges are built, they should be subjected periodically, every year, to the closest examination." *Toledo, P. & W. R. Co. v. Conroy* (1873) 68 Ill. 561.

Evidence that a telegraph pole had not been inspected for two years before it broke and injured a servant, and that it should in the exercise of reasonable care have been inspected once in each year, will justify a verdict for the plaintiff. *Essex County Electric Co. v. Kelly* (1897 N. J. L.) 37 Atl. 619.

There is sufficient evidence of negligence to go to the jury where a chain supporting a weight of over 250 pounds had been mended by joining two of its links with five strands of fine wire, and suffered to remain in that condition without inspection for eight years. *Tangney v. J. B. Wilson & Co.* (1891) 87 Mich. 453.

Where it is shown that a track inspector and his gang carefully examined and repaired a curve about two weeks before an accident, an employee of the railroad company working upon an engine cannot recover for injuries alleged to be due to a defect in the rails at that place. *Burrell v. Gowen* (1890) 134 Pa. 527.

A railroad company is not liable for the death of an engineer by the derailment of his engine caused by a sudden fall of rain saturating the already moist earth, so that the cross-ties sunk on one side under the weight of the engine and turned it over, where the place had been twice inspected that morning and appeared to be safe, and two heavy freight trains and a fast express train had passed over it in safety. *Binns v. Richmond & B. R. Co.* (1892) 88 Va. 891.

In *Lake Shore & M. S. R. Co. v. Conway* (1896) 67 Ill. App. 155, the court remarked that a "defective condition, caused by an accumulation of frozen snow and mud, is very different from a defect arising from a flaw in a rail, a thing which might not be discoverable save upon a minute, and, before the passage of each train, impracticable, examination."

A railroad company is not liable for an injury to an employee caused by the derailment of a car, if the car was carefully inspected before the accident, and was in good condition, and was apparently in the same condition after the accident. *O'Connor v. Illinois C. R. Co.* (1891) 83 Iowa, 105.

A railroad company which every month requires a competent and experienced workman and assistant to subject the stay bolts in a boiler to the best test known to discover if they are whole and sound is not liable for the death of an engineer from an explosion of the boiler due to broken stay bolts, eight days after such inspection. *Chicago & A. R. Co. v. Du Bois* (1894) 56 Ill. App. 181.

In *Powers v. New York C. & H. R. R. Co.* (1891) 60 Hun, 19, the company was held not liable for an injury caused by the breaking of a king-bolt which had been inspected eight days before the accident.

An employee cannot be held liable as for a breach of his duty to inspect an elevator, where only a week before the servant was injured it had been thoroughly examined in all its parts by a competent inspector. *Bucher v. Pryibill* (1897) 19 App. Div. 128.

Where steps leading to a platform were secure at the close of working hours of one day the master could not be held responsible in a showing that they were insecure at the beginning of the working hours on the next day, without a further showing that there was a reasonable probability that their security would be disturbed in the interim by some cause which the master, in the exercise of reasonable care, could have foreseen and guarded against. *Krampe v. St. Louis Brewing Asso.* (1894) 59 Mo. App. 277.

In *Houston v. Brush* (1894) 66 Vt. 331, it appeared that although a derrick which gave way owing to the working out of a pin was almost daily subjected to the strain of lifting heavy stones, it had not been inspected to see if it was safe in this respect for about thirty days prior to the accident. The court said: "The working out of the pin was an accident which, in the ordinary course of things, does not occur if those who have the care and management of a derrick use proper care. The case standing thus, we think the jury had a right to consider the fact that the pin came out as it did, and from it to draw the inference that the defendants had failed to exercise ordinary care."

In *Brann v. Chicago, R. I. & P. R. Co.* (1890) 53 Iowa, 595, 36 Am. Rep. 243, the car which caused the plaintiff's injury was received by the defendant at Beverly, Missouri, on the 12th of October from a connecting road, and was taken to Chicago, and it was on its return trip on the 17th day of October when the accident occurred. There was evidence tending to show the car was in good order when received by the defendant. It reached Beverly on the day after the accident, and was again inspected, and the "hand-hold" found in bad condition. The inspector testified that he put on a new one, that the wood was sound, indicating that the "hand-hold" had been out of repair only a short time, not exceeding a week. It was held that the evidence warranted the conclusion that the "hand-hold" had got out of repair at some time on the trip to and from Chicago, but the court declined to say, as a matter of law, whether the car should have been inspected during the trip.

In *Webb v. Rennie* (1865) 4 Fost. & F. 615, the question left to the jury was whether the defendant had been negligent in not examining the poles of a scaffolding, and Cockburn, Ch. J., charged as follows: "It appeared that a pole had been two years in the earth, and that during that time it had not been examined, and at the end of that time it was unsound. . . . If the jury were satisfied that according to the general practice of ship-builders, poles were allowed to remain

two, three, or four years in the ground without being examined, and that the usual mode of raising them was adopted in this case, and that all this had gone on in shipbuilding yards for years without any accident, then it would be for the jury to say whether, looking to the experience of the past (which, of course, though not conclusive, was always material as an element of judgment), there was any negligence on the part of the defendants; or whether, by leaving the poles so long in the ground without examination there was in this respect a want of due and ordinary care on the part of the defendants. And it was not because in a single instance it had turned out that a pole could not be safely left in the ground for two years, and that the accident might have been prevented by a timely examination—it did not necessarily follow from this that therefore there was a want of due and reasonable care on the part of the employer who had acted in accordance with all his past experience. Such a matter must always be dealt with by juries in a reasonable way and with reference to reasonable care. No man could be safe against the occurrence of accidents from causes quite casual, fortuitous, and unforeseen. A man might have 1,000 poles used on his premises with safety, and then by some chance one might turn out to be unsound and cause an accident for which the master was not necessarily liable. If any instances had been proved of poles having previously broken by reason of their having been left so long in the ground it would have been strong to show negligence; but there was no such evidence. On the other hand, evidence that poles had been left in the ground much longer without any accident occurring went strongly to a contrary conclusion:

1. Limits of liability based on duty of inspection.

See also XI., e, *infra*.

1. Generally.

The scope of the principles illustrated by the case cited in the preceding subdivision will be more clearly understood if we examine the employer's duty in its negative aspects.

The duty of inspection is not imposed in respect to articles which are merely handled by the servant for the purposes of carriage. Thus, the purchaser of cotton is not liable for an injury to his servant from the giving way of the bagging upon a bale while he was moving it with a hook, in the absence of evidence of a custom or agreement on the master's part to inspect it and ascertain its strength. *Garragan v. Fall River Iron Works Co.* (1893) 158 Mass. 596.

The rule that a master owes his servant the duty of inspection or reasonable care to furnish him safe and suitable means for performing his work has no reference to the safety and condition of the thing the servant is employed to repair or complete. *Allen v. Galveston, H. & S. A. R. Co.* (1896; Tex. Civ. App.) 37 S. W. 171.

In *Stourbridge v. Brooklyn City R. Co.* (1896) 9 App. Div. 129, the court took the ground that the only duty of an employee in regard to a cross-beam furnished merely as a part of the structure which the servant is engaged in erecting, and not for the purpose of providing him with a place of work, is to apprise him of the existence of any latent defects of which it has knowledge.

See also XI., e, *infra*.

2. Omission of duty must be proximate cause of injury.

Where the undisputed evidence shows that the most careful inspection demanded by the law would not have disclosed the defect, the question whether that which was made was adequate is immaterial. *Louisville & N. E. Co. v. Campbell* (1892) 97 Ala. 147.

Where it is apparent from the evidence that the defect which caused the injury was of such a nature that it would not have been discovered by the defendant by an examination made at a reasonable time before the accident, the necessary causal connection between the accident and the breach of the defendant's duty to inspect is not established. *Boess v. Clausen & P. Brewing Co.* (1896) 12 App. Div. 360.

Where a railroad company provides skilful inspectors, and an inspector makes a proper inspection, it is not liable for injuries to its servants resulting from defects which the inspector could not have discovered by proper inspection. *Indiana, I. & I. M. Co. v. Snyder* (1892; Ind.) 53 Am. & Eng. R. Cas. 225.

A railroad company is not liable for the death of a fireman thrown between the engine and tender by the breaking of the king-bolt by which they were coupled, and in which there was a latent defect beneath the surface which was not and could not have been discovered, although the pin was carefully inspected before the accident. *Powers v. New York C. & H. R. R. Co.* (1891) 60 Hun, 19.

Where, for anything that appears, the defect which caused the explosion of a gas generator may have been of such a nature as to have eluded the most careful examination of the most skilful experts, an instruction is erroneous which holds that the mere absence of examination by prudent men is conclusive of the defendant's liability. *Krans v. White* (1881) 8 Ill. App. 583.

In *Philadelphia & R. R. Co. v. Hughes* (1888) 119 Pa. 301, the court held that the servant could not recover for injury from the breaking or falling out of a brake pin. It was conceded that the brake was in proper condition a few miles above the place of accident, whilst the next place of inspection was a short distance below. The proof did not show whether the pin broke, fell out, or was removed. The court said: "It devolved upon the plaintiff to show negligence of the company, and that that negligence was the proximate cause of the injury. In this he has failed, and in the absence of proof on that point we cannot ascribe the accident to that cause."

In *Carlson v. Phoenix Bridge Co.* (1892) 132 N. Y. 273, several hooks were made by a blacksmith from pieces of iron about 18 inches long, cut from a bar purchased by the defendant's superintendent. They were used in lifting the heavy girders which formed a part of the structure for the railway. And only one was shown to have broken, or to have been weak or defective. The piece of the bar not used was shown to have been of the best quality, and to possess an elasticity and strength far beyond that required in lifting the girder in question. The hook that broke did so from a weakness in the iron at the particular point of fracture. The court said: "The evidence does not show from what part of the bar the piece of iron from which the hook was manufactured was taken, and if the cutting test had been applied to either end or the middle of the bar, the jury could not have found that it would have disclosed the defect complained of. A

conclusion that the defect would have been discovered, would have had no other basis than speculation or conjecture, and evidence of that character would be insufficient to sustain a judgment."

In *Bannon v. Sanden* (1896) 68 Ill. App. 164, it was contended that a proper examination was not made of the timber that broke in a scaffold, but the court was of the opinion that from the facts that it had been used four or five times without breaking, and that an examination would not have disclosed any knot in the timber, an examination would have been useless.

In *Oberfelder v. Doran* (1889) 26 Neb. 118, there was evidence upon which the jury might properly find that the faulty character of certain timbers was such that a proper inspection would have disclosed the same. It was thought necessary to pass upon the question as to whether the duty of the defendant to make such inspection would exist only where it was shown that such inspection would have revealed the defects.

3. Employer not liable for latent defects.

Employers "are not answerable for latent defects in materials employed in the construction of their machinery, which the usual and well-recognized tests of science and art fail to detect." *Toledo, P. & W. R. Co. v. Conroy* (1873) 68 Ill. 561.

An employer is not liable "for hidden defects which could not have been discovered by the most careful inspection." *Ladd v. New Bedford R. Co.* (1875) 119 Mass. 412, 20 Am. Rep. 331.

Where a defect "is not discoverable by the customary modes of inspection, or, in other words, is a latent defect," the employer is not guilty of negligence in failing to remedy it. *Read v. New York, N. H. & H. R. Co.* (1897) 20 R. I. 211.

"While charged with knowledge of patent defects, and with the usual effect of use and wear upon the machinery, the employer is never charged by his mere duty of using it with the duty of inspection for latent defects." *Missouri P. R. Co. v. Crenshaw* (1888) 71 Tex. 341.

The master is not liable for "latent defects, which he could not have discovered by the use of ordinary diligence." *Quintana v. Consolidated Kansas City Smelting & Ref. Co.* (1896; Tex. Civ. App.) 37 S. W. 369.

Where a rail without any visible defects breaks by reason of cold weather, the railroad company is not liable for the resulting injuries. *Devlin v. Wabash, St. L. & P. R. Co.* (1885) 87 Mo. 545.

"This rule [as to the employer's duty to provide safe instrumentalities] does not go to the length of making the employer an insurer against injury by the breaking of machinery or the explosion of boilers while used by an employee in the service of the employer, provided such machinery is apparently in a safe condition and the injury results from latent weakness or defect unknown to the employer and which the exercise of ordinary care and skill of the employer would not enable him to detect or guard against, and, when an accident happens under such circumstances, it must be regarded as one of the risks incident to the employment which, when no fault is chargeable to the employer, the employee assumes." *Racine v. New York C. & H. R. Co.* (1893) 70 Hun, 453.

It follows directly from the principles laid down above that no defect can be considered

dependent contractors for the reception of water-mains.

A street-railway company owes no duty to the driver of a car to keep a man to watch a switch leading towards the stable, during the daytime, when it is closed and properly secured. *Donnelly v. New York C. & H. R. R. Co.* (1896) 3 App. Div. 408. (The plaintiff had been thrown off by the sudden turning of the car, and there was no evidence to show how the switch became open, or that the track and car were not in good order.)

A jury would be warranted in finding that a railroad company had not used the care which the circumstances required to keep the track in a safe condition, where the evidence tends to show that a derrick had remained unused by the side of the track, dangerously near an overhanging bank of earth and stones, in plain view and with a guy loosely stretched across the track, though at a sufficient height, when the derrick was upright, to clear the passing trains, for at least ten days while the earth was alternately freezing and thawing; that, on the day preceding the night on which the plaintiff was injured, the bank thawed, and it was apparent to anyone who looked at it that a large mass of the bank was loosened and ready to fall upon the derrick; and that just before the train on which the plaintiff was at work came along, such a mass broke off from the bank, and fell upon the derrick, knocking it down, and bringing the guy stretched across the track into such a position that it swept over the top of the train and struck the plaintiff. *Holden v. Fitchburg R. Co.* (1890) 129 Mass. 268, 37 Am. Rep. 343.

Where a mason is injured by the explosion of a dynamite cartridge left in a stone taken from a quarry at some distance from the work an instruction is correct which leaves it to the jury to say whether the defendant, knowing the manner in which the operations at the quarry were conducted, and the risk that unexploded cartridges might remain in the stones carted away for building purposes, ought, as an ordinarily prudent man, to have examined the stone from which the servant's injury resulted. *Neveu v. Sears* (1892) 155 Mass. 303.

A master who erects a privy for the use of his operatives in such a dangerous place as in a wheel-house directly over the water-wheel is under a specially imperative obligation to it to see that the foundations of the structure are made and kept sound and safe beyond contingency. It is his duty to know that the privy is safe, and that the servants for whose use it is designed may resort to it without personal risk or peril to life or limb. *Ryan v. Fowler* (1862) 24 N. Y. 410, 82 Am. Dec. 315.

That a hole in a railroad track was concealed from sight by slush will not excuse the railroad company from liability to a brakeman for injuries received from stepping into it. It is for the jury to say whether the company has done its duty in regard to the discovery of the unseen defect. *Northern P. R. Co. v. Teeter* (1894) 27 U. S. App. 316, 63 Fed. Rep. 527, 11 C. C. A. 332.

In *Flood v. Western U. Teleg. Co.* (1892) 131 N. Y. 603, the defendant was held not to be liable for injuries caused by the breaking of an arm on one of its telegraph poles, where there was a system of inspection for the arms when purchased, and it did not appear that there was anything in the external appearance of the defective arm when it was new which indicated any weakness, or that there was any defect therein discernible by any ordinary inspection. The court said: "This arm had been in use for about six years, and during all that

time had perfectly answered its purpose. There was no proof showing how long such an arm ought to last or be used. The defendant had a system of inspection which appears to have been all that was practicable. Its inspectors went along the line of telegraph poles and wires, and carefully looked at them and tried the poles to see if they were still strong and adequate. They were provided with arms so that if they discovered any that were insufficient they could replace them. They were not expected to climb up every pole and examine the arms thereon. Such an inspection would be manifestly impracticable and unnecessary."

Where the fall of a bridge on which a servant is employed to dump coal cars is caused by decay of the timbers, it is, in an action by the servant against the master to recover damages for injuries sustained, for the jury to determine whether the bridge was properly built; whether the defendant employed competent men to inspect it, and whether the defendant had no notice of its dangerous condition; and if the jury do not so find, the plaintiff is entitled to recover. *Everson v. Rollinson* (1887; Pa.) 6 Cent. Rep. 745.

In *Faulkner v. Erie R. Co.* (1867) 40 Barb. 324, where a bridge which fell had every appearance of being sound and safe, and had been examined and tested and watched, under the weight of a train of cars, on the day before the accident happened, by the repairer of bridges and the superintendent of that division, and then deemed entirely sound and safe, the court said that it did not see what more could have been legally required of the company in the exercise of proper care than had been done.

In *Warner v. Erie R. Co.* (1868) 89 N. Y. 468, the defendant was held not liable where it was proved that, by competent agents, a frequent inspection and examination of the bridge which collapsed had been made; that the accustomed tests, long employed, and deemed ample and sufficient, were applied to the structure in its various parts, and no imperfection or decay was detected; that no imperfection was visible upon an outward and external inspection; and that, on the day before it fell, a special observation was made on the bridge while a heavy train was passing over it, and no imperfection or weakness was discovered. In answer to the objection that the test of boring the timbers was not applied, the court remarked that this is no more a certain test than the one which was applied; that it had but rarely been used upon the bridges on the defendant's road, or, so far as the testimony showed, upon any other; that, when carried too far, became itself a source of weakness; and that while, after a catastrophe has occurred, it is sometimes easy, and quite common, to say that if something else unusual and unthought of had been done, it might possibly have been averted. Ordinary care and diligence, which is the acknowledged measure of the defendant's obligation, do not require the application of these unusual tests, nor the employment of the utmost possible safeguards.

A railroad company is liable for injuries caused by the fall of a decayed bridge where an auger or an ax properly applied would have revealed the rotten condition of its timbers, and its consequent insecurity. It is immaterial that a bridge was skillfully built when erected, where time and exposure to the elements have smitten it with certain decay, which the simplest test would have discovered to the company. *Toledo, P. & W. R. Co. v.*

Conroy (1878) 68 Ill. 561. There the court refused to set aside a verdict for a plaintiff who had been injured by the fall of a bridge, saying: "There is much testimony from which the jury might fairly infer that the bridge broke down from the rotten and decayed condition of the timbers. It had been erected about fifteen years—a common trestle bridge, uncovered and unpainted. An ordinary wooden structure like that, exposed to the storms of fifteen years, should be expected to be, by the end of that term, in a state of decay demanding the utmost vigilance of the company. They were bound to know the nature of the structure, and they are justly chargeable with negligence in failing to find out and remedy its defects. It is in proof that such was the condition of some of the materials that a stick could be easily thrust into them, and, though they exhibited no outward sign of decay, were rotten at the heart. Not a person in the employment of the company stated that any tests were made, such as by boring or chopping, to ascertain the condition of the timbers. They had, months before the accident, direct notice of the unsafe condition of this structure. It is true, some repairs had been put on the bridge a short time before the accident, but there was no thorough overhauling, no searching to find out defects,—a glance being deemed sufficient to satisfy the employees of the company of its safe condition. Trains of cars had passed over it safely the day before, and it had been subjected, quite recently, to the heaviest strains which can be imposed upon a bridge; the switching being done upon it. All this should have admonished the company that the structure required a thorough examination."

In Flynn v. Union Bridge Co. (1890) 42 Mo. App. 529, there was no evidence offered that planks which are used for scaffolding are in any case entirely free from knots, nor that such planks are, as a rule, subjected to any strain test before they are used; nor that the plank actually used was not of such a thickness, soundness, or quality as is ordinarily used for scaffolding, irrespective of its height. Under these circumstances it was considered that to require of the master that he should subject each plank to a strain test, before permitting it to be used, would be requiring of him, not simply reasonable care, but a most extraordinary care, and to this the law does not subject him. It was also pointed out that the strain itself might injure the plank, and, instead of helping matters, make them worse.

A master is liable for injuries caused by the breaking of a plank in a platform, owing to a defect which could readily have been discovered by a proper inspection before the plank was put in position, but was out of sight of anyone who was merely using the platform. Bensing v. Steinway (1886) 101 N. Y. 547.

An employer is not required to test the strength of every piece of timber on a scaffold, and he is therefore not liable for the breakage of one of the planks owing to the presence of a knot which was not visible on the outside of the timber. Bannon v. Sanden (1896) 68 Ill. App. 164.

Evidence that there was, in a platform over which workmen were wheeling barrows, a depression "so small as to have escaped the attention of numerous persons who had used the platform, some of whom specially examined it," is insufficient to support an allegation of negligence against the employer,—especially where it is improbable that the imperfection played any part in the accident occasioning the injury complained of. Kaare v. Troy Steel & I. Co. (1893) 139 N. Y. 369.
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In Weiden v. Brush Electric Light Co. (1889) 73 Mich. 268, the defendant was held liable on the ground that there was no competent evidence in the case that any examination of a certain tower and its cable had ever been made.

2. Weight—supporting appliances.

A master is liable for an injury caused by the breaking of a chain partly from wear and partly from bad welding, where he has not had it examined or tested, although there are well-known methods for doing so. Murphy v. Phillips (1876) 24 Week. Rep. 67, 85 L. T. N. S. 477.

A railway company which, after using a lifting jack purchased by it containing a latent defect in the weld of the foot attached to the jack, sends it to its shops for other repair, is liable to a section hand injured because of such defective weld, if it could have been discovered by a reasonable examination at the time such repairs were made. Kansas City & P. R. Co. v. Ryan (1894) 52 Kan. 637.

In Moynihan v. Hills Co. (1888) 146 Mass. 586, the question whether the defendant had been negligent was held to be for the jury, where it was proved that a rod which broke was designed to carry one iron ball weighing about 118 pounds, and that under the defendant's direction the machine had been reconstructed, and the rod made to carry two such balls; that it had been subjected to a use which caused the iron in the rod to vibrate while under a strain, and which tended to crystallize it and make it brittle; that there had been no inspection of it to ascertain its condition for nearly two years before the accident; that the rod was slightly discolored at the place of the fracture, as if the break was not fresh, and that it appeared to him as if the iron had not freshly parted.

Testimony that a hook after it gave way looked as if there was a break previously to the main break, that "if a man made a careful examination of the hook, after making it, he might possibly, or if a man familiar with hooks examined it, he might perhaps, have discovered the flaw which caused the accident, but these flaws would not be visible on an ordinary inspection," that there was actually a visible crack or flaw in the hook above the flaw at the place of rupture, and that, as testified, iron will usually break in the weakest spot,—tends to show that a careful inspection would have revealed the weakness of the hook. Spicer v. South Boston Iron Co. (1885) 138 Mass. 426.

See also Erskine v. Chino Valley Beet-Sugar Co. (1905) 71 Fed. Rep. 270, the gist of which is stated in VIII. 2, 3, supra.

3. Steam boilers.

A railroad company "is not required to adopt extraordinary tests for discovering defects in a locomotive boiler, or any of its machinery, which are not approved, practicable, and customary; but it fulfils its duty in this regard if it adopts such tests as are ordinarily in use by prudently conducted roads engaged in like business and surrounded by like circumstances." Texas & P. R. Co. v. Barrett (1896) 166 U. S. 617, 41 L. ed. 1136.

A verdict holding a railroad company for injuries caused by the explosion of an engine due to defective stay bolts will not be disturbed where there is testimony to the effect that if any one out of several recognized tests had been applied within a reasonable time before the explosion, the true condition of the

stay-bolts would have been discovered. *Texas & P. R. Co. v. Barrett* (1895) 30 U. S. App. 196, 14 C. C. A. 873, 67 Fed. Rep. 214, Aff'd (1896) 166 U. S. 617, 41 L. ed. 1136.

Ordinary care does not require a railroad company to take out the dome-cap and throttle valve of a locomotive purchased from reputable manufacturers. It would be an unreasonable rule to require such a company to keep on hand such mechanical contrivances and employ experts capable of making the highest tests, like those which the manufacturers are in a position to make. *Clyde v. Richmond & D. R. Co.* (1894) 65 Fed. Rep. 482. There the special master, whose report was approved in toto by Newman, D. J., considered that the rule laid down by the Supreme Court of the United States in *Richmond & D. R. Co. v. Elliott* (1892) 149 U. S. 286, 37 L. ed. 728, meant that the employer was not bound to do more than test an engine to see that it was in good running order, where it had been purchased from a manufacturer of good standing.

Where a boiler of a locomotive engine bursts, owing to a flaw which was latent and discoverable only by the steam and hydraulic tests, which are not in ordinary use with railroad corporations, and rarely applied except when boilers are first put in use, or when the engines undergo their periodical examination in the workshop, the employer is not liable. *Louisville & N. R. Co. v. Allen* (1885) 78 Ala. 494.

In *Racine v. New York C. & H. R. R. Co.* (1893) 70 Hun, 453, a boiler case, after a supposed burning of the crown plate, was subjected to the test of 145 pounds pressure, its maximum capacity, and resisted that pressure, and upon that test was put in service by the defendant, in hauling freight and passenger trains, under a pressure of from 140 to 145 pounds of steam, and continued in such service for about one week after such supposed burning of the plate, to the time of the accident, without any evidence of weakness. It finally exploded while carrying only 110 pounds of steam, and while running at a moderate rate of speed alone, and without a train. The court said that it could not see from the evidence, either that the place furnished by the defendant for the interstate to work was unsafe, or that the defendant was guilty of negligence in suffering it to become unsafe while the interstate was employed by the defendant, and the nonsuit of the trial judge was sustained.

The effect of a statute requiring steam boilers to be tested in a certain manner every year is merely to provide an additional safeguard, and since the duty of an employer to use care in inspecting the appliances used by the servants does not arise out of statute but is imposed by the common law, the fact that such a statute has been complied with by such employer does not necessarily establish that his duty has been performed. *Egan v. Dry Dock, E. B. & B. R. Co.* (1896) 12 App. Div. 556.

Whether or not the duty of a master properly to inspect a boiler kept in a building in which servants are engaged is performed by the application of any given test is "a question to be determined by the condition of the boiler and the situation and location, and by considering whether the particular test will give indications as to the safety of the boiler." *Egan v. Dry Dock, E. B. & B. R. Co.* (1896) 12 App. Div. 556.

The "hammer test" being regarded as the best known method of examining steam boilers, negligence will not be imputed to an em-

ployer where that test had been applied to a boiler six days before it exploded, by an inspector reasonably competent to perform the work. *Chicago & A. R. Co. v. Dubois* (1895) 65 Ill. App. 144.

In an action for damages caused by the explosion of a boiler it is not error to submit to the jury the question whether a railroad company has been negligent in its inspection of a boiler fourteen days prior to the accident, where the plaintiff's testimony is to the effect that the stay-bolts had become broken to the number of fifty or sixty and had been broken so long before the explosion that the ends were worn smooth; that either the hydrostatic or the hammer test was, when properly conducted, sufficient to show the presence of broken bolts; and that by the hammer test at least 90 per cent of the broken bolts could be discovered. *Woods v. Chicago & G. T. R. Co.* (1896, Mich.) 66 N. W. 328.

In *Jones v. Malvern Lumber Co.* (1893) 58 Ark. 125, it was shown that the only tests of a boiler's strength, applied after it was repaired, were made by sounding its rivets and braces with a hammer, and by the pressure of steam raised for that purpose; and testimony was adduced by the plaintiff to prove that the "hammer test" was not effective, and was not the test usually applied. In rebuttal the defendant introduced a person engaged in the milling business, and asked him what tests the mill men of the vicinity generally applied to the steam boilers used in their business. The question was objected to, but the court permitted the witness to answer and he stated that the "hammer test" was the one usually applied, so far as he knew." The court said: "The defendant's duty to its servants did not require it to resort to unusual or impracticable tests; and we think the question was proper, as eliciting evidence tending to show that one of the tests applied by the company's master-mechanic was that usually employed by persons engaged in operating similar machinery."

4. Cars and their appurtenances.

A railroad company in discharging its duty towards its employees to inspect cars "is not required to resort to tests that are impracticable and oppressive, or which would be incompatible with the proper furtherance of business and which are only required to insure absolute safety." *Louisville, N. A. & C. R. Co. v. Bates* (1896) 146 Ind. 564.

A railroad company "is not bound to pursue a system of inspection of its cars and locomotives which would embarrass the operation of the road," but simply to exercise ordinary care. *Smoot v. Mobile & M. R. Co.* (1880) 67 Ala. 13.

It is not required of a railroad company that the tests made by car inspectors should be so thorough and exhaustive as the tests made at the general construction or repair shops. *Atchison, T. & S. F. R. Co. v. Ledbetter* (1885) 24 Neb. 328.

Inspectors of cars are not required to apply tests of physical force to the steps of a ladder upon a freight car, in order to absolve the company from liability for defects therein, unless some indication of weakness or defect is perceived upon a careful inspection by the eye. *Allen v. Union P. R. Co.* (1891) 7 Utah, 239.

In *Smith v. Chicago, M. & St. P. R. Co.* (1877) 42 Wis. 520, the court remarked with regard to the tests applied to the defendant's brake-rods: "The defendant proved by John Baillie, its master car builder, that the iron was purchased of the best makers, and was of the best quality; that samples of each lot were tested in the

defendant's shops in the usual and most approved manner; that all materials were inspected, as well as the work done, by first-class inspectors; that he himself examined thoroughly all cars purchased by the company, as to the character of the cars, the material used, and their manufacture; and that no car was allowed to go on the road in which he could discover any defect which would make it unsafe. It appeared that the system of inspection of cars which were purchased, and the tests applied to the materials of which its cars were manufactured, were the same as those adopted or applied by railroad corporations generally. . . . So far as we are able to judge from the testimony, the defect in the brake-rod was a latent one, which would not likely be detected or discovered by the usual examination or inspection of the car. . . . There should be at least some testimony tending to show that the tests applied to determine the sufficiency of the brake-rod were inadequate and not in accordance with the most approved methods, to justify the finding of the jury."

In *DeGraff v. New York C. & H. R. R. Co.* (1879) 76 N. Y. 125, in commenting on the contention of the plaintiff that the exercise of ordinary care would have discovered the defect in the coupling chain which broke and injured him, and that the defendant neglected to exercise such care, the court said: "There was an entire absence of evidence, as to the nature and character of the defect, or the cause of the breaking; . . . or, in the next place, there was a failure of evidence to show that the defendant, its servants, or agents, did not exercise reasonable care, or make suitable and proper examination." As to the claim that these chains should be detached at intervals, and their strength tested by hydraulic pressure, or dead weight, or by some other mode, which would be effectual for that purpose, it was said: "Such a requirement is unreasonable, and unnecessary, either to insure the safety of the public or employees. . . . As a general rule the degree of vigilance required is measured by the dangers to be apprehended or avoided. It does not appear to be necessary that the full strength of these chains should be kept up. That would involve a test on every trip, and a possible renewal on every trip. Again, on a train of thirty cars, each one having a brake, it would not seem to be indispensable that every brake-chain should be perfect, as but a few of that number could or would be used in controlling the train; and again, it does not appear that the breaking of a chain would ordinarily result in such an accident. Such chains frequently break, as the evidence shows, but there is no evidence that an injury ever resulted from such breaking, nor that it would ordinarily do so."

In *Philadelphia & R. R. Co. v. Hughes* (1888) 119 Pa. 301, there were three points for the inspection of certain coal cars within 20 miles, besides other alleged inspections at the coal-chutes, by an employee who had these cars in his special charge. The court said: "The inspections at these points were not minute or critical; they were limited to a hurried examination of the most exposed and important points; the cars were subjected to a thorough examination only when turned into the shop for repairs. Whether this provision of the company in view of the heavy grades along the road, and the number of cars to be inspected, was a reasonably adequate one, would, if the question were material, be for the determination of the jury. It is absurd, 41 L. R. A.

however, to suppose that in these inspections the company was required to remove the bolts, screws, pins, or other appliances belonging to the machinery of a car, en route, in order to detect any possible imperfections."

A servant of a railroad company has no right to demand an inspection of cars at every station, though that will afford greater security against accidents. *Smooth v. Mobile & M. R. Co.* (1890) 67 Ala. 13.

A railroad company is, as matter of law, not liable for injuries caused by the breaking of the lever of a hand-car, where it gives way owing to a crack in part of the wood which is concealed by an iron socket, and no one could have discovered the defect by an external inspection. *Louisville & M. R. Co. v. Hinder* (1895) 16 Ky. L. Rep. 841, holding that a verdict should have been directed for the defendant.

An allegation that the plaintiff was injured by reason of a defective brake-staff, and that it might have been discovered by proper inspection at the inspecting station, was held to have been sufficiently proved. The inspector himself testified that he did not go on top of the cars to do the inspecting, and was not acquainted with stuck brakes put up and let off by hand, and an expert testified that there was nothing to indicate, when a brake was applied, that it was stuck, but that fact became apparent only when the brakeman attempted to let it off. *Louisville & N. R. Co. v. Binion* (1894) 107 Ala. 645.

The inspection of a brake-staff is not adequate unless it extends to the portion which rests within the socket. *Moon v. Northern P. R. Co.* (1891) 46 Minn. 106.

A judgment for the plaintiff will be reversed where it rests upon a special verdict which finds that, upon inspection made at different times and in different places, no defect was discovered in the brake-staff of a foreign car from which the plaintiff's injury resulted, and that such defects as existed could not have been discovered without taking the brake-staff of the car and striking it with a hammer. *Chicago, St. L. & P. R. Co. v. Fry* (1891) 131 Ind. 319.

The court refused to set aside a judgment for the plaintiff, where he was injured by the giving way of a brake-shaft, where a subsequent examination showed that there was an old fracture in the shaft, and a weld at the place of the fracture and a silver joint above it. It was considered reasonable to infer that, upon proper inspection, these appearances would have invited scrutiny, and led to a discovery of the defect. *Texas P. R. Co. v. O'Fiel* (1890) 78 Tex. 486.

In *Louisville & M. R. Co. v. Campbell* (1892) 97 Ala. 147, it was held that there was no case to go to the jury where a brakeman was injured through the giving way of a brake-rod in which there was an old crack which could have been discovered only by taking it out or lifting it up. The court said: "We have seen that the undisputed evidence shows that ordinary inspections of brakes are never made on well-regulated railroads, by taking out or removing the rods; and that it would be impracticable to do so. Indeed, common observation and experience suggest the impracticability of such a system. If one brake should be taken apart and examined, all should; and if all, then every other machine or appliance connected with the train and composed of adjustable parts. To do this would cripple and embarrass the operation of the road beyond any requirement of the law.

We are of opinion that such an inspection is an extraordinary duty called into being only by some exigency which could suggest to the mind of a reasonably prudent person a necessity for its performance." The fact that a part of the break had existed long enough for rust to accumulate was too uncertain a predicate to rest a charge of negligence upon.

A railroad company is not liable to an employee injured by falling from a hand car which he was assisting to operate, due to the breaking of a handle by which the lever was worked owing to a defect which could not have been discovered without removing the handle from the socket, in the absence of actual knowledge of the defect by the company. *Louisville & N. R. Co. v. Hinder* (1895) 16 Ky. L. Rep. 841.

In *Read v. New York, N. H. & H. R. Co.* (1897) 20 R. I. pt. 1, p. 211, a verdict for the plaintiff was set aside where the evidence on the part of the defendant tended to show that a flaw in a brake-rod was not discoverable, owing to rust on the rod, by the usual methods of inspection, and there was no evidence on the part of the plaintiff to rebut this, his testimony to the effect that the defect would have been discernible by the eye if it had been daylight being held to be merely his inference from the fact that the brake-rod was so easily twisted off in his attempt to set the brake.

In *Palinton v. Northern C. R. Co.* (1890) 83 N. Y. 7, a brakeman was injured by the breaking of a defectively welded eye-bolt connecting the chain with the rod of a brake. There was no evidence of notice of the defect to defendant, or any of its agents, or that it could have been discovered by inspection, except that the maker could have discovered it by bending the bolt while hot and in other ways, but it did not appear whether the eye-bolt was made by the company or purchased; and no want of care, the exercise of which would have discovered the defect, was shown. The plaintiff, it was held, could not recover, in so far as his case rested upon the imperfection referred to.

In *Tierney v. Minneapolis & St. L. R. Co.* (1886) 33 Minn. 311, the court said: "It is difficult to lay down a general rule which will be applicable in practice, and define accurately the limits of the master's liability in this class of cases. But if the special duty and responsibility belong to the car inspector to examine and determine whether a car is unfit for service, and shall be so marked and sent to the repair track or shop, it is difficult to discover any distinction in kind between his duty and that of the mechanics who make the repairs. It will also be borne in mind that the measure of liability on the part of the company is reasonable care, which must be determined by the circumstances in each case. Experience in the competent and practical management of railroads will naturally determine the nature and frequency of inspections which ordinary care would require should be made between the intervals of the more minute examinations at the general repair shops. But the general examinations which experience has shown practicable and necessary to be made of cars at the yards designated for such purpose, without causing undue delay while in the course of transportation, would at least include such patent defects as would be readily discoverable upon inspection by a competent person in the exercise of reasonable care."

A loose bolt or screw on one end of a handhold on a railroad is a defect which could have been discovered by an inspection conducted with ordinary care. *Bran v. Chicago, R. I. & A. L. R. A.*

P. R. Co. (1880) 53 Iowa, 595, 36 Am. Rep. 243.

For injuries alleged to be caused by the breaking of a push pole made out of cross-grained, wind-shriveled, and knotty wood it was held on demurrer that a railroad company was not liable where there was no allegation of a lack of ordinary care in providing appliances or of the defendant's knowledge of the defects. *Norfolk & W. R. Co. v. Jackson* (1888) 95 Va. 489.

The fact that a stake on a lumber car is "decayed, rotten, and dozy," according to the uncontradicted testimony, shows that there has been no efficient inspection of the loading of the cars. *Ryan v. New York C. & H. E. R. Co.* (1905) 88 Hun, 269.

In *Watts v. Hart* (1893) 7 Wash. 178, the defendant was absolved from liability where the only visible defect in a piece of timber used for "staking" cars was a small knot.

In *Manser v. Eastern Counties R. Co.* (1861) 3 L. T. N. S. 585, a wheel of a passenger car had been examined by the "hammer" test when new, and found to be apparently sound. After much use which reduced its thickness considerably, it was returned but not subjected to the same test. There being evidence to the effect that if the same test had been applied a defective weld would have been discovered, it was held that it was for the jury to say whether the defendant had been guilty of negligence in regard to a passenger who was injured through the breaking of the wheel.

It is negligence to send out a car with a handhold so defective that its condition is obvious to one making the most casual inspection. *Settle v. St. Louis & S. F. R. Co.* (1894) 127 Mo. 336.

A railroad company is liable for an accident to a brakeman free from contributory negligence, caused by the absence of a nut from the top of a brake-staff which held the lever fast to it, notwithstanding an imperfect inspection made a short time before the injury. *Hayden v. Platt* (1895) 84 Hun, 487.

A brakeman employed in shifting cars and making up trains, injured because of a defect in a chain on a brake of a car, without any fault on his part, is entitled to recover where the defect was or might have been known to the company by careful inspection. *Richmond & D. R. Co. v. Burnett* (1892) 88 Va. 538.

An employee of a railroad company may recover for injuries resulting from an accident occasioned by a defect in a brake-rod, which an investigation pursuant to a rule of the company would have revealed in time to prevent the accident. *Bailey v. Rome, W. & O. R. Co.* (1893) 139 N. Y. 802.

IX. *Employer's duty to know the character and capacity of his servants.*

See also III. b, 4, III. c, 4, *supra*, and XIV. b, 8, *infra*.

The obligations of an employer to keep himself acquainted with the character and capacity of his servants are in some respects quite analogous to those which are incumbent on him with regard to the inanimate agencies of his business. But the differences between the two types of cases are sufficiently important to render it more convenient to treat those relating to servants in a separate subdivision.

a. *At the time of hiring.*

We have seen that an employer is to a great extent entitled to act upon the assumption that instrumentalities purchased from persons

whose business it is to manufacture them are in a sound condition when they are first put in use. But he clearly would not be justified in acting upon the assumption that a servant who seeks a position is qualified for it. It is therefore well established that, where the service in which the servant is employed is such as to endanger the life and persons of coemployees, upon the plainest principles of justice and good faith, the master, upon engaging such servant, should be required to make reasonable investigation into his character, skill, and habits of life. *Western Stone Co. v. Whalen* (1894) 151 Ill. 472.

A master is "bound, as towards all the world, so far as reasonable care in their selection can accomplish that end, to employ none but competent and trustworthy servants; and if he falls in this by taking into his service those whom he knows to be incompetent or careless, he ought to answer to his other servants for the consequences which may happen to them from such neglect. *Chicago & G. E. R. Co. v. Harney* (1867) 28 Ind. 28, 92 Am. Dec. 282.

"While a railroad company is not responsible to one employee for an injury resulting from the mere negligence or incompetence of a coemployee in the same general employment, it is liable in such case where the company has been guilty of negligence in the employment of, or, after notice, continuing in employment of, a negligent or incompetent employee, thereby conducing to the injury." *Ohio & M. R. Co. v. Collarn* (1881) 73 Ind. 261, 38 Am. Rep. 134.

"It is the duty of the employer to exercise reasonable care, prudence, and discretion in ascertaining the character, habits, and fitness of his employees for the discharge of the duties to be assigned to them, and by proper supervision and superintendence to keep himself informed as to the manner in which the duties intrusted to them are performed." *Norfolk & W. R. Co. v. Nuckols* (1895) 91 Va. 193. [One of several rules said to be well recognized.]

In *Alabama & F. R. Co. v. Waller* (1872) 48 Ala. 459, it was said that the doctrine of common employment is not applicable where the offending servant is "incompetent in skill or prudence within the employer's knowledge" or "his reasonable means of ascertaining," and that the master is bound, in investigating the qualifications of his servant, to use "due or reasonable" care and diligence, the exercise of "ordinary" care and diligence not being sufficient to absolve him from liability.

In the absence of evidence as to the exercise of any care in his selection, proof that a servant who has been in the service but two or three weeks was incompetent when employed need not be supplemented by proof of the company's knowledge of his incompetency. The presumption that the employer had done his duty is overcome by proof that the servant was incompetent. Where one competent at the time of his employment becomes incompetent, or indulges in a habit which renders him incompetent during its indulgence, notice of the incompetency or of the habit must be brought home to the company, or the incompetency or habit must be so notorious as to charge the company with knowledge; but when the incompetency does not arise after the employment, but existed at the time, proof of notice is not necessary. *Lee v. Michigan C. R. Co.* (1891) 87 Mich. 574.

In *Bunnell v. St. Paul, M. & M. R. Co.* (1882) 29 Minn. 305, there was held to be sufficient evidence to sustain a verdict for the plaintiff on the ground that the defendant's master builder had employed a foreman of carpenters

with knowledge of his unfitness, where the testimony showed that the foreman had been in the defendant's employ only about four months before the accident caused by his negligence; that for three years before that time he had been in the insurance business; that he had never learned the carpenter's trade; and had, in all, never worked more than twelve weeks as a carpenter.

In *Gibson v. Northern C. R. Co.* (1880) 22 Hun, 289, a car inspector who failed to discover and note a defect, was thirty-four or thirty-five years old, and had worked for three or four months in a railroad yard in Ireland, putting brasses into freight cars, but, with this exception, had been employed as a common laborer, and was not a mechanic, and was without knowledge of machinery up to the time of entering the service of the defendant. He worked in the defendant's carpenter shop, repairing cars, putting in brasses, bolting, and putting in boxes, and assisting in the shop, from one to two years, and was then made car inspector. His sobriety and intelligence were not questioned, nor was there any evidence that he had, before or since, failed to detect defects, or had been charged with incompetency, or that any person in authority had reason to suspect that he was incompetent. His evidence showed clearly that he understood the details of his business, and appeared to have been given intelligently. It was held that negligence in employing him as a car inspector was not shown.

To enable a servant to recover on the ground of the offending fellow servant's incompetency, the plaintiff must show, not only the incompetency, but that "the defendant failed to exercise proper care and diligence to ascertain his qualifications and competency prior to his appointment, or failed to remove him after his incompetency had come to the notice of some agent or officer of defendant having the power to remove the servant. *Wabash R. Co. v. McDaniels* (1883) 107 U. S. 454, 27 L. ed. 605, where the court said that "ordinary care in regard to the selection and retention of servants and agents implies that degree of diligence and precaution which the exigencies of the particular service reasonably require," and approved a charge containing the words "proper and great care," and declined to accept the suggestion of defendant's counsel that "ordinary care in the employment and retention of railroad employees means only that degree of diligence which is customary, or is sanctioned by the general practice or usage which obtains among those intrusted with the management and control of railroad property and railroad employees."

On the other hand, the employer's duty is fully discharged if "he makes careful inquiry into the habits and competency of the men employed and upon such inquiry believes, and has reason to believe, them sober, competent, and careful." *Moss v. Pacific R. Co.* (1872) 49 Mo. 167, 8 Am. Rep. 126. To the same effect, see *Indiana Mfg. Co. v. Millican* (1882) 87 Ind. 87; *Baltimore & O. R. Co. v. Henthorne* (1896) 43 U. S. App. 113, 73 Fed. Rep. 634; *Fines v. Sillery* (1893) 73 Hun, 549.

It is not the duty of the master to ascertain the qualifications of a servant "as a fact," for the imposition of such an obligation would be tantamount to a requirement that his qualifications should be warranted. *Illinois C. R. Co. v. Morrissey* (1891) 45 Ill. App. 127. Compare *Holland v. Tennessee Coal, I. & R. Co.* (1890) 91 Ala. 444, 12 L. R. A. 232, cited in c. 1, post.

Whether the master at the time of engaging

the servant, or afterwards, ought to have inquired whether he was experienced or not, or should have taken notice, under all the facts, of the probability that he was not, nothing being said on the subject by either party, is a question for the jury. *May v. Smith* (1893) 92 Ga. 95 (from syll. by ct.)

In *Corson v. Malne C. R. Co.* (1884) 76 Me. 244, the court held that if the jury undertook to decide that a person was unfit to be employed as a brakeman, on account of what they saw, or supposed they saw or could read, in his face and manner while testifying before them as a witness, they fell into a very grave error, and said: "As well might a jury find a man guilty of murder because in their opinion they could see guilt in his face. The law does not recognize physiognomy as an art or science sufficiently reliable to found a verdict upon,—not even against a railroad corporation."

In *Penslee v. Fitchburg R. Co.* (1890) 152 Mass. 155, it was argued that the jury had a right to determine from the appearance of a witness that he was so manifestly incompetent that the defendant was negligent in employing him as engineer. The court said there was nothing in the exceptions to show that there was anything in his appearance that would justify such an inference, and that it could not be presumed that there was. *Keith v. New Haven, infra*, was distinguished on the ground that there was other evidence of incompetency in that case, while in the case at bar the only evidence of incompetency was the single act of negligence.

In *Keith v. New Haven & N. Co.* (1885) 140 Mass. 175, the court declined to rule that the appearance and conduct of a car inspector in the presence of a jury, when considered together with other testimony tending to show his unfitness, might not be legally sufficient to satisfy them that he was an incompetent person.

Notice of a servant's want of competency for the duties of a brakeman cannot be imputed to an employer from the fact that he is a negro. *Missouri P. R. Co. v. Christman* (1896) 65 Tex. 369.

"The selection of a servant must be made with a view to the nature of the employment. If it involves special knowledge or experience, only men of special knowledge and experience should be employed. If the work may be well done by the unskilled and inexperienced it cannot be said that the master is lacking in the measure of care he owes to other employees, should he employ unskilled and inexperienced men upon it." *Holland v. Tennessee Coal, I. & R. Co.* (1890) 91 Ala. 444, 12 L. R. A. 232.

An employer's omission to question an applicant for work as to his competency is negligence only when there is no better source of information at hand, and cannot be imputed as culpable where information is sought from the applicant's former employer. *Gier v. Los Angeles Consol. Electric R. Co.* (1895) 108 Cal. 129.

b. At time of promotion.

The principles which are applicable where a servant is assigned to duties of a more onerous or responsible nature than those which he was previously discharging will be apparent from the following decisions:

An employer is bound to institute affirmative inquiries in order to ascertain the qualifications of a servant whom he promotes to a position for which special qualifications are demanded, unless the servant has given proof of his capacity in some similar position. *Evansville & T. H. R. Co. v. Guyton* (1888) 115 Ind. 450. There the court in commenting upon the evidence which was held to justify the jury in finding the defendant liable for the negligence of a conductor whom it had promoted without the usual examination, said: "It should be remembered that Stice [the conductor] had served the company as brakeman until quite recently before the unfortunate accident, and while his service as brakeman is not to be disregarded in determining his competency to act in the more responsible position of conductor, it does not follow, without more, that because he was an efficient and competent brakeman, and fit for promotion, he was also competent to take charge of and run a wild train."

In *Harper v. Indianapolis & St. L. R. Co.* (1871) 47 Mo. 507, 4 Am. Rep. 353, the court approved arguendo the doctrine formulated in *Shearm. & Redf. Neg. § 193*, that "proof of the employment of one who had always been a mere clerk or a common laborer, to run a steam engine, would raise a presumption of negligence on the part of the master, without showing that he had actual notice of the servant's antecedents."

But evidence which merely goes to show that a servant has been employed in an inferior capacity will not justify the inference that the master was negligent in employing him in a much higher capacity in the same line of business. *Edwards v. London & B. R. Co.* (1865) 4 Fost. & F. 531.

What time or training is requisite to make a competent engineer is a question of fact. Hence, where the evidence is that the culpable servant had been a mere laborer in a mine before he became the engineer, and that the whole time he had worked at the mine amounted to six months at the most, it is error to instruct the jury that proof of the employment of one who had always been a manual laborer or a mule driver, to run a steam engine, raises a presumption of negligence of the master, without showing that he had actual notice of the servant's antecedents." *Juch v. Dankwardt* (1877) 85 Ill. 331.

In *Louisville & N. R. Co. v. Kelly* (1894) 24 U. S. App. 103, 63 Fed. Rep. 407, 11 C. C. A. 260, the defendant requested an instruction to the effect that, in determining whether the fireman was competent to handle an engine to switch cars at a station, the jury should consider how long he had been engaged as a locomotive fireman, what were his capacity and aptness for learning to handle an engine, how often before he had handled an engine on similar occasions, whether firemen frequently do switching before being promoted to engineers, "that firemen after a certain period of service as firemen are promoted to engineers," etc. The comments of the court were as follows: "The last expression is objectionable. It assumes it to be a fact that promotions from the place of firemen to that of engineer were of uniform, or at least customary, occurrence 'after a certain period of service as fireman,' without regard to the capacity, habits, and temper of particular individuals. There was no proof of such custom; none such, of course, has ever prevailed. . . . If it is the prevailing custom of engineers to leave the firemen in charge of their engines when switching or similar work is to be done, then it is to be presumed that brakemen, when they engage or continue in their employment, do so with the knowledge of the custom, assuming the additional hazard which the custom involves."

a. During time of service.

1. Generally.

A master does not discharge his entire obligation in the matter of hiring servants by inquiring fully concerning an applicant's fitness at the time he takes him into the service. It is his duty to exercise proper supervision over the work of his servants and through such supervision to keep himself advised as to the continued fitness of those in his employ. *Baltimore & O. R. Co. v. Henthorne* (1896) 43 U. S. App. 113, 73 Fed. Rep. 634. See also *Norfolk & W. R. Co. v. Nuckols* (1895) 91 Va. 193; *Ohio & M. R. Co. v. Collarn* (1881) 73 Ind. 261, 38 Am. Rep. 134; *Wabash R. Co. v. McDaniels* (1883) 107 U. S. 454, 27 L. ed. 605, supra, IX., a.

An employer "is in no case held to an undertaking to select absolutely competent and careful servants. The rule requires of him no more than the exercise of reasonable care in either case,—such care only as men of reasonable and ordinary prudence exercise; and when he has done this he cannot be held responsible for injuries which result from the incompetency of servants, or latent defects in machinery, so selected and employed. The only further duty then upon him is, the exercise of care in ascertaining any incompetency of the servant, or defect in the machinery, which the service may develop, and thereupon discharging the one and discarding the other." *Holland v. Tennessee Coal, I. & R. Co.* (1890) 91 Ala. 444, 12 L. R. A. 232.

The duty of a master requires the institution of inquiries to ascertain their character and qualifications, but when suitable and competent persons have been employed, the same degree of diligence is not demanded. Good character and proper qualifications may be presumed to continue, and the master may rely on that presumption until notice of a change. *Blake v. Maine C. R. Co.* (1879) 70 Me. 60, 35 Am. Rep. 297, citing *Chapman v. Erie R. Co.* (1874) 55 N. Y. 579 (see *infra*).

Where an employer has shown due care in the choice of his servants no presumption arises afterwards that they have become unfit for their duties. *Michigan C. R. Co. v. Gilbert* (1881) 46 Mich. 176.

Thus, until informed to the contrary, a master has a right to assume that an agent or officer carefully chosen will use good judgment in making his own appointments and doing his own duties; and he has a right to rest upon that belief until, in the exercise of that general vigilance which devolves on himself, he finds they have been mistaken. *Michigan C. R. Co. v. Dolan* (1875) 32 Mich. 509.

In *Chapman v. Erie R. Co.* (1874) 55 N. Y. 579, the defendant complained of the following charge: "But, if after a competent and proper person is employed for such a duty, his habits become such that it is unsafe to trust him any longer in that capacity, the company are bound to use, through their proper officers, such reasonable care and diligence in ascertaining what the man is, after he is employed, as they would be in his original employment." The court of appeals upheld the objection, saying: "Good character and proper qualifications once possessed may be presumed to continue, and I see no reason why a principal may not rely upon that presumption as to these personal qualities until he has notice of a change or knowledge of such facts as would be deemed equivalent to notice, or at least such as would put a reasonable man upon inquiry. The charge permitted the jury without restriction or limit to determine what particular su-

pervision or watchfulness was necessary to exonerate the defendant from the charge of negligence. They might require periodical investigations, or an efficient detective system. They were at liberty to adopt any rule, and might adopt one which would practically make the defendant a guarantor of the correctness of every act of its employees. We have been referred to no authority for such a doctrine, and it would be manifestly unjust to adopt it." The court held that reasons for inspection of machinery or implements are not applicable to the case of an employee, and said: "If competent when employed, additional experience would naturally render him more so, and while his habits might change for the worse, there is no such depravity in human nature as in law requires special vigilance on the part of the employer to prevent it."

A master is not chargeable with notice of incompetency of a servant, so as to render him liable for the latter's negligence causing an injury to a fellow servant, by the mere statement of the latter that the former was incompetent, where he did not state facts showing incompetency. *Snodgrass v. Carnegie Steel Co.* (1896) 173 Pa. 228.

The plaintiff is rightly nonsuited where there is no evidence tending to prove that the employees, whose retention is alleged to establish negligence on the defendant's part, had ever shown any lack of skill or efficiency in the performance of their duties before the accident occurred in which the plaintiff was hurt. *Curran v. Merchants' Mfg. Co.* (1881) 130 Mass. 374, 39 Am. Rep. 457.

2. Single delinquency of servant prior to accident.

Proof of a single careless act of a street-car driver, committed at some past time, is not sufficient to show his incompetency or unfitness for the employment, so as to make his employment negligence of the company. *Dallas City R. Co. v. Beeman* (1889) 74 Tex. 291, following *Houston & T. C. R. Co. v. Myers* (1881) 55 Tex. 110, where this is assumed in the argument to be the correct principle.

The law will not go so far as to hold a railroad corporation to such an extreme of circumspection as to compel it to note, at its peril, every lapse of its employees, where no notice thereof is directly communicated, and where the circumstances are not such as to afford a reasonable inference of the derelict conduct of the employee having become known to the employer prior to the act which gives origin to the action for damages. *Huffman v. Chicago, R. I. & P. R. Co.* 78 Mo. 50, quoted with approval in *Zumwalt v. Chicago & A. R. Co.* (1889) 35 Mo. App. 661.

The most elaborate discussion of the question how far a master is chargeable with negligence in retaining a servant who is merely shown to have been guilty of a single act of negligence prior to that which caused the plaintiff's injury is to be found in *Baile v. New York & H. R. Co.* (1874) 59 N. Y. 356, 17 Am. Rep. 325, where the plaintiff was held to have been rightly nonsuited. The court said: "An individual who by years of faithful service has shown himself trustworthy, vigilant, and competent, is not disqualified for further employment, and proved either incompetent or careless, and not trustworthy, by a single mistake or act of forgetfulness and omission to exercise the highest degree of caution and presence of mind. The fact would only show what must be true of every human being, that the individual was capable of an act of negligence, forgetfulness, or error of judgment. This must be the case as to all employees of corporations

until a race of servants can be found free from the defects and infirmities of humanity. A single act may, under some circumstances, show an individual to be an improper and unfit person for a position of trust, or any particular service, as when such act is intentional and done wantonly, regardless of consequences, or maliciously. So the manner in which a specific act is performed may conclusively show the utter incompetency of the actor, and his inability to perform a particular service. But a single act of casual neglect does not, per se, tend to prove the party to be careless and imprudent, and unfitted for a position requiring care and prudence. Character is formed and qualities exhibited by a series of acts, and not by a single act. An engineer might from inattention omit to sound the whistle or ring the bell at a road crossing, but such fact would not tend to prove him a careless and negligent servant of the company. The company is only charged with the duty of employing those who have acquired a good character in respect to the qualifications called for by the particular service, and no one would say that a good character acquired by long service was destroyed or seriously impaired by a single involuntary and unintentional fault. (*Murphy v. Pollock* (1863) 15 Ir. C. L. Rep. 224.) But this appeal does not necessarily depend upon the correctness of this view of the effect to be given to a single instance of neglect. All that the corporation defendant was bound to do, after the occurrence, was to inquire into it, and ascertain the facts, and act in the discharge or retention of the switchman with reference to the facts as ascertained, as reasonable prudence and care should dictate, and if such care and caution was exercised, the company is not liable, although its general agent erred in judgment in retaining the switchman in the same service. Ordinary care and a reasonable exercise of discretion and judgment is all that is necessary to absolve the corporation from the charge of neglect of duty in such a case."

In *Evansville & T. H. R. Co. v. Guyton* (1888) 115 Ind. 450, the court said: "The idea is not to be tolerated that the law will pronounce a person, who is shown to be qualified by years of efficient service, incompetent because of a single mistake or act of forgetfulness. The fact cannot, however, be disguised that a single act, with the circumstances surrounding it, where the consequences are so overwhelming as the bringing of two trains of cars, running at a high rate of speed, into collision, on the same railroad track, may tend very strongly to show the incompetency of the actor to perform the service to which he was assigned."

The mere fact that a yard master had sent an engine upon the track when a coming train was overdue does not conclusively show that the company was negligent in keeping him in its service, since he might have had information showing that the train would not arrive for some time. *Michigan C. R. Co. v. Gilbert* (1881) 46 Mich. 176.

Of course there is no difficulty in holding that the fact that an engineer in a coal mine has on a previous occasion made a missholst does not charge his employer with knowledge of his incompetency so as to make it liable to one killed on the subsequent occasion of a missholst, where there is no evidence that it was notified of the accident. *Mulhern v. Lehigh Valley Coal Co.* (1894) 161 Pa. 270.

In *Murphy v. Pollock* (1863) 15 Ir. C. L. Rep. 224, *Deasy, B.*, and *Pigot, C. B.*, held that the fact of an employer's hiring and retaining in his employment an incompetent person is evidence from which a jury may fairly infer that

the employer was aware of such incompetency. *Fitzgerald and Hughes, BB.*, considered that, even supposing a reasonable man might, from the single act adduced in this case to establish the incompetency, infer that he was wanting in ordinary skill and care, such a deduction was not itself evidenced from which a reasonable man could infer want of reasonable care on the master's part in selecting him or knowledge of his incompetency. In the *Exchequer Chamber* it was held, on a review of the facts, that there was no evidence to go to the jury upon the question of the delinquent servant's incompetency, or of the employer's knowledge of such incompetency. The above general propositions as to the onus of proof were not discussed.

In *Parker v. New York & N. E. R. Co.* (1895) 18 R. I. 778, the court denied that "the point urged by plaintiff's counsel, viz., that as no person remained at the switch during the day, in accordance with the custom to have someone there constantly, the jury may properly have inferred that the defendant knew that it was unattended, and hence was guilty of negligence, is of any importance, so long as someone was provided to look after the same, for it was clearly not necessarily incumbent on the defendant to have a switchman there continuously. Its duty was to provide a competent person to take care of the switch during the temporary absence of Tourtellot [the regular switchman] and having done this, it had the right to presume that the person so provided would discharge his duty. And the mere fact that he did not remain at said switch continuously during . . . the temporary absence could not properly be construed by the jury as an implied notice to the company that said switch was unattended."

In a suit against a railroad company by a brakeman to recover damages for injuries received while coupling cars, evidence that the engineer, shortly before, had declared to the plaintiff that he "would as soon run over him as not," is admissible as bearing upon the question whether the company selected an unsuitable man for engineer, but the jury should be charged that, if the malice of the engineer toward the plaintiff was the cause of the injury, there could be no recovery. *Houston & T. C. R. Co. v. Willie* (1880) 53 Tex. 318, 37 Am. Rep. 756.

3. Several previous delinquencies.

The controlling principle which determines what deductions may properly be drawn from evidence that he has been guilty of several derelictions of duty before the particular act which caused the injury in suit is entirely analogous to that which has already been noticed in connection with the subject of prior failure of inanimate appliances—that is, such evidence is competent to establish negligence on the master's part in retaining the servant, but not to establish the actual fact that the servant was wanting in due care at the time when the accident occurred, or was generally incompetent.

The former branch of the rule is illustrated by the following decisions:

Negligence in retaining a servant may be established by showing that before his careless act had caused the injury complained of he had committed several acts of the same character. *Huffman v. Chicago, R. I. & P. R. Co.* (1883) 73 Mo. 50.

If it is shown that the master knew of the acts, or that they were of such a character and so frequent that he must have known of them, the master may be chargeable with negligence

in retaining such servant. *Michigan C. R. Co. v. Gilbert* (1881) 46 Mich. 176.

In *Pittsburgh, Ft. W. & C. R. Co. v. Ruby* (1871) 38 Ind. 294, the court said: "We think that it is well settled, not only by the authorities, but in reason and on principle, that for the purpose of showing that the officers of a railroad company had not exercised due care, prudence, and caution in the employment, or in retaining in service of careful, prudent, and skilful persons to manage and operate such road, and for the purpose of charging such corporation with notice of the incompetency of its employees, it may be shown that such employees had been guilty of specific acts of carelessness, unskillfulness, and incompetency, and that such acts were known to such officers prior to the employment of such agents, or that such employees had been retained in such service after notice of such acts." Citing *Gahagan v. Boston & L. R. Co.* (1861) 1 Allen, 187.

A railroad company is liable for the death of an employee, caused by disobedience of its rules by a fellow servant, where such disobedience is habitual, and has come to its knowledge and is pursued with its acquiescence, or is the result of a want of vigilance in supervising the conduct of its employees. *Whittaker v. Delaware & H. Canal Co.* (1891) 126 N. Y. 544, *Affirming mem.* (1890) 84 N. Y. S. R. 822.

Evidence that a certain engineer was careless in handling his engine in making couplings; that he had been reported to the conductor; and that his engine was constantly being repaired for defects which would not have occurred had he exercised proper care,—is sufficient to charge the railroad company with notice of his incompetency, although there is testimony that he was a careful and safe engineer. *Houston & T. C. R. Co. v. Patten* (1888; Tex.) 9 S. W. 175.

In *Coppins v. New York C. & H. R. R. Co.* (1890) 122 N. Y. 557, the defendant was held liable, where the servant was shown to have been absent several times a month at an hour when his presence was demanded to secure the safe operation of the road, and this dereliction of duty was known to the servant's immediate superior.

Where it appears that a servant has been repeatedly guilty of carelessness or incompetency it is usually for the jury to determine whether the master knew of it or would have known if he had exercised ordinary care. *Michigan C. R. Co. v. Gilbert* (1881) 46 Mich. 176.

In *Chapman v. Erie R. Co.* (1874) 55 N. Y. 579, evidence was given that the negligent servant was in the habit of drinking daily, many times, and had become somewhat dissipated, and that he was intoxicated on the night of the accident. The evidence of knowledge, or notice to the defendant's representatives, was not conclusive, but facts were proved from which the jury might infer such knowledge. They were accustomed to daily intercourse with the servant, saw him in drinking places, and were present on some occasions when he drank. On one occasion one of them testified that he reprimanded the servant for drinking. On another occasion a witness thinks that he heard the same one say that "he must quit this," referring to his drinking habits. Held, that a motion for a nonsuit was properly denied. The court said: "It is quite evident that both . . . [the employer's representatives] had an opportunity to know the fact from actual observation; and we think the jury might infer that they did know it, although they each testified that they did not recollect of seeing him drink, or of seeing him when he was

intoxicated. It was for the jury to determine the credibility of witnesses and the weight and construction to be given to the evidence. If there was any evidence to justify a verdict, the motion for a nonsuit was properly denied, and we think there was."

Where evidence is given tending to show that a servant was in an intoxicated condition as often as two or three times a week, that this was his usual condition for nearly two years before the accident, during all the time he worked for the defendant, and that the defendant's superintendent was personally present at the place of that work every other day, and was there the day on which the accident happened; but no direct testimony is offered that defendants knew of the habits of Delamater,—it is error to nonsuit the plaintiff. *Tonnese v. Sanford* (1890) 58 Hun, 415,—the court remarking that the superintendent was so frequently present where the servant was at work, and the habits were proved to be so settled and continuous, that it was a question for the jury to pass upon as to his knowledge or means of knowledge.

Evidence tending to show that during the summer preceding the accident, the delinquent servant had, on numerous occasions, run engines through the defendant's yard and in and across the streets of the city where the accident occurred, without giving any notice of their movements; that this was known to the train dispatcher and superintendent of the defendant's road; and that this course of action upon his part was so frequent and continuous that it should have been known to the defendant's officers if they had properly discharged their duty,—is sufficient to justify the submission to the jury of the question whether the defendant's officers, whose duty it was to employ and discharge employees occupying the position held by the delinquent servant, knew, or ought to have known, that he was thus habitually negligent. The court committed no error in submitting the question of defendant's negligence to the jury, and that its finding upon that question should be upheld. *Wall v. Delaware, L. & W. R. Co.* (1889) 54 Hun, 459. (*Coppins v. New York C. & H. R. R. Co.* (1888) 48 Hun, 292.)

Evidence of the commission of several previous acts of negligence similar to that which caused the injury raises a question for the jury whether the master was negligent in keeping the delinquent servant in his employment. *Sutton v. New York, L. E. & W. R. Co.* (1892) 50 N. Y. S. R. 514.

In *Chapman v. Erie R. Co.* (1874) 55 N. Y. 579, it was objected that the trial court had erred in admitting in evidence a declaration by the defendant's superintendent that he had heard that the negligent servant had been "off on a spree, drinking;" that the servant did not deny it, and that the superintendent reprimanded him for it. The court of appeals, however, said: "As evidence of the fact of the habit of drinking it [the declaration] was not admissible, within the general rule, that the declarations of an agent will not bind the principal unless made at the time of doing some act within the scope of the agency, and which in fact constitutes a part of the act itself ([*Luby v. Hudson River R. Co.* (1858)] 17 N. Y. 181; [*First Baptist Church v. Brooklyn F. Ins. Co.* (1863)] 28 N. Y. 153.) But we think this evidence was competent to prove notice to Flak [the superintendent]. Other evidence was produced that Allison [the negligent servant] was in the habit of drinking to excess, and the remark, if it had reference to such habit, was

pertinent to establish that he knew it. It would be competent to prove that a third person told him of it; and it is more satisfactory to establish the fact that he admitted such knowledge at the time. It is evidence of a material fact. An admission afterward that he had known the fact would stand upon a different footing. It is not error to receive evidence, if competent, for any purpose."

In *Hilts v. Chicago & G. T. R. Co.* (1885) 55 Mich. 437, the only question to be determined by the jury was whether the defendant was negligent in failing to learn as to habits of intoxication of the engineer who was competent and safe when hired. The court said: "If the engineer was addicted to the habitual use of intoxicating liquor to such excess that his intoxicated condition was observed and known by the employees and others coming in contact with him for a period covering several months of time, and if by inquiry or observation the officers of the company during that time would have discovered his unfitness for the position of engineer by reason of his habits of becoming intoxicated, the omission to make inquiry or to observe his condition is negligence fully as culpable as if they had employed a notoriously incompetent engineer without inquiry." The jury specially found that before the accident he had been intoxicated or under the influence of liquor when running his engine three times, and their verdict for plaintiff was sustained.

In *Zumwalt v. Chicago & A. R. Co.* (1889) 35 Mo. App. 661, the only evidence tending to show that during the period of a brakeman's employment he had exhibited habits of intoxication, was testimony of one witness as to such habit about four years prior to the accident. The court remarked that this testimony did not fix any considerable length of time during which these habits continued, and that there was no evidence to show such habit during the subsequent four years. The defendant, on the other hand, adduced a mass of evidence tending to show that during his employment for a part of nine years with short intervals during which he had voluntarily quit work, he had demeaned himself as a sober and competent man. There was no evidence whatever that any officer of the defendant, having power to employ and discharge brakemen upon its trains, knew of any such habit in the brakeman, at the time when the accident took place, or at any other time. The master was held not liable.

In *Frazier v. Pennsylvania R. Co.* (1890) 38 Pa. 104, 80 Am. Dec. 467, it was held that "character for care . . . must . . . be proved by evidence of general reputation, and not of special acts." The court referred to *Greenl. Ev.* §§ 461-469, for the general principle, and said: "Character grows out of special acts, but is not proved by them. Indeed, special acts do very often indicate frailties or vices that are altogether contrary to the character actually established. And sometimes the very frailties that may be proved against a man may have been regarded by him in so serious a light as to have produced great improvement of character. Besides this, ordinary care implies occasional acts of carelessness, for all men are fallible in this respect, and the law demands only the ordinary."

But this has been said, in *Pittsburgh, Ft. W. & C. R. Co. v. Ruby* (1871) 38 Ind. 294, to "stand alone unsustained and unsupported." The following decisions are based on the second branch of the rule:

In *Hatt v. Nay* (1887) 144 Mass. 186, the 41 L. R. A.

plaintiff desired to put in testimony as to certain specific acts of carelessness on the part of the foreman while engaged on the same job, and before the accident happened. The court said: "This was properly excluded. Because a servant may have been guilty of negligence on certain specified occasions, it by no means follows that he was on the occasion in question, or that he might not ordinarily be a careful and skilful workman, and properly employed as such. The investigation of other individual acts of alleged carelessness on the foreman's part would necessarily have a tendency to confuse the case by collateral inquiries, to protract it indefinitely if those inquiries were carefully made, and to mislead and distract a court or jury from the true issue. *Robinson v. Fitchburg & W. R. Co.* (1856) 7 Gray, 62; *Maguire v. Middlesex R. Co.* (1874) 115 Mass. 239."

A jury should not be told that if they find the delinquent fellow servant was frequently, and for an improper length of time, absent from his post, and the practice was known, they might consider the fact as bearing on the question of his skill and competency. *Kindel v. Hall* (1890) 8 Colo. App. 63.

Yet in *Gier v. Los Angeles Consol. Electric R. Co.* (1895) 108 Cal. 120, it was remarked that evidence of individual acts evincing negligence or incompetency is admissible, not to show his reputation, but that the employee was inevitably unfit or incompetent.

4. *After what time knowledge of servant's unfitness will be inferred.*

To affect the employer with liability for the incompetency of a servant, it is not necessary that it should actually be brought to his knowledge. If it continue for such a length of time that a careful and diligent supervision of its business ought to bring it to light, he is chargeable with notice of its existence. *Whittaker v. Delaware & H. Canal Co.* (1891) 126 N. Y. 544.

Whether the master ought to have discovered, prior to the accident in suit, that the culpable servant had been so frequently guilty of acts indicating that his continued employment was negligence as regards his co-servants, is, as in all these cases, primarily a question for the jury. The extent to which one court of eminence has gone in controlling the findings of a jury will be apparent from the elaborately discussed case of *Cameron v. New York C. & H. R. Co.* (1895) 145 N. Y. 400, where a verdict was set aside by which a railroad company was declared to be negligent in retaining a brakeman who had habitually violated a rule. The following extracts from the opinion sufficiently explain the grounds upon which the conclusion was based: "There is no arbitrary rule of law that charges the master with constructive notice of the negligent omissions of duty on the part of a co-servant, after the lapse of a certain time, under all circumstances. The doctrine of constructive notice is founded upon reasonable and just considerations, and the mere lapse of time is not always the test of negligence on the part of the master. If a defect exists in the appliances furnished the servant for doing his work of such a character and for such a length of time as to enable the master to discover and remedy it by reasonable vigilance, inspection, or examination, then the law will imply notice, since he ought to know what can thus be ascertained. The same rule will apply where the place furnished to the servant to do his work becomes

defective, dangerous, or unsafe by use or otherwise. So, when the negligence of a coservant in performing his work is of such a character as to leave traces or evidence of it in the work itself, which can be seen or discovered by reasonable examination, the master might be chargeable after it had continued for such a length of time as to render it reasonable to assume that he either must have known of the omission of duty, or could have known of it by the exercise of reasonable care, or where the incompetency of the servant is frequently displayed under the eye and observation of some officer or foreman who represents the corporation or had the power to discharge him. But how was the master in this case to know that Norton habitually violated the rules for his own protection and that of his coservants? His work was performed on freight trains running over a long line of railroad, with little, if any, opportunity for any officer or representative of the company to watch or observe him at any one point. He had sufficient ability and intelligence to do his work, and his omissions of duty were purely wilful or thoughtless. It would be manifestly unreasonable and unjust under such circumstances to impute negligence to this defendant for the sole reason that during four months it failed to detect his delinquencies. The defendant had given him by its rules plain and simple instructions to govern his conduct with respect to the switches, and there was no reason to suspect that they would be disregarded, since it was quite as convenient for him to obey as to violate them. Moreover, it had in these same rules invited and requested all of his coservants to make prompt report to the company of any neglect or disobedience of the rules on his part, and no complaint had been made. It was reasonable to assume that his coemployees, whose lives might be endangered by his neglect, would observe and report his omissions of duty, if any, and if they failed to observe any, how can it be said that the defendant itself was in fault for not discovering what his coservants themselves had not discovered? The negligent acts of Norton took place while he was working on the same train and in a like capacity with the deceased. It is more reasonable to suppose that they were done in his presence, or under his observation, than to imply knowledge on the part of the defendant, and if it can be said that the deceased knew of these omissions of duty on the part of his fellow brakeman, and failed to report them, he might be regarded as voluntarily assuming the risks and dangers incident to his association in a common work with a careless or incompetent coservant. There is a manifest inconsistency in assuming that the officers or representatives of the defendant knew, or could have known, of Norton's violation of the rules, and at the same time that the deceased did not. On the evidence in the case it is true that the defendant's servant was unfaithful, and that his want of care resulted in the death of the plaintiff's intestate. But the defendant cannot be made liable for his negligent act, unless it was at fault in selecting him for the work, which is not claimed, or in failing to adopt such means as ordinary prudence and care would dictate to secure his fidelity, and we are unable to perceive what more it could have done, unless it employed other men to watch his conduct, and that would be plainly an unreasonable requirement."

d. *General reputation of the delinquent servant as notice to the master.*

1. *Generally.*

Where an injury has occurred through the in-

competency, recklessness, or unskillfulness of a servant who was generally known and reputed to be unfit, reckless, or unskillful, evidence of the fact that he was generally so reputed, is competent as tending to show that the master, by the exercise of that ordinary and reasonable care required in his employment, could and ought to have known of his unfitness, want of skill, or reckless habit. *Western Stone Co. v. Whalen* (1894) 151 Ill. 472, approving the following statement of principles in *Shearman & Redfield on Negligence*, § 223: "In applying the rule just stated, it is clearly sufficient for a servant, injured by the incompetency of a fellow servant, to prove that such fellow servant's incompetency was actually known to the master, or to his responsible representative to whom the power of discharging had been delegated, or that either of them had received information of the fact sufficient to put a reasonably careful man upon inquiry, or that the servant had a general reputation for incompetency, to such an extent that, if the master had maintained a habit of vigilant supervision and inquiry, he would probably have learned the fact."

As a master is bound to use due care both in procuring and retaining suitable persons as servants, evidence that an employee's reputation for competency was bad, is competent upon the question whether the master was negligent in hiring him. *Hatt v. Nay* (1887) 144 Mass. 180.

Hence, where evidence has been given that the servant through whose misconduct the accident in suit occurred was drunk at the time of such accident, it is proper to admit evidence that the master, through his agents, knew or ought to have known, from a due supervision of his employees, that the culpable servant had a general reputation of being an habitual and excessive drinker of intoxicating liquors. *Baltimore & O. R. Co. v. Henthorne* (1896) 43 U. S. App. 113, 73 Fed. Rep. 634.

On the other hand, evidence going to show that a fellow servant of the plaintiff had a reputation for recklessness is incompetent, where there is no proof that the injury in suit was caused by any improper conduct on his part. *Hawk v. Pennsylvania R. Co.* (1887; Pa.) 9 Cent. Rep. 786.

So, evidence of the culpable servants' general reputation for intemperance is irrelevant where there is no evidence that he was drunk or negligent at the time of the accident. *Norfolk & W. R. Co. v. Hoover* (1894) 79 Md. 253, 25 L. R. A. 710.

An instruction is erroneous which tells the jury that unless the culpable servant was drunk at the time of the accident, and his negligence by reason of such drunkenness produced or contributed to the accident, evidence of general reputation as to his incompetency is not relevant and cannot be considered "unless such reputation was brought home to the knowledge of the defendant before the accident." The condition thus appended is inaccurate, because, on the one hand, if the culpable servant did not cause the accident, the master's knowledge of his reputation has nothing to do with the case; while, on the other hand, if the culpable servant did, by his intemperance, cause the accident, it is immaterial whether the master had actual knowledge of his bad reputation, inasmuch as he was negligent in not knowing it. *Norfolk & W. R. Co. v. Hoover* (1894) 79 Md. 253, 25 L. R. A. 710.

Where the employer is a corporation, unless actual knowledge of the habits of the servant which render him unfit for the employment is brought home to some one of its officers who

has power to employ and discharge such employees, the plaintiff must, in order to make out the right to recover upon the ground of its negligence in retaining the servant, show that the unfit habit of the servant was so notorious that such officer or officers of the defendant ought to have known of it by reasonable care and inspection. *Zumwalt v. Chicago & A. R. Co.* (1889) 85 Mo. App. 661.

If the injury result from the negligence or misconduct of an agent of the company, liability can be imposed on it by showing incompetency of the agent, and the want of reasonable care and prudence in his selection, or his continuance in place after notice of his unfitness. *New Orleans, J. & G. N. R. Co. v. Hughes* (1873) 49 Miss. 258.

Evidence that an employee was, when first employed, reputed to be an habitual drunkard in the community where he lived, and that, while in the employment, he was drunk every night, is competent to show that the defendants knowingly, or in ignorance caused by their own negligence, employed an habitual drunkard, and thereby occasioned the injury. *Gilman v. Eastern R. Corp.* (1885) 10 Allen, 233, 87 Am. Dec. 635, 13 Allen, 433, 90 Am. Dec. 210.

This case was followed, and the general principles elaborately discussed, in the following passage of the opinion in *Davis v. Detroit & M. R. Co.* (1870) 20 Mich. 105, 4 Am. Rep. 364: "If the defendants continue a man in their employ who is so notoriously unfit as to have established a general reputation to that effect, it is unreasonable, the plaintiff argues, to suppose the officers of the defendants ignorant of that fact, unless we excuse their want of information on the ground of neglect of duty on their part to their employees and the public so gross as to make it proper and just to hold them responsible to the same extent as if they were fully informed of all the facts. And if they fail to inquire into the cause of accidents where manifestly this is an important part of their duty, and a high obligation rests upon them to accomplish it thoroughly and faithfully, they cannot afterwards justly plead their ignorance to excuse their principal from responsibility for other accidents resulting from the same cause. It is plain, however, that Harris is not shown to have a general reputation for carelessness or unfitness of any description. No one ventures to express an opinion to that effect. The evidence only tends to show that when an accident occurred, remarks were made that he was careless, or that he went too fast. They were such remarks, we suppose, as were almost certain to be made in any case, when an unfortunate accident occurs, while the consequences are exciting the bystanders, and before inquiry and calm consideration have determined whether there is any basis for them in justice or not. Such remarks are of very trifling importance, and if they would tend to convict a man of negligence, few engineers of much experience, we apprehend, would escape condemnation. And of how little importance they were in the present case, and how little likely to express settled opinions, may be inferred from the fact that no one of the persons supposed to have made these remarks is placed upon the stand to testify to facts which would justify them. We think, therefore, that the evidence of reputation should be dismissed from further consideration. It will not be inferred from what we have said, that we should hold that evidence of a general reputation, such as was sought to be proved in this case, would be inadmissible. From the 41 L. R. A.

language employed in some cases it might be supposed that the notice of unfitness, which was to charge the employer, must be nothing else than actual notice; but we are not disposed to question in the least the correctness of the doctrine advanced in the case of *Gilman v. Eastern R. Corp.* (1885) 10 Allen, 233, 87 Am. Dec. 635, and which put upon the employer the responsibility of negligently employing an unfit person, generally known and reputed to be such, notwithstanding the employer may in fact have been ignorant of such unfitness. The ignorance itself is negligence in a case in which any proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative. See *Wright v. New York C. R. Co.* (1862) 25 N. Y. 566."

In *Norfolk & W. R. Co. v. Hoover* (1894) 79 Md. 253, 25 L. R. A. 71, the court put the question: "Can you fix upon the master a failure to use due care in selecting careful servants by showing such notorious or general reputation respecting the servant's unfitness or incompetency as that the master could not, without negligence on his part, have been ignorant of it when he employed the servant?"—and answered it as follows: "About this there ought to be no difficulty. If the servant's general reputation before employment is so notorious as to unfitness as that it must have been known to the master but for his, the master's, negligence in not informing himself—if he could have been ignorant of it only because he failed to make investigation,—then it is obvious that he has not used the care and caution which the law demands of him in selecting his employees. Hence, the servant's general reputation for unfitness may be sufficient to overcome the presumption that the master used due care in his selection, even though actual knowledge of such reputation for unfitness on the master's part is not shown." *Wood, Mast. & S. § 420.*

In *Monahan v. Worcester* (1890) 150 Mass. 430, the court said: "The master is bound to use reasonable care in selecting his servants, and if a person is incompetent for the work he is employed to do, the fact that he is generally reputed in the community to want those qualities which are necessary for the proper performance of the work certainly has some tendency to show that the master would have found out that the servant was incompetent, if proper means had been taken to ascertain the qualifications of the servant. We cannot say that it may not be a matter of common repute in a community that a man is physically weak, and is partially blind and deaf."

In *Chicago & A. R. Co. v. Sullivan* (1872) 63 Ill. 293, the defendant was held liable on the ground that, upon the evidence, the character of the servant as an intemperate man must have been known to the officers of the company, since his habits in that regard were so notorious among the men and so long continued that it was impossible that the division superintendent could have been ignorant of them.

A railroad company is charged with knowledge of the reputation of a watchman who has been in its employ for nine years, where such reputation is a matter of common knowledge in the county. *St. Louis, I. M. & S. R. Co. v. Hackett* (1894) 58 Ark. 381.

To the same general effect, see *Lake Shore & M. R. Co. v. Stupak* (1889) 123 Ind. 210; *Grube v. Missouri P. R. Co.* (1889) 98 Mo. 330, 4 L. R. A. 776.

The general reputation of the culpable employee for unfitness at any time during his employment is admissible. Hence, testimony as to such reputation is not objectionable for the

reason that it is not distinctly confined to a period just preceding the receipt of the injury by the plaintiff. *Mexican Nat. R. Co. v. Mustette* (1894) 7 Tex. Civ. App. 169.

But negligence cannot be imputed to a railroad company for not knowing the reputation acquired by a servant in a city on one of its lines ten or fifteen years before the accident in suit, at a time when he was still attending school and had not yet entered the company's employment. *Baird v. New York C. & H. R. R. Co.* (1897) 16 App. Div. 490.

Where a man is engaged in an occupation, which, like that of a railroad engineer, brings him into contact with only one class of the community, inquiries as to his reputation must be confined to that class. *Galveston, H. & S. A. R. Co. v. Davis* (1893) 4 Tex. Civ. App. 468, holding that a question worded: "Do you know what his general reputation was, and how he was generally regarded as to care and competency, while running his engine?"—was too general.

As a general reputation regarding the incompetency of a servant is admissible on the ground that it furnishes some reason to believe that, if the master had exercised due care, he might have learned or heard of the incompetency, it necessarily follows that "the reputation of a foreman amongst a few workmen employed under him is not a general reputation. It is merely the opinion of a small number of men, of which there is no sufficient reason to suppose the master may be cognizant or which he may be bound to heed." *Driscoll v. Fall River* (1895) 163 Mass. 105.

The principle which in the above cases is seen to operate to the disadvantage of the master sometimes inures to his benefit.

Thus, the general reputation of a servant for competency and care at the time of employment, of such character as to imply information to the employer, is admissible as tending to disprove negligence in hiring him. *Illinois C. R. Co. v. Morrissey* (1891) 45 Ill. App. 127.

There can be no inference of negligence on the part of a railroad company in regard to the employment of a brakeman where there is no evidence that he had not a good reputation at the time of his hiring, or at any other time than during two days during which he had been engaged in making a single trip on a certain train. *Van Dusen v. Lake Shore & M. S. R. Co.* (1891) 12 N. Y. S. R. 351.

In one case we find this remark: "Reputation is not competent evidence to charge a master with negligence in the employment of a servant. Because, first, it may be false, and, secondly he may never have heard it." *Haskin v. New York C. & H. R. R. Co.* (1878) 65 Barb. 129.

But this statement is altogether too sweeping as the foregoing authorities very clearly indicate.

2. Reputation not evidence of servant's unfitness.

In some cases the theory has been advanced by counsel that the servant's reputation for incompetency is evidence that he is actually incompetent, and not simply a circumstance which puts the master upon inquiry as to whether he is or is not competent. But this contention has always been rejected. Thus, it has been held that proof that an engineer has a general reputation of drunkenness puts the employer on inquiry as to his habits, but is not conclusive evidence that he is really addicted to the liquor habit. *Cosgrove v. Pitman* (1894) 103 Cal. 268.

In *Pittsburgh, Ft. W. & C. R. Co. v. Ruby* 41 L. R. A.

(1871) 38 Ind. 294, a claim that the only evidence that was admissible, for the purpose of charging the company with notice as to the incompetency of an employee, was his general character, was rejected. His general character might be not only good, but very good, while the defendant had actual knowledge that he was, in point of fact, careless, negligent, reckless, unskilful, and incompetent; or his general reputation might be that of a sober man, when, in point of fact, the defendant knew that he was in the habit of getting drunk, and that when drunk he was desperate and reckless.

In *Gier v. Los Angeles Consol. Electric R. Co.* (1895) 108 Cal. 129, the court held that it is the character of the employee which is the object of ultimate determination, not his reputation, and that as evidence of reputation becomes necessary only where there is an inability to furnish direct proof of the employer's knowledge, so it is proper only after the establishment of the fact that the employee is in truth an unfit person. It said: "Reputation is not proof of that fact. A man's reputation may be at variance with his character or in accord with it. He may be reputed reckless, and in fact be careful. An employer is not bound to discharge an employee merely because of his ill repute; but he is culpable if he retains in his employ a servant with a bad reputation, well founded."

The doctrine that specific acts of carelessness are not admissible as evidence of incompetency was also recognized in *Galveston, H. & S. A. R. Co. v. Davis* (1893) 4 Tex. Civ. App. 468.

Evidence of previous specific acts of negligence on the part of the culpable servant, known to the master's superintendent, is not admissible as bearing upon the question whether he was negligent in setting the plaintiff to work in an unsafe place, or in failing to warn him of the danger to which he was exposed in that place. *Connors v. Morton* (1894) 160 Mass. 333.

A servant's reputation for carelessness is not competent evidence, where the sole question at issue is whether he discharged his duty faithfully at the time of the accident. *Baltimore & O. R. Co. v. Colvin* (1888) 118 Pa. 230.

3. Nicknames as evidence.

Evidence that the culpable servant's general reputation prior to the accident was that he was "a little off," and that among railroad men he was usually called "Crazy Brown," is admissible to prove the master's knowledge of his unfitness. *Park v. New York C. & H. R. R. Co.* (1895) 85 Hun. 184.

The fact that a servant is called by his fellow employees "Crazy Nolan" is not, in the absence of other proof, competent evidence to show that he is actually crazy. *Marrinan v. New York C. & H. R. R. Co.* (1897) 13 App. Div. 439. (In this case the court seems to have scarcely realized the true force of the distinction between the admissibility of such evidence to show constructive notice to the master, and its admissibility to prove the fact in regard to which the reputation existed.)

In a subsequent case this ruling was cited with approval, and a new trial ordered, on the ground that the jury had not been left uninfluenced by the evidence of a nickname, ("crazy") which had been applied to the culpable servant. *Baird v. New York C. & H. R. R. Co.* (1897) 16 App. Div. 490.

Evidence that an engineer in defendant's employ, through whose negligence plaintiff was injured, was known by the nicknames of "Crazy

Pete" and the "Wild Irishman," is inadmissible either for the purpose of showing that the engineer was incompetent or negligent, or for the purpose of showing that the employer knew of his incompetence or negligence. *St. Louis, A. & T. H. R. Co. v. Corgan* (1891) 49 Ill. App. 229.

"Nicknames are not so generally expressive of the characteristics of the persons to whom they are applied as to be competent evidence for the purpose of proving that the bearer of the name possessed the characteristics denoted by a nickname." *Marrinan v. New York C. & H. R. R. Co.* (1897) 13 App. Div. 439.

a. Omission to ascertain capacity of servant who is injured.

A corollary from the principle that if a person of apparently full age and mature understanding undertakes certain duties he is presumed to appreciate and accept the risks incident thereto (see *Bailey's Personal Injuries*, § 2718 et seq.) is that an employer where he hires a man of twenty years of age is not bound to examine him as to his experience and capacity with a view to ascertain whether he needs instruction as to the dangers of the work. *O'Neal v. Chicago & I. Coal R. Co.* (1892) 132 Ind. 110; *Pittsburgh, C. & S. L. R. Co. v. Adams* (1885) 105 Ind. 151.

The case is different where a servant hired for one kind of work is directed to perform some other requiring special skill. Thus the act of a foreman in directing a common laborer employed to break stone and drill holes, to draw a charge from a blast, without ascertaining what his knowledge or experience is, constitutes negligence as matter of law. *Vitto v. Farley* (1895) 15 Misc. 153.

See also the note on the Duty to Instruct a Servant, which will shortly appear in this series, for other cases illustrating this principle from an analogous standpoint.

X. Employer's duty as to the supervision of appliances not owned by him but used by his servants.

a. Introductory.

The precise extent of the responsibility of an employer in regard to the supervision of instrumentalities which he does not own, but which his servants are obliged to make use of in the course of their work, is not easy to determine from the adjudged cases.

Of course, if they have become for practical purposes a portion of his business plant, no distinction can logically be based upon the bare circumstance that he has a merely qualified right of property in them.

Thus, the fact that the track on which a railroad company operates its trains belongs to another company does not relieve it of its obligation to use due care to see that it is kept in a safe condition for the use of the trainmen. *Smith v. Memphis & L. R. R. Co.* (1883) 18 Fed. Rep. 304 (in charge to jury).

So, the fact that an employer does not own a machine, and does not know that it is defective, does not relieve him from liability for an injury to an employee caused by a defect therein, where he pays for the use of such machine, and it is used under the superintendence of his foreman and representative. *Higgins v. Williams* (1896) 114 Cal. 176.

Some rulings ascribe a considerable importance to the question whether the employer had or had not the power to control the instrumentalities.

A warehouseman who receives cargo from a vessel upon a swinging stage placed in position 41 L. R. A.

by those in charge of the vessel, and entirely under their control and management, is not responsible for the giving way of the supporting tackle, unless it is shown that he neglected his duty of inspection and warning, and, in the absence of anything to excite suspicion or apprehension, he may assume that due care would be used by those in charge of the vessel. *Moynihan v. King's Windsor Cement Dry Mortar Co.* (1897) 168 Mass. 450.

In *Dixon v. Western U. Teleg. Co.* (1895) 71 Fed. Rep. 143, it was held that "when in the course of the erection of a telegraph pole, an occasion arises for the casual and sporadic use of a telephone pole belonging to another company, to remove an obstructing wire, . . . [it was not a] breach of the master's duty to direct an employee to climb such telephone pole without a previous inspection of it having been made. Whether the defendant would be responsible for a failure to inspect, if the pole had belonged to it," was a question which it was deemed not to be necessary to consider."

In *Hughes v. Malden & M. Gaslight Co.* (1897) 168 Mass. 395, plaintiff was injured while working in a trench which was neither dug nor controlled by the defendant. The court, in discussing the question what the plaintiff had a right to expect when set to work in such a place, said: "He had not a right to expect it to shore the sides of the trench or to make it safer than it was, because, as was manifest, and as the plaintiff must be taken to have known, the defendant had no control over the trench. He had a right to expect that, if the defendant knew of any danger which the plaintiff did not know and ought not to be assumed to know, it would inform him. But no such knowledge on the part of the defendant was shown. It does not appear to have known anything except what was visible to the eye, or to have been able or bound to infer from what was visible anything which the plaintiff with his experience was not equally able to infer. What more could it have done? There is no reason to suppose that inspection would have disclosed anything beyond the visible facts, and therefore it is not necessary to consider whether the duty of inspection existing with regard to cars received from connecting lines to be forwarded on a railroad would be held to exist in such a case as this."

Compare also the remarks of *Morton, J.*, in *Trask v. Old Colony R. Co.* (1892) 156 Mass. 298: "It may not be necessary, in order to render an employer liable for an injury occurring to an employee through a defect in the ways, works, or machinery, that they should belong to him, but it should at least appear that he has the control of them, and that they are used in his business, by his authority, express or implied. . . . Neither the employer nor any person in his service can be justly charged with negligence as to matters over which they have no control."

The reasoning in these cases, however, is scarcely satisfactory, for even if the want of a power to exercise over the instrumentalities that limited right of property which is implied in the process of removing some dangerous defect be a conclusive ground for not holding him liable for the existence of the defect, it does not by any means follow that he may not properly be held liable for a failure to perform the concurrent duty which arises upon the discovery of an abnormal defect, the duty, that is to say, to warn the servant.

If a car or other appliance is actually borrowed, the employer is regarded as the owner pro tempore, and his liability is measured by

the rule as to furnishing proper instrumentalities, and not by the rule as to inspection merely. Thus, it is held that the owner of a quarry using a car furnished by a railroad company to convey stone from its quarry to the railroad owes the same duty to its employees in respect to such car as though the car were owned by it. *Spaulding v. W. N. Flynt Granite Co.* (1893) 159 Mass. 587, distinguishing the cases where cars of other companies are received merely for forwarding.

b. Rule as to the inspection of foreign cars.

1. General principles.

That some provision must be made for the inspection of these is universally conceded by courts which take the ground that the receiving company's duty is fully discharged when he has employed competent inspectors. *Keith v. New Haven & N. Co.* (1885) 140 Mass. 175; *S. P. Cincinnati, H. & D. R. Co. v. McMullen* (1888) 117 Ind. 439.

The rationale of the doctrine that a railroad company is not liable for the negligence of the inspectors of foreign cars is that it is, in this case, not the duty of the company to furnish appliances, but merely to make proper inspection and give notice of defects if any are found, and that this duty is performed by the employment of a sufficient number of competent inspectors, who are subjected to proper rules and instructions. *Cincinnati, H. & D. R. Co. v. McMullen* (1888) 117 Ind. 439.

The duty of the receiving company is not to furnish a proper instrumentality, but proper inspection. *Mackin v. Boston & A. R. Co.* (1883) 135 Mass. 201; *Keith v. New Haven & N. Co.* (1885) 140 Mass. 175.

"Railroads are compelled to haul the cars of other roads, provided they appear to be in an ordinarily safe and proper condition. As to their own cars, railroads choose which they will use; as to the cars of other companies they have no opportunity for selection; because of this, the duty of railways in respect to the cars of other roads is merely that of proper inspection. The car in question not belonging to appellant, its duty was not to use reasonable diligence to have the same reasonably safe, but, before making use of it, to properly inspect it for the purpose of seeing if it was in a fit condition for use." *Chicago & G. W. R. Co. v. Armstrong* (1895) 62 Ill. App. 228.

"The duty of the receiving company is not that of furnishing proper machinery and instrumentalities for service, and seeing that the same are kept in safe repair, but its duty is one of inspection; and this duty is performed by the employment of sufficient competent and suitable inspectors, who are to act under proper instructions, rules, and superintendence. If it has furnished such inspectors, and if a proper inspection is made and due notice of defects have been given to the employee, its measure of duty is satisfied." *Atchison, T. & S. F. R. Co. v. Myers* (1894) 24 U. S. App. 295, 63 Fed. Rep. 793, 11 C. C. A. 439.

It is the duty of a railroad company to inspect cars owned by or received from another company, which the employees of the former are required to handle or use, where there are time and opportunity to do so; and it will be liable to its employees for injuries resulting from defects in such cars which an ordinary inspection would have discovered. It will not be excused for failure to perform that duty because such cars are only used for a brief time, or carried a short distance, nor will the mere fact that the company is not required to

repair such defects relieve it from the obligation to inspect. [*Syllabus by the court.*] *Atchison, T. & S. F. R. Co. v. Penfold* (1896) 57 Kan. 148.

Hence, it is error for a trial court to hold, as matter of law, that a trialman assumes the risks arising from the want of an inspector of such cars. *Bennett v. Greenwich & J. R. Co.* (1895) 84 Hun, 216.

For a total failure to make an inspection the company is only excused when the defect which such an inspection would have disclosed is one of which the injured servant had actual knowledge, or which he could easily have discovered. *Missouri P. R. Co. v. Barber* (1899) 44 Kan. 612.

See generally XII., infra.

"The company receiving a foreign car can be held responsible by an employee who sustains an injury from its defects, only for failure to furnish a competent inspector, or for failure of the inspector to exercise due care in making the inspection." *Atchison, T. & S. F. R. Co. v. Myers* (1894) 24 U. S. App. 295, 63 Fed. Rep. 793, 11 C. C. A. 439.

"The fact that a railroad company has no right to repair the foreign car which caused the injury does not relieve it of the duty of inspecting it." *Atchison, T. & S. F. R. Co. v. Penfold* (1896) 57 Kan. 148.

It is not bound to take such cars if they are known to be unsafe. *Gottlieb v. New York, L. E. & W. R. Co.* (1885) 100 N. Y. 462; *Moon v. Northern P. R. Co.* (1891) 46 Minn. 106.

"If the car came to it with any defects visible or discoverable by ordinary inspection, its duty was either to return the car to the company from which it came or to repair it sufficiently to make it reasonably safe." *Atchison, T. & S. F. R. Co. v. Myers* (1894) 24 U. S. App. 295, 63 Fed. Rep. 793, 11 C. C. A. 439.

Where foreign cars are of unusual and extra hazardous construction it is the duty of the railroad company to know that they are so, and to warn its servants of the increased danger to which they will be subjected in handling them. *Missouri P. R. Co. v. White* (1890) 76 Tex. 102.

A railroad company which undertakes to haul a foreign car in its train, and has had an opportunity to inspect it, is liable for a negligent failure to discover dangerous defects in its coupling appliances. *Bender v. St. Louis & S. F. R. Co.* (1897) 137 Mo. 240.

That the cars are only used by the receiving company for a short time, or carried a short distance, will not relieve it of its duty to its employees of inspecting such cars. *Atchison, T. & S. F. R. Co. v. Penfold* (1896) 57 Kan. 148.

The duty of a railroad company to inspect cars coming from other roads is not limited to cars to be sent out upon its own road, but applies to cars switched from the other road to be loaded and returned to the road from which they are received. *Texas & P. R. Co. v. Archibald* (1896) 41 U. S. App. 567, 75 Fed. Rep. 802, 21 C. C. A. 520.

The company being under the obligation, and having the right, to reject foreign cars in which it discovers a dangerous defect, is not absolved from liability for an injury due to such a defect by a constitutional provision compelling the company to receive such cars. *Louisville & N. R. Co. v. Williams* (1893) 95 Ky. 199; *Illinois C. R. Co. v. Price* (1895) 72 Miss. 862.

Similarly, it is held that a statute which makes it the duty of every railroad to receive and forward cars of other roads impartially and diligently does not require the transfer of cars unfit for passage. *Smith v. Potter* (1881) 40 Mich. 258, 41 Am. Rep. 161.

The duty of exercising care in regard to the inspection of a foreign car devolves both on the forwarding and the receiving company. Hence, the fact that the latter has been negligent in that regard does not sever the causal connection between the former's breach of duty in transferring a defective car, and any injury which the latter's employees may receive in consequence of the existence of that defect. *Moon v. Northern P. R. Co.* (1891) 40 Minn. 103.

The plaintiff cannot recover for injuries caused by a defective foreign car unless he offers some evidence tending to show that the defect might have been discovered by the exercise of ordinary care.

In *Carroll v. Chicago, R. I. & P. R. Co.* (1895) 55 Kan. 690, it did not appear from the evidence at what point beyond an inspecting station called Horton the defective car came upon the defendant's road, and there was no account of it further than another inspecting station called Topeka. The court said: "If it had been shown that the rod [of a handhold] was loose or out of order, or the wood so decayed at the place of fastening as to render it unsafe, and this was discoverable by ordinary inspection at Horton or at the North Topeka roundhouse, then it would be a matter for the jury to determine whether the defect was known, or by the exercise of ordinary care ought to have been known, by the defendant in time to remedy or call attention of employees to it before the occurrence of the casualty. But in the absence of any such proof the district court was right in sustaining a demurrer to the evidence."

Guthrie v. Maine C. R. Co. (1889) 81 Me. 572 (see XVII. a. post), was cited by counsel for the plaintiff as tending to establish the proposition that if a car with defective appliances is taken into a train, and an injury to an employee results from it, the company will be liable without proof of notice of the defect or its equivalent. But the court did not think that case would bear such a construction, for the draw bar and bumpers of the car, which was the instrument of the injury, had been broken off before the casualty complained of, and this was a patent defect, of which the railroad company was bound to take notice.

Plaintiff's counsel also referred to *Chicago & E. I. R. Co. v. Kneflim* (1894) 152 Ill. 458, decided by the supreme court of Illinois, but in that case it was held not to be in point, as it appeared that, although the car had just been inspected, "the nut which held the wheel on the brakestaff was off, and, from the rusted appearance of the threads of the staff (they being filled with rust) had been off for several weeks," and the absence of the nut was the cause of the injury.

In *Elkins v. Pennsylvania R. Co.* (1895) 171 Pa. 121, it was contended that the rule which makes a railroad company responsible to its employees for the condition of the cars it receives for transportation over its own lines was not applicable in regard to cars which it requires them to shift from one place to another on the tracks and in the yard of a shipper. This contention did not prevail, the court saying: "They are as clearly in its service in the latter case as in the former; their work is of the same nature in one case as in the other, and the risks attending it are the same. No sufficient reason appears for discriminating between the liability of a railroad company for injuries to its employees in handling upon its own line the cars of another corporation which are 'faulty in construction or dangerously out

of repair' and its liability to them for injuries in handling such cars by its order elsewhere. It is not the ownership of the cars or of the line on which they are moved that imposes the liability upon the company, but it is the handling or shifting of them by its order. The defendant company was not bound to shift cars in the yard of the refining company without a previous inspection of them. If the latter refused to allow an inspection the former could have properly declined to engage in the work of shifting them. But having done the work it is responsible to its employees for injuries caused by the unsafe condition of the cars they were required to handle."

In a short per curiam opinion the supreme court of Pennsylvania has held that the rule applicable to railroad companies, requiring them to inspect cars of other companies used for transporting freight, before permitting their employees to handle them, is not applicable to companies or persons on whose sidings loaded cars are delivered for the purpose of permitting them to unload the freight. *McMullen v. Carnegie Bros.* (1883) 158 Pa. 518, 23 L. R. A. 448.

2. Degree of care required.

The prevailing rule is that the liability of a railroad company in respect to foreign cars is the same in every respect as it is in respect to its own under similar circumstances; that is to say, foreign cars must be inspected with as much care as would be bestowed upon the examination of its own cars at way stations as contrasted with stops.

A railway company "is answerable for the same degree of care and diligence" in regard to the inspection and repair of foreign cars as it is in the care of its own cars. *Fay v. Minneapolis & St. L. R. Co.* (1883) 30 Minn. 231.

A railroad company "is under the same obligation with reference to the inspection of foreign cars as is enjoined in respect to its own cars." *Louisville & N. R. Co. v. Reagan* (1896) 96 Tenn. 128, following *Gottlieb v. New York, L. E. & W. R. Co.* (1885) 100 N. Y. 462.

There is no distinction between the liability of a railroad company in respect of its own cars, and those belonging to another company which came to it for transportation over its own line. *Reynolds v. Boston & M. R. Co.* (1891) 64 Vt. 68.

The case which is most often cited as to the general duty of a company in respect to the inspection of foreign cars is *Gottlieb v. New York, L. E. & W. R. Co.* (1885) 100 N. Y. 462, Aff'd (1883) 20 Hun. 637, where a brakeman was injured owing to the fact that the buffers of two such cars were too short to admit of his going between them as they left a space of only 6 inches. The court said: "The defect was an obvious one, easily discoverable by the most ordinary inspection, and it would seem to be the grossest negligence to put such cars into any train, and especially into a train consisting of cars of different gauge. But these two cars did not belong to the defendant. They belonged to other companies and came to it loaded, and it was drawing them over its road to their destination. They were in good repair, and the defects were in their original construction, they being just as they were originally made. The defendant claims that it was bound to receive and transport these cars over its road, and was under no responsibility for any defects in their structure, and that the plaintiff, upon entering its employment, assumed all risks from such defects." After reviewing some of the cases, and pointing out

that they are not entirely harmonious, but that they all hold that the company drawing the cars owes, in reference to them, some duty to its employees, the court proceeded thus: "When cars come to it which have defects visible or discoverable by ordinary inspection, it must either remedy such defects or refuse to take such cars; so much, at least; is due from it to its employees. The employees can no more be said to assume the risks of such defects in foreign cars than in cars belonging to the company. . . . The rule imposing this responsibility is not an onerous or inconvenient or impracticable one. It requires before a train starts, and while it is upon its passage, the same inspection and care as to all the cars in the train."

In a later New York case (*Goodrich v. New York C. & H. R. R. Co.* (1889) 116 N. Y. 398, 401, 5 L. R. A. 750), these views were reiterated, the court saying:

"The employees whose duty it is to manage the train have a right to assume that, so far as ordinary care can accomplish it, the cars are equipped with safe and suitable appliances for the discharge of their duty, and that they are not to be exposed to risk or danger through the negligence of their employer." With respect to the dangerous conditions which caused the accident in that case, viz., bumpers of different heights, the court remarked: "The defect complained of in this case was obvious and discernible to the most ordinary inspection, and could have been easily remedied. It is argued by the defendant that it had fulfilled its duty when it had furnished for the use of its employees crooked links which could be used in coupling together cars upon which the bumpers were of different heights. We do not think that in this case that fulfilled the measure of defendant's obligation. It could not be so held unless it was the duty of the plaintiff to examine and inspect the cars to ascertain whether the coupling appliances were in proper condition. The duty of examination, like the duty of furnishing the proper machinery and appliances in the first instance, rests upon the master."

These two cases were cited and followed in *Baltimore & P. R. Co. v. Mackey* (1894) 157 U. S. 72, 39 L. ed. 624.

Another leading case on the subject is *Gutridge v. Missouri P. R. Co.* (1897) 94 Mo. 468, where the court rejected the contention of the defendant, that it had a right to assume that the car, being a foreign one, was reasonably safe and fit for the uses for which it was being used, and said: "Cars coming from one road to another must necessarily be subjected to wear, and are liable to be rendered unfit for use in the course of transportation, and this must be known to the receiving company. It is but the result of the most common observation. While it is not incumbent on the receiving company on the receipt of the car to make tests to discover hidden defects in the construction, still it is bound to inspect foreign cars just as it would and is required to inspect its own, after they have been in use."

The same principle is recognized in the following cases, in most of which the New York and Missouri rulings are expressly approved: *Louisville & N. R. Co. v. Davis* (1890) 91 Ala. 487; *Sack v. Dolese* (1890) 35 Ill. App. 636, Aff'd on other grounds in (1891) 137 Ill. 129; *Louisville & N. R. Co. v. Williams* (1893) 95 Ky. 199; *Bomar v. Louisiana North & South R. Co.* (1890) 42 La. Ann. 983, and 1206; *Mateer v. Missouri P. R. Co.* (1891) 15 S. W. 970; *Bender v. St. Louis & S. F. R. Co.* (1896) 137 Mo. 240; *Mason v. Richmond & D. R. Co.* (1892) 111 41 L. R. A.

N. C. 482, 18 L. R. A. 845, Following *Gottlieb v. New York, L. E. & W. R. Co.* (1885) 100 N. Y. 467; *Bennett v. Northern P. R. Co.* (1891) 2 N. D. 112, 13 L. R. A. 465; *Jones v. New York, N. H. & H. R. Co.* (1897) 20 R. I. pt. 1, p. 212; *Railroad Co. v. McClanahan*, 3 Tex. Law Rev. 324, cited in *Gulf, C. & S. F. R. Co. v. Dorsey* (1886) 66 Tex. 148; *St. Louis, A. & T. R. Co. v. Putnam* (1892) 1 Tex. Civ. App. 142; *International & G. N. R. Co. v. Kernan* (1890) 78 Tex. 294, 9 L. R. A. 703; *St. Louis, A. & T. R. Co. v. Putnam* (1892) 1 Tex. Civ. App. 142; *Eddy v. Prentice* (1894) 8 Tex. Civ. App. 58.

It is error to give a charge to the effect that a brakeman assumes the risk of unequal couplings on foreign cars. *Bender v. St. Louis & S. F. R. Co.* (1896) 137 Mo. 240.

The amount of care required of a railroad company to inspect cars coming from other roads to be merely loaded and returned is not less than that as to cars to be sent out upon its own road. *Texas & P. R. Co. v. Archibald* (1896) 41 U. S. App. 567, 75 Fed. Rep. 802, 21 C. C. A. 520. (Refusal to give instruction to contrary effect held proper.)

The effect of the principle established by these authorities is that "a railroad company is under legal duty not to expose its employees to danger arising from such defects in foreign cars as may be discovered by reasonable inspection before such cars are admitted to its train." *Baltimore & P. R. Co. v. Mackey* (1895) 157 U. S. 72, 39 L. ed. 624, Affirming *Mackey v. Baltimore & P. R. Co.* (1890) 8 Mackey, 282; *S. P. Missouri P. R. Co. v. Barber* (1890) 44 Kan. 612.

It has even been said that the "company must exercise a high degree of care" in regard to the inspection of foreign cars. *Chicago, B. & Q. R. Co. v. Avery* (1880) 8 Ill. App. 133.

In *Indianapolis, B. & W. R. Co. v. Flanigan* (1875) 77 Ill. 365, it was also remarked by the court, arguendo, that if the draw-bar in a foreign car which caused the injury in suit "had suddenly become out of order it could hardly be insisted that defendant would be liable unless attention had been called to the defect, or the company, by the exercise of a high degree of care, could have discovered it and opportunity been afforded in which to make the needed repairs."

But this expression is perhaps rather too strong. The usual epithets used to define the degree of care incumbent on the employer are "ordinary," "reasonable," and the like. It is more consistent with analogy to say that the duty of a railroad company to its employees in respect to appliances on cars received from other roads is not higher than that in respect to appliances on its own cars. That duty is fully discharged if the appliances are such as are in ordinary use, though they may not be the best or safest for the purpose." *Dooner v. Delaware & H. Canal Co.* (1895) 171 Pa. 581.

A slightly different way of expressing the same principle is that a railroad company is responsible for the consequences of such defects in foreign cars as could be discovered by ordinary care. *McDonald v. Fitchburg R. Co.* (1897) 19 App. Div. 577.

"Ordinary care" is also the standard mentioned in *Louisville & N. R. Co. v. Williams* (1893) 95 Ky. 199; *Louisville, N. A. & C. R. Co. v. Bates* (1896) 146 Ind. 564.

The words "reasonable care" have also been used in this connection. *Eddy v. Prentice* (1894) 8 Tex. Civ. App. 58.

The exercise of "reasonable precautions" is required in other cases. *Denver, T. & Ft. W. R. Co. v. Smock* (1897) 23 Colo. 456.

"A railroad company is not liable to its serv

ants because it does not discover all defects in the cars of other companies coming into its hands, but is only liable for such defects as should have been discovered by reasonable skill and diligence." *Allen v. Union P. R. Co.* (1891) 7 Utah, 239.

In *Gottlieb v. New York, L. E. & W. R. Co.* (1885) 100 N. Y. 462, it was said that a railroad company is at least responsible for the consequences of such defects as would be disclosed by "ordinary inspection." The same phrase is used in *Atchison, T. & S. F. R. Co. v. Penfold* (1896) 57 Kan. 143.

The phrase "ordinary inspection" is also used to express the degree of care which the receiving company must exercise, in *Louisville & N. R. Co. v. Reagan* (1896) 96 Tenn. 123; *Carruthers v. Chicago, B. I. & P. R. Co.* (1895) 55 Kan. 600.

An instruction to the effect that the defendant was "not bound to test the safety of a certain foreign car, but might have presumed that it was in good condition, if it required close inspection to determine that it was not in good condition," is appropriate only to a case in which the defect was latent and not discoverable by ordinary inspection. A request for such an instruction is therefore rightly refused where the defendant has taken the ground that the draw-head which injured the plaintiff was so battered on the outside as to indicate its defective condition, while the conductors of the incoming and substituted crews both admit that they were aware of the defect. *Louisville & N. R. Co. v. Reagan* (1896) 96 Tenn. 123.

In other cases the phrase "proper inspection" is used. *Atchison, T. & S. F. R. Co. v. Myers* (1894) 24 U. S. App. 295, 63 Fed. Rep. 793, 11 C. C. A. 431.

Other analogous phrases are "due inspection." *Moon v. Northern P. R. Co.* (1891) 46 Minn. 106.

"Reasonably careful" inspection. *Moon v. Northern P. R. Co.* (1891) 46 Minn. 106.

The limit of a railroad company's duty as to a car received from a refrigerator company is "diligence to know that it is serviceable." *O'Connor v. Illinois C. R. Co.* (1891) 83 Iowa, 105.

More elaborate and specific statements of the nature of the receiving company's obligation in respect to examination are the following:

"The inspection which the company is required to make of a foreign car tendered to it by another company for transportation over its lines is not merely a formal one, but it should be made with reasonable diligence, so that its employees will not be exposed to perils which reasonable care would have guarded against." *Atchison, T. & S. F. R. Co. v. Myers* (1894) 24 U. S. App. 295, 63 Fed. Rep. 793, 11 C. C. A. 433.

"The inspection which a company is required to make of a foreign car tendered to it by another company for transportation over its lines, is not a merely formal one, but should be made with reasonable care so as to furnish its employees with reasonably safe appliances for use in the discharge of their duties." *Patterson, Railway Accident Law*, §§ 290, 291. Quoted with approval in *Chicago, St. L. & P. R. Co. v. Fry* (1891) 181 Ind. 319, and in *Louisville, N. A. & C. R. Co. v. Bates* (1896) 146 Ind. 564.

"The inspection should be such as the time, place, means, and opportunity and the requirements and exigencies of commerce will permit. If the company has used ordinary care to secure competent inspectors, and inspection is made with ordinary care, under the circumstances, taking into consideration the time,

place, means, and opportunity for inspection, and the defects, if any are discovered, are repaired or due notice thereof given to the employee, the duty resting upon the company is discharged." *Louisville, N. A. & C. R. Co. v. Bates* (1896) 146 Ind. 564.

"It is immaterial whether the car with the merchandise belonged to the one corporation or the other; it was the duty of the appellant, by inspection or otherwise, to ascertain whether or not the car was in such a condition as that it could be safely handled by its subordinates. This care to be exercised is not such as would require the company receiving the car to test the strength of the metal or the material out of which it was constructed, or to make that rigid examination into the car's condition as could only be arrived at by actual tests, but the care must be of at least an ordinary inspection by one competent to know whether or not the car is in a safe condition for transportation, and can be handled by a subordinate who will exercise ordinary care without danger. There are different appliances used for coupling and uncoupling cars, and in the manner of constructing cars; still if such appliances are those ordinarily used by the road on which the injury occurs, the company is not responsible, if the difference in the appliances alone produces the injury. A car, however, may be so constructed or built as to render it more than ordinarily dangerous when attempting to couple it with other cars of different construction, and when this is patent the company must see to it that the danger is removed." *Louisville & N. R. Co. v. Williams* (1893) 95 Ky. 199.

In *Richardson v. Great Eastern R. Co.* (1875) L. R. 10 C. P. 488, 33 L. T. N. S. 248, Reversed in (1876) L. R. 1 C. P. Div. 342, 35 L. T. N. S. 351, 24 Week. Rep. 907, the duty of a railway company to inspect foreign cars was exhaustively discussed. The plaintiff was a passenger, and, strictly speaking, the case does not fall within the scope of the present note, but the facts were such as to make the decision quite applicable in the present connection. In the opinion delivered in the court of appeal (1876) L. R. 1 C. P. Div. 342, 35 L. T. N. S. 351, 24 Week. Rep. 907 by Jessel, M. R., it is said: "A coal truck belonging to the Birmingham Wagon Company, but which had been let to a colliery company, came on to the defendant's line at Peterborough. The defendants are compelled by statute to forward foreign traffic, i. e., through traffic, from other lines. It seems to me that the railway company are bound to take reasonable care to ascertain that trucks belonging to other companies and persons so coming on their line are in such a state as to travel safely. They must therefore use due diligence in the examination of such trucks, and the question is whether, on the facts in this case, that obligation was discharged." As to this question, the evidence was substantially this: At Peterborough there are every week a very great number of trucks sent along the defendant's line from other lines. They are subject to a "cursory" examination which is not of a very minute character, but such as is usually taken in such cases, and generally found sufficient. By these usual precautions two defects were discovered, one being that a spring had lost its camber and the other a crack in the woodwork, which was not so material. It being inconvenient to unload the truck, without which the latter defect could not be remedied, and as it did not interfere with the safety of the truck, the spring was repaired at the owners' shop near by, and on its return to the defendants, their servant

ascertained that the repair had been done, and examined the truck in the usual way, to see that there was no other defect. It was then sent on, and the accident occurred through a defect in no way connected with the two defects previously mentioned, viz., a defect in the axle, which might have been discovered by a sufficiently minute examination. Jessel, M. R., said: "We must look to what is reasonable in reference to the exigencies of the case. The company cannot stop all foreign trucks and empty them for the purposes of a minute examination. If they were entitled to do so, it would practically destroy the right given by statute to other companies of having the through traffic forwarded, and give a monopoly to the company itself. The suggestion that they should do this is too absurd to bear discussion. It cannot be said that it is obligatory on the company so to treat the foreign trucks as to destroy the very object for which they went sent onto the line, viz., for the purposes of through traffic. There must be some reasonable limit to the amount of examination required, and the substantial question was whether the mode of examination adopted by the company was reasonably satisfactory." To the question whether it was the duty of the defendants to examine the axle by scraping off the dirt and minutely looking at it—so minutely as to enable them to see the crack—and so to prevent or remedy the mischief, the jury answered "No." To the question whether it became their duty so to do upon discovering the other defects the jury answered, "It was their duty to require from the Birmingham Wagon Company some distinct assurance that it had been thoroughly examined and repaired." But Jessel, M. R., said: "If the defect discovered were such as ought reasonably to induce a person of experience to think that some other defect existed, or was likely to exist, then there would be a duty to examine further, but if the defect discovered had no probable connection with any other undiscovered defect, then I see no reason why any further or other examination should be made. Now, I read the answer of the jury to the third question as meaning . . . that the defendants ought to have inquired. But there was no evidence on which they were entitled to find that such a duty existed, or that it had been neglected. . . . If it was the defendants' duty to inquire, it could only be because they were bound to satisfy themselves of the fitness of the trucks, and if so bound, they could not exonerate themselves by mere inquiry of the wagon company. If it had been proved that they relied on mere inquiry, I am not sure that might not, per se, be evidence of negligence. I do not think we ought to give any effect to this finding of the jury, and the case for the plaintiff therefore fails. The judgment must therefore be reversed."

The court of common pleas had taken the position that, under the circumstances, there had been a want of reasonable care on the defendants' part in not properly overhauling and repairing the car which had been found defective, the assumption apparently being that the case was one in which provision should have been made for general repairs.

This theory, as was pointed out by Mellish, L.J., in the court of appeals (1876) 1 C. P. Div. 347, 35 L. T. N. S. 351, 24 Week. Rep. 907, was based on a misapprehension of the facts, as there was really no question of repair at the junction station, other than with respect to the defects which the examination, as actually made, had disclosed.

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A statute which makes it the duty of every railroad to receive and forward cars of other roads impartially and diligently does not require the transfer of cars unfit for passage; but it does require that no unnecessary delays or hindrances shall be interposed, and that all precautions against the use of improper cars shall be adopted with reference to reasonable despatch. *Smith v. Potter* (1881) 46 Mich. 258, 41 Am. Rep. 161.

It is not incumbent upon the receiving company "to repeat the tests which are proper to be used in the original construction of the car, but it may assume that all parts of the car which appear upon ordinary examination to be in good condition are in such condition;" but the duty of exercising ordinary care requires a more careful inspection of an old and dilapidated car than of one in appearance of which there is nothing unusual. *Louisville, N. A. & C. R. Co. v. Bates* (1896) 146 Ind. 584.

The receiving company is not liable for hidden defects "which could not be detected by such an inspection as the exigencies of traffic will permit." *Patterson, Railway Accident Law*, §§ 290, 291, Quoted with approval in *Chicago, St. L. & P. R. Co. v. Fry* (1891) 181 Ind. 319.

No negligence can be imputed to the company where the car had been duly inspected at the regular station a short time previously. *Chicago & A. R. Co. v. Pratt* (1883) 14 Ill. App. 346.

If, at the time the eyebolt in a braketstiff gives way, the car has run such a short distance from the place of the last inspection that a doubt arises whether the inspection was made with due care, that question should be left to the jury. *Sheedy v. Chicago, M. & St. P. R. Co.* (1893) 55 Minn. 357.

The duty of inspection is a positive and affirmative duty, to be continuously performed by the employer. Hence it is not for the court to say, as a matter of law, when, where, and how often a foreign car shall be inspected by a railroad company, or that it should not have been inspected at some time while the car was under the company's control. *Brann v. Chicago, R. I. & P. R. Co.* (1880) 53 Iowa, 595, 36 Am. Rep. 243. (As to how often inspections should be made, see, generally, subd. supra.)

In *Chicago, B. & Q. R. Co. v. Avery* (1880) 8 Ill. App. 133, the court, waiving the question of a railroad company's liability for the negligent acts of another company in the occupancy or use of its road, or of its liability for the negligence of appellee's fellow servants, thought it plain that, "no matter whose duty it was to keep the car in repair or to prevent its coming into appellant's yard in a damaged condition, if these duties were neglected, and the car permitted to come into appellant's yard for so many consecutive days that appellant, in the exercise of a high degree of care, might have known of its damaged and dangerous condition in time to avoid any injury therefrom, then appellant would be liable to its employees for any damage occasioned thereby, without any fault of their own."

A doctrine less favorable to the servant than that propounded in most of the above cases was laid down by the majority of the court in *Railton v. Chicago, M. & St. P. R. Co.* (1882) 54 Wis. 257, 41 Am. Rep. 31, where it was held that, although the fastening of a round of a ladder in a foreign car may be so insufficient as to show culpable negligence on the part of the company under whose supervision it was fastened, yet if it is in apparently good condition the company which receives it into its train

is not guilty of negligence as regards a servant who is in the habit of handling the car and has the same means of knowledge as the company itself. This case contains one of the most elaborate discussions of the subject to be found in the reports. The majority of the court thought the case came under the rule that, where the risks of a service were unknown to the master and his ignorance is not owing to any negligence on his part, the risk is with the servant, not the master. This conclusion necessarily involved the corollary that the duty of a railway company with regard to the inspection of foreign cars is less onerous than that duty with respect to its own cars, for it was conceded that the fastening of the slat was insufficient, and was culpable negligence on the part of the company responsible for the fastening. Cassady, J., said in regard to the defect which caused the injury: "It was discoverable by taking out the bolts and looking beneath the slats or rounds. So the sufficiency of the bolts, as to length as well as size, might have been determined by the application of a heavy weight or by a strong man or some machine, wrenching the same. Assuming that some such test should have been applied, the questions would remain, when, by whom, and how frequently? If properly tested by the manufacturer, then, is it to be repeated by the purchaser and everyone who uses the same? And, if so, shall he go beyond ordinary inspection, while at rest or in use to the extent of unmaking what has already been made? There is much propriety in the law exacting rigid tests to the different parts in the first instance and while a car is in the process of manufacture, which would be impracticable, if not impossible, to repeat every time a loaded car passed from one railway company to another. May not the company so receiving such loaded car, and without being chargeable with negligence, assume that all parts of such car which appear to be in good condition are in such condition? Is the law so exacting as to the management of railroad trains as to impute negligence in not discovering what ordinary care would fail to detect? Is the law so stringent in such a case as to infer negligence without any omission of duty?"

The theory, however, upon which most stress was laid was that the injured servant had the same means of knowledge as the company, and that this fact negatived the existence of any right of recovery. "It appears from the testimony," said Judge Cassoday, "that the ladder in question was almost in constant use, not by the engineer, nor so much by the conductor, but by the brakeman. The straining test was necessarily applied whenever the brakeman ascended or descended the ladder in question. . . . His inspection and testing was the company's inspection and testing. His failure to discover any visible indications of insufficiency, while so inspecting and testing, was no more culpable in the company than in himself." Judge Taylor dissented in a very elaborate and well-reasoned opinion, both on the general ground that the measure of care incumbent on a company in regard to the inspection of foreign cars was the same as in regard to its own cars, and on the special ground that it was a question for the jury whether the company had been reasonably careful under the circumstances. The following extracts show the strength of his arguments, and the extreme difficulty there is in arriving at a definite conclusion with respect to this much controverted question. "There is no doubt, an implied warranty on the part of the furnishing company that the cars are reasonably fit for use, and, 41 L. R. A.

unless the defect be plainly visible, there is, as between these parties, no duty on the part of the receiving company to make any particular examination for defects; and if injury results from the use of the cars from defects which ought to have been known to the furnishing company, such company would, undoubtedly, be liable to make good the damages. This rule as to the duty of the receiving company, as between itself and the furnishing company, is not in my opinion the rule as to the duty of the receiving company to its employees. The fact that the car is not its own does not relieve the company using it from its general obligation not to subject its employees to unnecessary danger by the use of imperfect or defective machinery or appliances. . . . It seems to me that the liability of the company as to its employees is the same whether the company has purchased the defective machinery or cars, or whether it has received them for use upon its road from another company. There certainly can be no doubt upon this point as to such machines or cars as the company lease from the owner for a definite term, and use upon their road. In cases like the one at bar, the receiving company takes the car and transports it for its own benefit, and only incidentally for the benefit of the furnishing company. . . .

If the convenience of business prevents the receiving company from making such inspection and tests of the cars received as are usually made and required of a company purchasing or leasing cars for its permanent use, and it is compelled to rely upon the vigilance of the company from which the cars are received to detect imperfections therein, then, as between itself and its employees, the want of vigilance on the part of the company purchasing the cars must, as between the company using the same and its employee, be imputed to the company using them, and such employee may recover damages for any injury resulting to him from a defect in such car, which ought to have been discovered by the company furnishing them, either from the master in whose use the car was at the time of the injury, or from the owner of the car;" citing *Pennsylvania Co. v. Roy* (1880) 102 U. S. 451, 28 L. ed. 141, as to the liability of a railroad company to its passengers for injuries received by reason of a defective construction of a car constituting a part of the train not owned by them, and for the use of which the passengers pay another company a separate charge. The dissenting judge said further that the defendant "should have shown that no inspection or tests which are made by railroad companies of its cars and their appliances would have discovered the defect; or, at least, it should have shown that it made such inspection and tests by competent men as are made by railroad companies generally, and that the defect was not discovered. It is certainly a question of fact, and not of law, whether a proper inspection or test of the ladder would have discovered the defect therein; yet the learned circuit judge determined, as a question of law, that no proper inspection or test would have discovered such defect. . . .

The assumption in this case that reasonable care on the part of the defendant company would not have discovered the defect which caused the injury is the assumption of a fact not proved in the case, and to support which there is no evidence. The other assumption, that there was any duty imposed on the brakeman to make an inspection of the car or ladder to see whether it was fit or safe for use, is an assumption based upon no proof, and is in no sense a question of law except so far as the law might charge the brakeman with knowl-

edge of a plain and visible defect, and defeat a recovery because the defect was so plain and visible that he could not but have known of its existence, and consequently took the risk of using that which was clearly dangerous to use."

The principles laid down in *Ballou v. Chicago, M. & St. F. R. Co.* (1882) 54 Wis. 290, 41 Am. Rep. 31, were approved in *Atchison, T. & S. F. R. Co. v. Ledbetter* (1885) 34 Kan. 323.

Of course, the rule that an employer is not liable for an injury caused by a latent defect is applicable to foreign cars. *Chicago, St. L. & P. R. Co. v. Fry* (1891) 131 Ind. 819, where the court reversed a judgment for the plaintiff supported only by a special finding that a crack which caused a brakestaff to give way could only have been detected by taking the staff off the car and striking it with a hammer.

3. *Duty of inspecting foreign cars, considered with reference to the doctrine of common employment.*

See also XIV. a, *infra*.

The effect of the doctrine of common employment upon the extent of the master's duty to inspect his instrumentalities will be discussed in its general aspects in the following subdivision. (See more especially XI., e.) The same difference of opinion which the cases there cited disclose as to the true scope of that doctrine in this particular connection reappears in the judicial discussion of the obligations of a railroad company with respect to ascertaining the condition of foreign cars. The decisions on this point do not proceed upon the theory that the receiving company is chargeable with one measure of care where the cars are its own, and with another measure of care where they are delivered to it by another company. They merely view the employer's responsibility from a different standpoint.

The duty of inspection may be regarded as either assignable or nonassignable; but even the courts which take the former view do not allow the fact that a car is a foreign one to excuse the receiving company for a failure to use ordinary and reasonable care to see that it is constructed safely,—as, for example, that it is furnished with such appurtenances as handles, ladders, or other safeguards in common use. *Dooner v. Delaware & H. Canal Co.* (1894) 164 Pa. 17.

The receiving company is held liable by such courts for its omission to provide for a proper system of inspection, and for its negligence in the selection of an inspector. *Keith v. New Haven & N. Co.* (1885) 140 Mass. 175. The difference of opinion, therefore, is merely as to the precise extent of a duty which is on all hands agreed to be obligatory to some extent; and the task of classifying the decisions reduces itself to one of defining the same lines of cleavage which show themselves in the more general discussions of the following subdivision.

The distinction between the legal consequences of a master's ignorance of abnormal conditions as an incident of the supply of instrumentalities, and as an incident of their use, as exemplified in the ruling that a railroad company is not liable for a failure to inspect foreign cars and see that they are properly loaded. *Mexican C. R. Co. v. Shean* (1891) (Tex.) 18 S. W. 151. Following *Galveston, H. & S. A. R. Co. v. Farmer* (1889) 73 Tex. 86. See also *Neutz v. Jackson Hill Coal & C. Co.* (1894) 139 Ind. 411, and XI., e, *infra*.

The doctrine that inspection is a nonassignable duty emerges in the ruling that the neglect of a car inspector to make any inspection of a car, or his neglect to make it with reason-

able care, having regard to the hazard of the service, is the neglect of the railroad company in respect to a brakeman. *Terre Haute & I. R. Co. v. Mansberger* (1895) 24 U. S. App. 551, 65 Fed. Rep. 196, 12 C. C. A. 574, Rehearing Denied in (1895) 24 U. S. App. 687, 67 Fed. Rep. 67, 14 C. C. A. 306; *S. P. Atchison, T. & S. F. R. Co. v. Myers* (1894) 24 U. S. App. 295, 63 Fed. Rep. 793, 11 C. C. A. 439, Disapproving the Massachusetts doctrine; *Fay v. Minneapolis & St. L. R. Co.* (1883) 80 Minn. 231; *Jones v. New York, N. H. & H. R. Co.* (1897) 20 B. I. pt. 1, p. 212.

Courts which hold, on general principles, that inspection is not an absolute duty of a master, naturally adopt the conclusion that the receiving company is not liable for the negligence of its inspectors in failing to discover a defect which supervenes while a car is being used. *Mackin v. Boston & A. R. Co.* (1883) 135 Mass. 201. The court said: "Although perhaps the mere ownership is not material, a car so received, while in transit to its destination, and until ready for such inspection as would be suitable and necessary in preparation for its return, would not come within the rule applicable to machinery and appliances furnished by the defendant. According to the course of business, well known to the plaintiff, and notorious, the defendant was in the habit of receiving many such cars daily, and drawing them over its road as a part of its freight trains. Even in the absence of any statute, or special contract, regulating the terms of receiving and drawing such cars, the defendant was bound, as a common carrier, to receive and draw them. *Vermont & M. R. Co. v. Fitchburg R. Co.* (1867) 14 Allen, 462, 469, 92 Am. Dec. 735. The obligation of drawing cars over its road would not extend to such as were in an unsafe condition; but, as to cars so received, the duty of the defendant is not that of furnishing proper instrumentalities for service, but of inspection; and this duty is performed by the employment of sufficient, competent, and suitable inspectors, who are to act under proper superintendence, rules, and instructions; and, however it may be as to other cars, the inspectors must be deemed to be engaged in a common employment with the brakemen as to such cars, while in transit, and until ready to be inspected for a new service." To the same effect, see *Keith v. New Haven & N. Co.* (1885) 140 Mass. 175; *Little Miami R. Co. v. Fitzpatrick* (1884) 42 Ohio St. 318; *St. Louis, I. M. & S. R. Co. v. Gaines* (1885) 46 Ark. 555; *Kelly v. Abbott* (1895) 63 Wis. 307, 53 Am. Rep. 292.

Still less can a railroad company under this theory be made liable for a defect in the original construction of a foreign car if proper provision has been made for its inspection. *Thyng v. Fitchburg R. Co.* (1892) 156 Mass. 18.

Perhaps the most elaborate exposition of this theory is to be found in the opinion delivered in *Smith v. Potter* (1881) 46 Mich. 258, 41 Am. Rep. 161, where it is said that if the inspectors committed an error, or were guilty of negligence, the employer was not to blame for it. "The work done is to be done at all hours and at every place where there are railroad connections with other roads. It is not a duty of management or general supervision but a task for which nothing is required but fidelity, and mechanical knowledge of a comparatively limited kind. It is such work as would seldom be delegated to an officer of extensive responsibility who has other interests to look after. But, whatever be its quality, it was in this case not claimed to have been placed in wrong hands. Nothing more could be asked of the employer. . . . There is no difference in the nature of

the danger, or in the quality of the inspector's employment, between the case of shifting cars belonging to other roads and cars belonging to the same road. Defects in both lead to the same results, and the methods of examining both are identical. Where a car has been damaged by some injury which has escaped notice, it cannot fairly be said that employers ignorant of it, who have taken all the usual and reasonable precautions against it, are any more to blame in the one case than in the other."

In *Cincinnati, H. & D. R. Co. v. McMullen* (1888) 117 Ind. 439, the court inclined to the view that inspectors of foreign cars were fellow servants of the brakeman, the view being taken that "it is not the duty of the company to furnish appliances and instrumentalities, but to make proper inspection and give notice of defects if any are found, and that this duty is performed by the employment of a sufficient number of competent and skilful inspectors who are subjected to proper rules and instructions." The defective car in this case belonged to the defendant, but the suggestion was taken up six years later by the same court, and made the ground of a decision that a mining company fulfils its duty to its servants as to inspection of cars furnished it for temporary use, by supplying competent and skilful inspectors subjected to proper instructions; and the negligence of noninspection in such case is not that of vice principals. *Neutz v. Jackson Hill Coal & C. Co.* (1894) 130 Ind. 411, Rehearing Denied in (1894) 139 Ind. 418. The court said: "In the present case the inspectors and the appellant occupied a relation to the appellee in all respects identical with that occupied by the inspectors and brakemen of railway companies handling cars of other companies in the course of the master's business. The cars came, not as instruments of the service supplied by the master, but as incidents of its business, and from the dependence of the master upon those not in any manner connected with such business or subject to the master's control. If the defects had been in the original construction of the cars it could not be said that such defects were chargeable to the negligence of the appellee, nor can it be said with greater reason that the ill repair was from the fault of the appellee, or that a duty rested upon the appellee to make the repairs. The extent of the appellee's control over the cars was in the use of them for loading coal, and it was not responsible to the appellant, or anyone else, for their sufficiency as a means of transportation. The failure to inspect, to set brakes, or to block the wheels, when the first car was removed, was negligence in the use, and not in the supplying of instrumentalities. One line of distinction between vice principals and coemployees is in the duty, in one instance, to supply or maintain instrumentalities of the service, and in the other of using the instrumentalities supplied. Negligence in the first, though that of a servant, is the master's negligence, while in the second the negligence is that of a fellow servant. This distinction keeps in view the proposition that where the master himself participates in the use, and the negligence is his own, he may not be said to be a fellow servant."

But the suggestion in the earlier case, which, if finally accepted, would have committed this court to the Massachusetts doctrine, has been now rejected so far as regards foreign cars received in the ordinary way for transportation, for it has now been held specially that the inspectors of a foreign car received for transportation over their employer's road are not the

fellow servants of employees operating the train in which the car is placed, although all are employed by the same company. *Louisville, N. A. & C. R. Co. v. Bates* (1896) 146 Ind. 564, explaining *Neutz v. Jackson Hill Coal & C. Co.* (1894) 130 Ind. 411, as a case in which the rule as to the liability of railway companies for the defective condition of foreign cars was not applicable, as the defective car was merely delivered to a coal company to be loaded with coal.

In *Kelly v. Abbot* (1885) 63 Wis. 307, 53 Am. Rep. 292, the coupling iron of a foreign car passed over those of a caboose to which the plaintiff's intestate was coupling it, and crushed him to death. A demurrer to a complaint, alleging the want of adaptation of the cars to each other and the negligence of the defendant company in allowing the foreign freight car to be brought on its track and requiring it to be coupled, was sustained,—the court saying: "There is no reason stated why the intestate did not or could not have discovered this apparent want of adaptation of the coupling irons of the caboose and car. It was presumably in the daytime, as it is not stated that it was in the night. That the coupling irons were so widely mismatched would seem to have been as observable and readily seen as the entire absence of coupling irons, one or both. It is not to be inferred that this was the only instance when the cars of different roads, brought together to be coupled, were so mismatched. It might rather be inferred that not unfrequently they have coupling irons higher or lower than each other, and that there is no reasonable assurance that they are always adapted to each other in this respect. This would seem to impose the duty upon the brakeman, before going between such cars and the caboose or cars of the road on which he is employed, to couple them together, to observe more closely and to use more caution than if he was attempting to couple the cars of his own road, which are adapted to each other by construction or selection, in order to ascertain whether their coupling irons would meet or pass each other. There is no allegation that he even looked to see, or that he could not have seen, if he had looked, this clearly apparent difference in the elevation of these coupling irons, or that his attention was diverted."

The difference in the elevation of the couplings irons of this foreign car and the caboose or other cars of the defendant's road would not have been very easily or readily observed when they were distant from each other, and yet the company is sought to be held liable for its want of ordinary care in not knowing this difference when consenting to take this foreign car into its train. When the car and the caboose were brought nearly together this difference could have been at least much more readily seen and observed by comparison. The company is charged with negligently endangering the lives of its brakemen by not knowing of this difference, and if presumed to know of it, in allowing this car to be attached to its train; and the intestate is alleged to have been in the use of proper care when he endangered his own life by not seeing, observing, or knowing of such difference in the elevation of the coupling irons. Did not the intestate have the same, if not superior, means of knowing of this difference, or as to that of the company? If the negligence of the intestate and that of the company in this respect are equally balanced, ought the plaintiff to recover? The duty of the company to know of this difference is not absolute, and it is not presumed to know of it as a matter of law."

XL. Assignability of the duty of inspection.

a. Introductory.

There is no difference of opinion as to the general principle, that the only ground of liability of the master to an employee for injuries resulting from the carelessness of a coemployee, which the law recognizes, is that which arises from personal negligence, or from want of proper care and prudence, in the management of his affairs, or in the selection of its agents or appliances. *Warner v. Erie R. Co.* (1868) 39 N. Y. 468.

"The master is not, and cannot be, liable to his servant, unless there be negligence on the part of the master in that which he, the master, has contracted to do." *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, per Lord Cairns.

Some of the conclusions to which this principle leads are obvious enough.

It is, of course, sufficient to negative the existence of any liability in cases where due care has been exercised in the selection of agents, and no fault can be imputed to those agents.

Thus, a railroad company is not liable for the death of an engineer from the explosion of a locomotive boiler because of error of judgment in the selection of steel for such boiler by competent, experienced, skilled, and careful workmen in its employ. *Chicago & A. R. Co. v. Du Bois* (1896) 65 Ill. App. 142.

It is also evident that, however strictly the master may be required to account for the performance of the duty of supplying sound machinery, he cannot be held liable for an injury received by a servant through the act of a fellow servant in operating, without the master's knowledge and against his orders, worn-out machinery which he had condemned as being unfit for service. *Durgin v. Munson* (1864) 9 Allen, 400, 85 Am. Dec. 770, where this illustration is given arg., to indicate the dividing line between injuries attributable to the personal negligence of the master and the negligence of a fellow servant. See, however, *V.*, *supra*.

The real difficulties of the subject begin when it is attempted to fix the precise meaning of the phrase "personal negligence."

(1) One construction placed upon the phrase would limit the master's responsibility to the exercise of ordinary care in choosing competent agents, and in furnishing them with adequate materials and resources for the work to be done, and absolve him entirely from any liability in regard to the subsequent maintenance of the agencies thus furnished. *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30.

(2) Another view is expressed in the doctrine that "a master is never exonerated by the negligent omission of subordinates to perform duties which are imposed on him in his character as master, resulting in injury to his employees." *Bailey v. Rome, W. & O. R. Co.* (1893) 139 N. Y. 302. "That is to say, 'No duty required of the master for the safety and protection of his servants can be transferred so as to exonerate him from such liability.'" *Northern P. R. Co. v. Herbert* (1886) 116 U. S. 642, 29 L. ed. 755, *Affirming* (1882) 3 Dak. 38.

Or, as the rule may be also expressed, of some of the duties imposed by the law upon an employer, "he cannot relieve himself except by performance." *Atchison, T. & S. F. R. Co. v. Seeley* (1894) 54 Kan. 21.

Both these doctrines seem to be consistent with the proposition that the duty of the master as to the furnishing of the machinery and

other appliances is absolute. It is apparently an obvious deduction from this proposition that the employer ought not to be permitted to evade his responsibility even by the interposition of an independent contractor, and so some courts have held. *Burnes v. Kansas City, Ft. S. & M. R. Co.* (1896) 120 Mo. 41; *Herdler v. Buck's Stove & Range Co.* (1896) 136 Mo. 8; *Wanamaker v. Rochester* (1892) 44 N. Y. S. R. 45.

Yet, as will be seen by referring to subd. VIII., *supra*, this principle is qualified to a considerable extent by another, which gives an employer in his character of a purchaser of manufactured articles a right to rely in some degree upon the judgment and skill of the manufacturer.

Whatever may be the correct doctrine upon this particular point, it is manifest that the general principles which determine the extent of the responsibility of an employer for the acts of an independent contractor involve the corollary that the owner of premises cannot dictate that his building be constructed of improper materials or upon an unsafe plan, and escape liability for injuries caused thereby because he made a contract with a third person to build it; nor can he, with knowledge of a weakness or defect threatening the strength of the building, set a man at work immediately under it, and shift all responsibility upon the builder. *Meler v. Morgan* (1892) 82 Wis. 289.

The only point upon which the advocates of the two doctrines, therefore, are really divided, is the extent to which the master may assign to employees the duty of seeing that his machinery and appliances do not become unsafe after they are put into use. Even in *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, it was conceded that a mine owner may be liable for defects in the general arrangement or system of ventilation, but is not liable for a defect in the construction of a temporary scaffold for certain working operations, whereby the free action of a good system of ventilation is for awhile interfered with. Per Lord Chelmsford and Lord Colonsay.

The cases on this controversy fall into four categories: (1) Those which hold that duty to be assignable; (2) those which hold the duty to be assignable, but require the master to exercise a reasonably careful supervision over the conduct of the agents to whom it is assigned; (3) those which hold the duty to be nonassignable; (4) Those which turn upon the distinction between the nature of the duty in its relation to the supplying and maintaining of the agencies, and in its relation to the mere use of the agencies.

We shall now proceed to state the effect of the cases which belong to each of these categories, in so far as they have a direct bearing upon the special subject of the present note.

b. Theory that the duty of inspection is assignable.

Compare the cases cited in X. b, 3, *supra*.

In England the courts prior to the decision in *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, had wavered between the doctrine of the nonassignability of certain duties of the master and the doctrine that certain servants are vice principals to whom the master delegates certain duties at his peril.

The influence of the latter doctrine is distinctly traceable in the quotation from the charge of Cockburn, Ch. J., in *Webb v. Rennie* (1866) 4 Fost. & F. 608. But, so far as regards

the duty of inspection, the former was undoubtedly the doctrine which had been most generally adopted. *Hall v. Johnson* (1865) 3 *Hurlst. & C.* 589, 34 *L. J. Exch. N. S.* 222, 11 *Jur. N. S.* 180, 11 *L. T. N. S.* 779, 13 *Week. Rep.* 411; *Searle v. Lindsay* (1861) 11 *C. B. N. S.* 429, 31 *L. J. C. P. N. S.* 106, 8 *Jur. N. S.* 746, 5 *L. T. N. S.* 427, 10 *Week. Rep.* 89; *Ormond v. Holland* (1858) *Kl. Bl. & El.* 102.

So, a servant whose duty it is to superintend the laying of temporary rails leading to a ballast pit, and to change their position as the work progresses, is a fellow servant of a laborer engaged in filling trucks with ballast. *Lovegrove v. London, B. & S. C. R. Co.* (1864) 16 *C. B. N. S.* 669, 33 *L. J. C. P. N. S.* 829, 10 *Jur. N. S.* 879, 10 *L. T. N. S.* 718, 12 *Week. Rep.* 988.

A decision to the same effect subsequent to that in *Wilson v. Merry* (1868) *L. R.* 1 *H. L. Sc. App. Cas.* 326, 19 *L. T. N. S.* 30, was *Murphy v. Phillips* (1876) 24 *Week. Rep.* 647, 35 *L. T. N. S.* 477.

The English doctrine has been adopted to a very considerable extent in this country, as the following rulings will show:

In *Arkansas* a car inspector is the fellow servant of the trainmen. *St. Louis, I. M. & S. R. Co. v. Rice* (1889) 51 *Ark.* 467, 4 *L. R. A.* 173.

The decision in *Wilson v. Merry* was expressly approved in *Columbus & I. C. R. Co. v. Arnold* (1869) 31 *Ind.* 174, 99 *Am. Dec.* 615, which held that where the directors of a railroad company have devolved the duties of superintending the repairs of machinery and directing its use on a skillful, competent, and trustworthy master machinist, and furnished him with adequate materials and resources for executing repairs, notice to them that an engine is out of repair and unsafe for use is not of itself sufficient to render the company liable. Such machinery is often liable to get out of repair and become unsafe, and as they do not direct or authorize its use when in an unsafe condition, they are not responsible for its use in that condition, in the absence of notice that it was being so used. The following extract from the opinion may be quoted for the purpose of showing the rationale of the decision: "The directors of such a corporation, from the very nature of the organization and the business in which it is engaged, are not expected personally to superintend the various operations of the road. There is no implied obligation that they should do so; nor is it to be presumed that they are selected with a view to their qualifications and skill for the performance of many of the duties required in constructing, equipping, and operating the road. The master is not liable to his servant, unless there be negligence on the part of the master in that which the master has contracted or undertaken, either expressly or impliedly, to do. It is the duty of such a corporation to use every reasonable care in the proper construction of its road, and in supplying it with the necessary equipment, including properly constructed engines, and the necessary and proper materials for its repair, and the selection of competent, skillful, and trusty subordinates to supervise, inspect, repair, and regulate the machinery, and to regulate and control the operations of the road. If these duties are performed with care and diligence by the directors, and one of the persons so employed is guilty of negligence by which an injury occurs to another, it is not the negligence of the directors or master, and the company is not responsible." 41 *L. R. A.*

But this case was overruled in *Indiana Car Co. v. Parker* (1884) 100 *Ind.* 181.

In *Maryland* a brakeman and an inspector of machinery and rolling stock are held to be fellow servants. *Wonder v. Baltimore & O. R. Co.* (1870) 32 *Md.* 411, 3 *Am. Rep.* 143. But the court recognizes the "vice principal" doctrine so far as to hold an employer liable for the negligence of a general superintendent, and to this extent departs from the English doctrine. *State, Hamelin, v. Malster* (1881) 57 *Md.* 287.

"In order to hold a railroad company responsible to an employee (as conductor on its train) for injuries sustained because of the road or its appurtenances being out of repair, it must be shown that the company is in default in its duty, either by the selection of incompetent servants or an insufficient number to do the work, or failure to furnish proper material, or that the company had notice of the bad condition of the road or is chargeable with negligence for not knowing." *Howd v. Mississippi C. R. Co.* (1874) 50 *Miss.* 178, following *Wilson v. Merry, supra*.

In *McDermott v. Pacific R. Co.* (1860) 30 *Mo.* 116, it was held that a brakeman could not recover for injuries caused by the fall of a defective bridge, there being no allegation that the company had failed to exercise ordinary care in the selection of its servants.

But this doctrine is now repudiated by the courts of Missouri, and replaced by one which has been thus stated in a recent case: "The duty of seeing that the place [of work] and appliances are such that the servant can perform his duties with reasonable safety is a personal one which the master cannot delegate to someone else [whether superintendent or independent contractor] and thus escape liability." *Herdler v. Buck's Stove & Range Co.* (1896) 136 *Mo.* 3.

The views of the New Jersey courts upon the question under discussion are somewhat inconsistent.

In *Van Steenburgh v. Thornton* (1896) 58 *N. J. L.* 100, it was held that the duty of furnishing a safe place of work was nonassignable.

It is also conceded that the president of a corporation is a vice principal. *Smith v. Oxford Iron Co.* (1880) 42 *N. J. L.* 467, 36 *Am. Rep.* 535.

Yet in *Essex County Electric Co. v. Kelly* (1894) 57 *N. J. L.* 100, it was said: "It is a matter of judicial disagreement whether a master can discharge the duty [of examining and ascertaining whether appliances have become unfit or unsafe from wear and tear or otherwise] and the similar duty of keeping tools and appliances in repair, by selecting and employing competent persons to make inspections and repairs. In our courts it is held that the master's duty may be thus discharged." The court cited *Rogers Locomotive & Mach. Works v. Hand* (1888) 50 *N. J. L.* 464, and *Harrison v. Central R. Co.* (1865) 31 *N. J. L.* 293. In the latter of these cases, where the plaintiff was injured by the fall of a bridge, the court remarked: "From the relation between the company and their brakeman, the legal consequence seems to have been deduced by the pleader that the former, with regard to the latter, was bound to keep the bridge in a safe condition. This is not a true statement of the obligation of the company. It was not near so absolute; for if the bridge was insecure from a secret defect which the company was not able to discern by the exercise of reasonable diligence and skill, no responsibility would have fallen on the defendants on account of its defective state. If, as was stated on the argument, the company, in point of fact, directed

its agents, who were possessed of competent skill, to examine at stated periods the bridge in question, and such agents reported to the company that the structure was in a secure condition, and no circumstances existed which were calculated to impair a reasonable confidence in such report, I think it is plain, upon the principles of law above propounded, that even if the agents making such report acted carelessly in the discharge of their duties, or even falsely reported their conclusions to the company, that under such a state of facts the plaintiff could not sustain this suit. To warrant a recovery in this case in favor of the employee, who is here represented by the plaintiff, the fault which forms the basis of the action must be that of the company, and not simply the negligence of a fellow servant."

The position of this court on the distinction between inspection as incident to the use, and to the supply of instrumentalities, will be explained below.

In Ohio a car inspector is held to be a fellow servant of the trainmen. *Little Miami R. Co. v. Fitzpatrick* (1884) 42 Ohio St. 318; *Lake Shore & M. S. R. Co. v. Lamphere* (1894) 9 Ohio C. C. 263, both following *Columbus & X. R. Co. v. Webb* (1861) 12 Ohio St. 475, which was itself based upon *Ormond v. Holland* (1858) El. Bl. & El. 102, one of the rulings in which, as already remarked, the decision in *Wilson v. Merry* was anticipated.

In Pennsylvania the doctrine is recognized that an employee placed in sole charge of his master's business, or of a distinct branch of it, is a vice principal. *Frazier v. Pennsylvania R. Co.* (1861) 88 Pa. 104, 80 Am. Dec. 467; *Ardesco Oil Co. v. Gilson* (1869) 63 Pa. 150; *Mullan v. Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2.

In *Tissue v. Baltimore & O. R. Co.* (1886) 112 Pa. 91, 56 Am. Rep. 310, it was held that, where a dynamite magazine, from the explosion of which a servant lost his life, was placed in the position which it occupied by the direction of the superintendent of the work at a tunnel, in obedience to the instructions of the master of the road, the act, so far as it concerned subordinate employees, was by the corporation itself, and could not be attributed to any of the fellow servants of the deceased.

It is also held that "whenever it is sought to hold the master liable for the act or neglect of his foreman, the question to be considered is whether the negligence complained of relates to anything which it was the duty of the principal to do." *Ross v. Walker* (1891) 139 Pa. 42.

But in regard to the obligation of supervision the principle of the nonassignability of certain duties thus distinctly recognized has been departed from in a manner which appears to be quite arbitrary, when it is considered that this court has fully adopted the doctrine that the duty to which the duty of supervision is incidental,—viz., the duty to furnish a safe place of work and safe appliances,—is positive and personal in its nature. See *Lewis v. Selfert* (1887) 116 Pa. 628.

Thus, in *Beimisch v. Roberts* (1891) 143 Pa. 1, the court approved of an instruction in which the jury were told, among other things, that the defendant was not liable for an accident caused by a defect of which he knew, or ought to have known, provided he had a person in his employ whose duty it was to keep the appliances in good condition. But there was no testimony showing that the employer or any agent of his having control had any knowledge of the defect, and the case was ultimately made to turn on the facts that the state of the appliance was as open to the observation of the 41 L. R. A.

plaintiff as of the defendant, and that the proximate cause of the accident was the negligence of the plaintiff's fellow servants in selecting an unsound appliance when they had the opportunity of selecting one that was in good condition.

Similarly, in *Mansfield Coal & C. Co. v. McEnery* (1879) 91 Pa. 185, 36 Am. Rep. 662, we find the court committing itself to this doctrine: If a railroad company exercises ordinary care and skill in the selection of employees to construct a bridge, it will not be responsible for defects resulting from its original construction; but if it had knowledge of such defects, more especially if notice had been given to it thereof, and it neglected to make the necessary repairs, it will be responsible not only to strangers, but even to one of its employees, provided he was not chargeable with concurring negligence or want of proper care, or neglect of duty on his part.

So, also, it has been held that the fact that the insecure condition of a railroad track is remotely due to the negligence of some servant who failed to report its condition and put it in repair will not excuse the company from liability. *O'Donnell v. Allegheny Valley R. Co.* (1868) 59 Pa. 239, 98 Am. Dec. 336.

So, a car inspector has been held to be a fellow servant of a brakeman. *Philadelphia & R. R. Co. v. Hughes* (1888) 119 Pa. 301. The court said: "If, however, the company employ competent and skilful persons for the purpose of inspection, and afford them reasonable opportunities and facilities for the work under proper instructions, the company will not ordinarily be liable for the negligent performance of the work by their employees, to a fellow employee, unless the company knew, or by ordinary diligence ought to have known, of the defective manner in which the inspection was conducted. We are clearly of opinion, too, that a brakeman and a car inspector are in the same circle of appointment; they co-operate in the same business, and the former knows that the employment of the latter is one of the incidents of their common service. But while the performance of the duty of inspection must necessarily be committed in detail to the employees, the general regulation is in the hands of the company, and it is the duty of the company to provide suitable persons, in sufficient numbers, at proper places, with reasonable opportunities to accomplish the work."

In *Nashville, C. & St. L. R. Co. v. Foster* (1882) 10 Lea, 351, the court cited *Mobile & O. R. Co. v. Thomas* (1868) 42 Ala. 672, to the point that a car inspector and brakeman were fellow servants.

In *St. Louis, I. M. & S. R. Co. v. Rice* (1889) 51 Ark. 467, 4 L. R. A. 173, the court said: "While we recognize the liability of the railway company for the wilful or negligent default of its chief inspectors and those deputed to supervise the condemnation of unsuitable tools, rolling-stock, etc., we cannot assent to the proposition that every yard inspector on the line of a railroad is a vice principal."

In an early case in Vermont, following, as may be surmised from the citations of counsel, the trend of the English decisions which preceded and anticipated the ruling in *Wilson v. Merry*, it was held that an engineer injured through the negligence of a master mechanic whose duty it is to see that the engines are kept in repair, cannot recover damages from the common employer. The ground was taken that the rule by which the master impliedly warrants the soundness of machinery, so far as the exercise of due care will enable him to discover any unsoundness therein, applies only to

the condition of the machinery at the time it is put into the hands of the servant. There is no warranty that the servants shall faithfully discharge their duty in keeping the machinery in its original safe condition. *Hard v. Vermont & C. R. Co.* (1860) 32 Vt. 473, holding that an engineer injured through the negligence of a master mechanic whose duty it is to see that the engines are kept in repair cannot recover damages from the common employer.

This theory is not unlike the Massachusetts doctrine to be noticed presently, but it wants the saving qualifications of the latter in favor of the servant. But this decision is practically overruled by *Davis v. Central Vermont R. Co.* (1892) 55 Vt. 84, 46 Am. Rep. 590, holding that a railroad company is liable for injuries caused by a defective condition of its track, which would have been known to the company's bridge builder and roadmaster if proper inspection had been exercised.

The decisions of the Federal courts cited in the next section but one have virtually overruled *Kidwell v. Houston & G. N. R. Co.* (1877) 3 Woods, 813, where, in discussing a contention of plaintiff's counsel that the averment in the petition, charging that the "master mechanic was advised of the habitual negligence and general bad habits of said car inspector, and that he failed and refused to discharge him," takes this case out of the general rule, as being equivalent to a charge that the company had employed an unskilful or incompetent car inspector, the court said: "This charge, thus vaguely made, seems to me only to amount to a charge of negligence on the part of the master mechanic in not reporting the character of the car inspector to the officers of the company, and does not, therefore, constitute an exception to the general rule that a railroad company is not liable to one of its employees for the mere negligence of another employee. It does not appear that the master machinist was anything more than a fellow servant of the car inspector and the plaintiff, without the power of appointment or removal. Under these circumstances the defendant company could not be made liable."

The fact that the inspection of foreign cars is, under the rulings of the state where the action is brought, an assignable duty, will not prevent a servant who is injured by the failure of a co-servant to discharge that duty properly from maintaining the action, if he might have recovered under the law of the state where the injury was received. *Walsh v. New York & N. E. R. Co.* (1894) 160 Mass. 571.

c. Theory that the master is bound merely to supervise the inspectors.

This theory has been most fully elaborated by the supreme court of Massachusetts. In the earliest of the cases in which the assignability of the master's duties was directly involved (*Ford v. Fitchburg R. Co.* (1872) 110 Mass. 240, 14 Am. Rep. 598), no traces of it are discoverable, for the court there held that instructions were properly refused which said the defendants would not be liable for negligence of persons examining a boiler. The court said: "The corporation is equally chargeable, whether the negligence was in originally failing to provide, or in afterwards failing to keep, its machinery in safe condition. The duty is essentially the same. . . . The question was not whether the officers named knew, or might have known, of the defect, or of the incompetency of those who had charge of the repairs, but whether the corporation in any part of its organization, by any of its agents, or for want of

of agents, failed to exercise due care to prevent injury to the plaintiff from defects in the instrument furnished for his use."

In *Colton v. Richards* (1878) 123 Mass. 484, it was recognized that the exercise of due care in selecting men and materials does not always represent the full measure of the defendant's duty, when, as master, he takes upon himself the business of furnishing a completed staging for the use of his workmen, but that it may still be his duty—especially when he superintends the work himself—to see that the structure is in itself reasonably safe and fit for the uses to which it is devoted. But as this was said merely with reference to the distinction, recognized by all courts (see *e. infra*), between the liability of the master for the quality of materials furnished for a structure, and for the quality of the structure itself erected by servants from those materials, as a part of their ordinary duties, the case does not cast much light upon the evolution of the doctrine.

The same distinction may, perhaps, be also sufficient to explain the actual decision in *Johnson v. Boston Tow-Boat Co.* (1883) 135 Mass. 209, 46 Am. Rep. 458, to the effect that a tow-boat company is not liable for the negligence of the captain of one of its lighters, who fails to replace a rope which he knows to be defective, where a sufficient stock of ropes is always kept on hand by the company, and a new one may be obtained at any time. But the following language used by the court can scarcely bear any other construction than one which commits it to a doctrine wholly inconsistent with that laid down in *Ford v. Fitchburg R. Co.* (1872) 110 Mass. 240, 14 Am. Rep. 598, although an elaborate attempt was made by Colt, J., to reconcile the two cases: "It was incidental to the use of the apparatus—a part of its contemplated use—that the rope should be occasionally renewed; and when the defendant had furnished the means for that renewal, and employed Moore to make the renewal whenever needed, it employed him as a servant, and not as agent or deputy. When a master has furnished suitable structures, means, and appliances for the prosecution of a business, all persons employed by him in carrying on the business by the use of the means furnished, including those who use the means directly in the prosecution of the business, those who maintain them in a condition to be used, and those who adapt them to use by new appliances and adaptations incidental to their use, are fellow servants in the general employment and business. One employed in the care, supervision, and keeping in ordinary repair of the means and appliances used in a business, is engaged in the common service."

The new doctrine was at length fully unfolded in *Rogers v. Ludlow Mfg. Co.* (1887) 144 Mass. 202, 59 Am. Rep. 68. "The rule of respondeat superior," said Field, J., "as applied to cases like the present, the exception of injuries caused by the negligence of a fellow servant, and the limitations of this exception, have been established by courts upon considerations of public policy, as well as of the legal principles which govern cases somewhat analogous. If a master who takes no personal part in the management of his business has any duty to perform towards his servants, it is difficult to say that it is always wholly performed by doing two things, namely, by employing competent servants, and by furnishing ample means. In order that the business may be properly managed, the servants should not only be competent, but they should be numerous enough to do, and they should have the means of doing, whatever ought reasonably to be done, and

such regulations should be established as will insure the regulate subordination and control and the exercise of reasonable intelligence and care in the conduct of the business; and it is almost as difficult to define all the duties of the master in these respects as to define the duties of a person under other relations. If it is not the absolute duty of the master to furnish suitable machinery, and if he is not held to warrant that the servants he employs to furnish machinery, or to keep it in repair, shall always use reasonable care, then the duty of a master who does not personally conduct his business, if he is under any duty, we think, must be to use reasonable care in the management, and that is to exercise, or have exercised, a reasonable supervision over the conduct of his servants, as well as to use reasonable care in seeing that his servants are competent, and are furnished with suitable means for carrying on the business." Then, after reviewing some of the earlier cases, the learned judge proceeded as follows: "These decisions show that it is the duty of the master to exercise a reasonable supervision over the condition in which the machinery, structures, and other appliances used in his business are kept by his servants, and that he cannot wholly escape responsibility by delegating the performance of this duty to servants; that the negligence of his servants in repairing or in failing to repair machinery is not necessarily the negligence of the master, but that it is also to be determined in each case whether the master has exercised a reasonable supervision over his servants, and reasonable care in seeing that his machinery is kept in proper condition, although he may have employed competent servants, and furnished them with suitable materials, and instructed them to keep the machinery in repair. As was said in *Johnson v. Boston Tow-Boat Co.* (1883) 135 Mass. 215, 46 Am. Rep. 458, 'The master is liable in all cases for his own negligence, and that may be shown by a defect of such a nature, or so long continued, as to be of itself evidence of negligence in the master, or the negligence of a servant may be of such a character that negligence of the master may be inferred from it.' We are aware that this rule is somewhat indefinite, and is, perhaps, not precisely that which generally prevails in the United States. *Northern P. R. Co. v. Herbert* (1886) 116 U. S. 642, 29 L. ed. 755; *Benzing v. Steinway* (1886) 101 N. Y. 547."

In another case decided about the same time the court said: "Perhaps the whole question is whether the master has exercised reasonable care in employing competent servants, in providing suitable machines and implements, and in doing that part of his business which he has undertaken to do himself, and has exercised a reasonable supervision over his servants in the performance of the duties which he has intrusted to them. This is often a question for the jury. Courts have therefore held that they could not say, as matter of law, that a master was not responsible for injuries occasioned by defective machinery, when the defect was substantial and rendered the machine unfit for use, although it was through the neglect of a competent servant that the machine had not been repaired; and they have also held that, when the defect was one that must frequently arise from the use of the machine, and was such that the person employed to superintend the use of the machine should attend to in order to keep it in running order, the master performed his whole duty by furnishing suitable materials and employing competent servants to keep the machinery in repair. These decisions have been made in cases where it appeared that the

defect in the machinery was unknown to the master. The general question is, what under the circumstances, the master ought reasonably to have known and done, and, in determining this, the nature of the defect, the length of time it has existed, and the means taken to remedy it, are important facts." *Rice v. King Phillip Mills* (1887) 144 Mass. 236, 59 Am. Rep. 80.

In *Moynihan v. Hills Co.* (1888) 146 Mass. 502, it was remarked: "The very nature of the implied contract created by the hiring, whereby he undertakes to use proper care in always providing safe tools and appliances, is inconsistent with his delegation of the duty to a fellow servant, for whose negligence he is not to be responsible. His obligation involves the exercise of every kind of care and diligence which is necessary to give him knowledge of the condition as to safety of his machinery and appliances, so far as such knowledge is obtainable by reasonable effort. His duty relates to the condition of these articles when they come to the hands of his servants for use, and the performance of that duty must carry him just so far into details as it is reasonably necessary to go, in view of the nature and risk of the business, to enable him reasonably to protect his servants from a danger which he should prevent."

"The servant charged with providing appliances stands in the place of the master, and performs the duty incumbent on him. It is not sufficient that he is an intelligent and competent servant; if he neglects this, the master is still responsible, unless he shall himself have exercised a reasonable care and supervision over him in seeing that the machinery was in proper condition. Nor is it enough that the master has employed suitable servants, and furnished them with suitable materials, and instructed them to keep the machinery in repair. He must see that such servants do their duty." *Elmer v. Locke* (1883) 135 Mass. 575; *Rogers v. Ludlow Mfg. Co.* (1887) 144 Mass. 198, 59 Am. Rep. 68; *Daley v. Boston & A. R. Co.* (1888) 147 Mass. 101.

The theory of the court was still further clarified by the ruling in *Babcock v. Old Colony R. Co.* (1890) 150 Mass. 467, where the plaintiff was injured by defects in a railroad track. The extremely vague character of the principles to which this court has committed itself in attempting to fix the boundary line between supervision as an assignable and as a nonassignable duty, will be apparent from the following passages of the opinion: "It is the duty of a railroad corporation to use reasonable care and diligence to keep its tracks in a safe condition for its employees to work upon. So far as the work of keeping its tracks in repair is left to its servants, it is its duty to exercise reasonable supervision to see that the work intrusted to them is properly done. How far into details this supervision must go before the domain which belongs exclusively to the master is passed and the domain which may be left to servants is entered, depends upon what it is reasonable to require of a master who is charged with the duty of providing safe works, machinery, tools, and appliances for his employees. In some cases this may be a difficult question to decide. . . . The next question in the case is, whether there was evidence to warrant the judge in submitting to the jury the question whether the section master was so far charged with the duty of supervision that the defendant might be liable to one of its servants for his negligence. It is well settled that one who is in some things a mere servant may be made the master's agent to perform duties

which are primarily personal to the master. *Moynihan v. Hillis Co.* (1888) 146 Mass. 586, and cases cited. If in the present case the section master was intrusted by the defendant with the performance of the duty, or a part of the duty, of supervision of the tracks which a reasonable regard for the safety of its employees required the corporation to perform, the defendant is liable for his negligence in the performance of it. There was evidence tending to show that different persons had some responsibility in representing the defendant in this respect. A part of the printed instructions to section masters was in these words: 'They will see that no wood, lumber, ties, or other obstructions are piled within 6 feet of the track'. It does not very clearly appear what other measures were taken by the defendant promptly to ascertain the existence of defects or obstructions along the track. The evidence on this branch of the case is rather meagre, but we cannot say that there was not enough to warrant the judge in submitting the question to the jury under the instructions which he gave. . . . The refusal of the judge to instruct 'that, if the defendant had used reasonable care in the supervision of the section men and of the use of the yard, the plaintiff could not recover for the neglect of the section men in leaving the ties by the track, or the neglect of the yard master or the section master or roadmaster in failing to have them removed, or to report that they were there,' was upheld on the ground that it might possibly have been the duty of the yardmaster, or the roadmaster, to exercise this supervision, and if he discovered neglect, to see that the road was not left in a dangerous condition on account of the neglect."

In *Coates v. Boston & M. R. Co.* (1891) 153 Mass. 207, 10 L. R. A. 769, there was evidence that a jaw-strap had been gone for some time, from which it might be inferred that the company knew of its absence, an inference which would justify a finding that the company ordered the plaintiff into a place where there was a concealed danger known to the company, and not known to the plaintiff or to the superior servant giving the order, and of which the plaintiff received no warning. The court said: "We do not put our decision on the identification of master and servant, and a union of the knowledge of the corporation and the command of the conductor in one person, by a fiction. But we think the jury might have found, at least, this negligence on the part of the corporation; that, knowing the condition of the car, it put a conductor there with men under him, having reasonable ground to anticipate that such orders would be given as were given without warning either him or the men."

If a superintendent knew, or had reason to know, that there was danger of the caving of a trench, and had no materials for bracing it, and no power to procure them, it was negligence to allow the digging to go on before the necessary materials were procured. For such negligence of a superintendent, the principal is answerable, and cannot escape liability by showing that it was by his own act, and not by the fault of the superintendent, that suitable materials were wanting. *Connolly v. Waltham* (1892) 156 Mass. 368.

With the above cases may be compared *Neveu v. Sears* (1892) 155 Mass. 303, where it was held that one sued for personal injuries to a stone mason in his employ, caused by the explosion of dynamite left unexploded in a block of stone which plaintiff was dressing, is chargeable with knowledge of those facts as to the use of dynamite at his quarry which he

either knew or ought to have known. His employment of competent quarrymen, and his furnishing them with proper means of preventing any dangers consequent on the use of dynamite, would not, it was said, justify him in relying on his actual want of knowledge that there had been carelessness at the quarry as an excuse for furnishing a dangerous stone for the plaintiff's use, if, knowing all that had happened at the quarry, he would then have had reason to believe that unexploded cartridges might remain in the blocks removed therefrom. An instruction was, therefore, held correct which left the jury to say whether, considering the knowledge which the master had, or ought to have had, of what occurred at the quarry, each block should have been examined for dynamite when it was transported from the quarry, or first appropriated for the work on which the plaintiff was engaged.

Traces of a similar doctrine are also to be found in the decisions of the New Jersey courts.

"A master cannot claim immunity on the ground that he has exercised due care in selecting mechanics of competent skill in the construction of machinery and buildings, but assumes the burden of seeing that such mechanics actually exercise reasonable care and skill in the execution of their work." *Collyer v. Pennsylvania R. Co.* (1886) 49 N. J. L. 59.

In *Smith v. Oxford Iron Co.* (1880) 42 N. J. L. 467, 88 Am. Rep. 535, it appeared that one Scranton, the president of the defendant company, to whose care was committed the superintendence of the business of the corporation, introduced the use of giant powder. It was clearly shown that it was a highly dangerous explosive, and that the proper manner of using it was not made known to the plaintiff, although printed instructions were in the possession of the company. The court said: "Before allowing this new compound to be introduced, it was a duty which the company owed to the plaintiff to ascertain and make known its properties and the mode of using it, either to the plaintiff himself or those under whose direction he worked. The obligation to do so rested upon Scranton, as the head officer of the company, and his neglect in that respect was the neglect of the company itself. It was gross negligence in the company to furnish such an article for a laborer's use without giving him the requisite information. Whether the company was aware of its dangerous quality, or furnished it for use without having taken steps to obtain such knowledge, it is equally liable. It was a duty which the company, through Scranton, was bound to perform, to see that such reasonable care as the exigency of the case demanded, was taken, and to impart to the subordinates full information as to the manner of applying the new compound, before placing it in the hands of an ignorant laborer. This obligation resting on the company itself, the president could not shift its liability by referring the matter to one of his subordinates. The effect of such a rule would be to substantially absolve a corporation from all liability. There was a clear failure on the part of the president to use the care which, under the circumstances of the case, the law exacted from the defendant, and his neglect must be imputed to the company."

In *Michigan C. R. Co. v. Dolan* (1875) 82 Mich. 510, the court referred to, but declined to discuss, the question how far down in the chain of delegated appointments the master is to be held as bound to personal supervision, remarking: "The starting point that he is only liable for his own neglect is one from which

we have no right to depart. And it is plain enough that, when he is held to any personal supervision which from the nature of his business is impracticable, the rule is violated, and there is no tangible distinction left between liability to servants and liability to strangers."

The nonexistence of a duty on the part of an employee alleged to be a vice principal to supervise his subordinates in the performance of their work to the extent claimed will, it is obvious, sometimes dispense with the necessity of inquiring into the correctness of that allegation.

A conductor, for instance, is bound to give orders as to the movement of the several parts of a freight train at a station, but he is not in duty required to follow up each brakeman, and see how each movement is executed. *Relyea v. Kansas City, Ft. S. & G. R. Co.* (1892) 112 Mo. 86, 18 L. R. A. 817, where it was held not to be negligence for the conductor to leave to the brakeman the work of seeing that the brakes were properly set on each of the cars which were left standing on a grade.

d. Theory that the duty of inspection is nonassignable.

1. General principles.

The general doctrine as to the nonassignability of the master's various duties has been thus laid down by the Supreme Court of the United States in a well-known passage: "A railroad corporation may be controlled by competent, watchful, and prudent directors, who exercise the greatest caution in the selection of a superintendent or general manager, under whose supervision and orders its affairs and business, in all of its departments, are conducted. The latter, in turn, may observe the same caution in the appointment of subordinates at the head of the several branches or departments of the company's service. But the obligation still remains to provide and maintain, in suitable condition, the machinery and apparatus to be used by its employees, an obligation the more important, and the degree of diligence in its performance the greater, in proportion to the dangers which may be encountered. Those, at least, in the organization of the incorporation who are invested with controlling or superior authority in that regard represent its legal personality; their negligence, from which injury results, is the negligence of the corporation. The latter cannot, in respect of such matters, interpose between it and the servant, who has been injured without fault on his part, the personal responsibility of an agent who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation. *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. 612. To the same effect, see *Northern P. R. Co. v. Herbert* (1886) 116 U. S. 642, 29 L. ed. 755; *Northern P. R. Co. v. Peterson* (1895) 162 U. S. 346, 4 L. ed. 905.

The following uncompromising assertion of the same doctrine is of special interest for the reason that it emanates from a court which, as has been shown above, has not carried that doctrine, in the case of the duty of inspection, to its logical results: "The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has the right to count on this duty, 41 L. R. A.

and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from the obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require. In one the master cannot escape the consequence of the agent's negligence; if the servant is injured in the other he may." *Ford v. Fitchburg R. Co.* (1872) 110 Mass. 240, 260, 14 Am. Rep. 598.

In *Riley v. West Virginia, C. & P. R. Co.* (1885) 27 W. Va. 145, the correct rule on this subject, as deduced from the more recent and better considered American cases, was said to have been that stated in *Wood on Master and Servant*, § 438, as follows: "Whenever the master delegates to another the performance of a duty to his servants which the master has impliedly contracted to perform in person, or which rests upon him as an absolute duty, he is liable for the manner in which that duty is performed by the middleman whom he has selected as his agent, and to the extent of the discharge of those duties by the middleman, he stands in the place of the master, but as to all other matters he is a mere coservant, and the question is not, whether the master reserved any oversight or discretion to himself, but whether he did in fact clothe the middleman with power to perform his duties to the servant injured."

The broad principles thus enunciated are undoubtedly those which are supported by the greatest weight of authority in this country, and by the majority of the courts they have been, as the subjoined rulings will show, construed in such a sense as to make the duty of inspection nonassignable.

"It is only at his own risk that a person engaged in excavating a ditch can depute to another the task of keeping it in a safe condition for the servants whom he puts to work in it." *Van Steenburgh v. Thornton* (1895) 58 N. J. L. 160. (See, however, as to the apparently inconsistent position of this court, b, and c, supra.)

It is observable that the fact of this nonassignability may be expressed by two different forms of statement. We may either say that the "nonfulfilment of a positive duty cannot be excused by the delegation of its performance to another" (*Pennsylvania R. C. v. La Rue* (1897) 55 U. S. App. 20, 81 Fed. Rep. 148), or that the employee entrusted with the performance of one of these absolute duties is not a mere coservant of the other workmen, but a vice principal. These alternative modes of statement, and the objects at which the courts have aimed in adopting the conception which underlies them both, are very clearly explained in the following passage from the opinion in *Rogers v. Ludlow Mfg. Co.* (1887) 144 Mass. 201, 59 Am. Rep. 68: "As a corporation must act by natural persons, and as all large corporations carry on their business by means of servants of different grades, it is manifest that, if it is held that these are all fellow servants, and that the corporation can delegate the whole duty of hiring and superintending its servants, and of providing its machinery and of keeping

it in repair, to one or more principal servants, such as superintendents or managers, the corporation may escape all responsibility for injuries caused by defective machinery, except in the few cases where it can be shown that these principal servants were incompetent, or that the directors of the corporation, or its principal officers, knew that the subordinate servants were incompetent, or that the machinery used was defective. To avoid this result, some courts have held that superintendents or managers are not fellow servants with the men employed to work under them, or that servants employed in one department of the business are not fellow servants with those employed in another. Other courts have held that they are all fellow servants, but that the master cannot avoid his obligation to see to it that reasonable care shall be exercised in procuring suitable machinery, in keeping it in repair, and in hiring and retaining competent servants, by employing a servant to do these things for him, and that if he does employ a servant for this purpose, and the servant does not use due care, the master is responsible."

So far as the actual liability of the employer is concerned, it is, of course, quite immaterial from which standpoint the position of the inspector is considered, and, as might be expected, the courts are apt to pass from one form of expression to the other in the course of the same discussion.

The following passage from the dissenting opinion of Mitchell, J., in *Tierney v. Minneapolis & St. L. R. Co.* (1885) 83 Minn. 311, 53 Am. Rep. 35, is worthy of notice as indicating some of the difficulties of fixing with precision the division line between nonassignable duties and the duties of fellow servants: "A familiar rule is that the master is bound to use ordinary care in furnishing suitable and safe instrumentalities for the use of his servants. Included in this is that of maintaining them in a safe condition. Repairing is, in a sense, furnishing. And, as necessarily incident to the duty of 'maintaining,' is the duty of providing an adequate system of inspecting, examining, and guarding these instrumentalities. It is also the rule that this duty of furnishing and maintaining safe instrumentalities is a primary duty of which the master cannot relieve himself by clothing some general agent with the power, and charging him with the duty, of making performance for him, but that the failure of such agent will be the failure of the master. This rule has been sometimes understood as meaning that the master is responsible to his servants for the negligence of every employee, however his station, who is engaged in performing the most common executive duties in the matters of repairing, examining, or watching the instrumentalities intended for the use of other servants. I think this is a misapprehension of the rule, which has sometimes arisen from losing sight of the distinction between one who is clothed with the powers of the master in the control and supervision of some department of the business, and who is *pro hac vice* the representative or alter ego of the master, and one who simply performs what may be termed mere executive details. . . . The management of an extensive business, like that of operating a railroad, includes so many departments and so many grades of service that it may not always be an easy matter to draw the line between those who are to be deemed 'vice principals,' or representatives of the master, and those who are to be deemed 'fellow servants,' as to other employees; but the fact of such a distinction is everywhere recognized. To hold that the master is responsible

to his servants for the negligence of every employee of the most subordinate rank who is engaged in the department of repairing, examining, watching, or guarding the instrumentalities used by other employees, would virtually abrogate the whole doctrine of 'common employment.' There is hardly an employee in the service of any railroad whose duties do not, in part at least, relate to the matter of maintaining in safe condition the track or rolling stock. If the rule be that all these *pro hac vice* represent the master, and are performing his duty, the same rule must be applied to all masters alike. Such a rule, if applied to farmers, manufacturers, and others, would, I think, effect a radical change in what has been supposed to be the law. And yet this is, I think, the logical result to which the opinion in this case would seem to lead; for I can see no distinction in principle between these 'car-inspectors' and switch-tenders, station agents, guards, watchmen, and the like, in so far as their duties relate to maintaining in safe condition the machinery and other instrumentalities of the master, designed to be used by his employees."

2. Illustrative rulings.

Cases in which the former rather than the latter of the two conceptions referred to at the close of the preceding section seems to have been present to the mind of the court are the following; but it must be remembered that, as the nonassignability of certain duties is the basis of the "vice principal" theory, the judges afterward resort to both forms of statement in the same opinion.

The duty which rests upon a railroad company to see to it at an inspecting station, that the wheels of a freight car which is about to be drawn out on the road are in safe and proper condition, cannot be delegated so as to exonerate the company from liability to a servant for injuries resulting from the omission to perform that duty, or through its negligent performance. *Union P. R. Co. v. Snyder* (1894) 152 U. S. 684, 38 L. ed. 597, *Affirming Daniels v. Union P. R. Co.* (1890) 6 Utah, 357.

The sufficiency of the number of inspectors of railroad cars, and their competency, furnish no defense to an action for injuries caused by a defect which could have been detected by a proper inspection. *Union P. R. Co. v. Snyder* (1894) 152 U. S. 684, 38 L. ed. 597.

In *Texas & P. R. Co. v. Barrett* (1897) 166 U. S. 617, 41 L. ed. 1136, the following instruction was approved: "If the jury believe, from the evidence under the foregoing instructions, that the boiler which exploded and injured the plaintiff was defective and unfit for use, and that defendant's servants, whose duty it was to repair such machinery, knew, or by reasonable care might have known, of such defects in said machinery, then such neglect upon the part of its servants is imputable to the defendant; and if said boiler exploded by reason of said defects, and injured the plaintiff, the defendant would be responsible for the injuries inflicted upon plaintiff, if plaintiff in no way, by his own neglect, contributed to his injuries."

An instruction is properly refused which directs the jury to find for the defendant, if he has used care in the selection of the appliance and of a competent inspector, and the plaintiff's injury was due to the negligence of such inspector in not making proper tests. *Texas & P. R. Co. v. Barrett* (1895) 30 U. S. App. 106, 67 Fed. Rep. 214, 14 C. C. A. 373.

In *The Frank and Willie* (1891) 45 Fed. Rep. 494, the evidence showed that the mate, after notice of the dangerous condition of a pile of

lumber, which his own unskilfulness or negligence had brought about, and after complaint made at least an hour before the accident, refused to take the usual precautions to make the pile safe, and, in effect, required the libellant to continue work in this dangerous situation. The court said: "This was breach of a duty owed by the ship and owners to the seaman, for which the ship and owners are liable. The master was absent, and the mate was not only temporarily in command, but, as mate, he was the officer having charge in unloading the cargo,—the representative of the ship and owners in the supervision of that work. His attention was specially called to the dangerous situation, its correction was requested, and the libellant was practically helpless. I do not hold the ship liable for the mate's mere negligence as a fellow workman in producing the dangerous situation, but for his refusal to remedy it when complaint was made, and the danger pointed out to him."

A master cannot escape liability for the defective condition of appliances furnished his servants by delegating the duty of inspection in respect to those appliances to other employees. *Baltimore & P. R. Co. v. Elliott* (1896) 9 App. D. C. 341.

A master cannot avoid liability for failure to perform a duty he owes his servant, by delegating it to a fellow servant; but a fellow servant, in the performance of such duty, is the agent of the master, and his knowledge that a place is unsafe to work in charges the master with knowledge. *Elledge v. National City & O. R. Co.* (1893) 100 Cal. 282, Rehearing Denied in 34 Pac. 852; *Distinguishing Daves v. Southern P. Co.* (1893) 98 Cal. 19, where the place of work was "of itself a reasonably safe one," and became unsafe only through the negligence of the foreman.

The delegation of the duty of inspection to an employee does not relieve the company from liability because of the negligence of that employee in the discharge of that duty. *Chicago & E. I. R. Co. v. Kneirum* (1894) 152 Ill. 458.

Where a servant of a railroad company is injured or killed in consequence of the giving way of a defective bridge, the company cannot escape liability from the fact that the bridge was constructed properly in the first place, and it employed skilful and competent subordinates to inspect and repair its bridges. *Toledo, P. & W. R. Co. v. Conroy* (1873) 68 Ill. 560.

An employer is not relieved from liability for injuries to an employee caused by the sudden starting of machinery due to the absence of a nut from an eyebolt used to hold a lever in place to keep the machinery stationary, where the nut had been gone for several weeks, by the fact that another employee having charge of the machinery knew of such defect, and did not report it or see that it was repaired, as the injured employee does not assume the risks of such negligence on the part of a fellow servant. *Monmouth Min. & Mfg. Co. v. Erling* (1894) 148 Ill. 521, Aff'd (1892) 45 Ill. App. 411.

It is the duty of a railroad company to provide and maintain reasonably safe and suitable cars and other appliances for its employees to work with; and it cannot escape liability to an employee, who, without fault or neglect on his part, suffers injury from the use of defective appliances or implements, by showing that the failure to discover and amend the defect was attributable to the neglect of an agent of the company to whom the duty of selecting and inspecting its cars and their appendages had been committed. *Ohio & M. R. Co. v. Pearcy* (1891) 128 Ind. 197.
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The employment by a railroad company of a competent inspector of its appliances does not relieve it from liability for injuries resulting from defects in the appliances, which would have been discovered by a reasonably careful inspection, but which were not in fact discovered. *Cleveland, C. C. & St. L. R. Co. v. Ward* (1896, Ind.) 45 N. E. 325.

A railroad company does not discharge its duty toward a fireman by having a competent inspector inspect the engine, unless the inspection is a reasonably careful one. *Cleveland, C. C. & St. L. R. Co. v. Ward* (1897, Ind.) 46 N. E. 462, Denying Rehearing in (1896) 45 N. E. 325; *Durkin v. Sharp* (1892) 88 N. Y. 225, followed.

As a corporation must act through its agents, the negligence of the employee in whom the duty of inspection is devolved is the negligence of the corporation. *Brann v. Chicago, R. I. & P. R. Co.* (1880) 53 Iowa, 595, 36 Am. Rep. 243.

But the scope of this decision is greatly limited by a subsequent ruling of the same court to the effect that the engineer in charge of an engine operating a machine for sawing, whose duties include that of keeping the machinery in good condition, and repairing it when broken or defective, is a fellow servant with another engaged in operating the saw. *Theleman v. Moeller* (1887) 73 Iowa, 108. The court said: "It is the rule of this court that an employee cannot, in an action against his employer, recover for the negligence of a coemployee engaged in the prosecution of a common business. But this rule does not extend to an employee who is charged with no other duty than to inspect the machinery, in the operation of which the injury occurs. *Brann v. Chicago, R. I. & P. R. Co.* (1880) 53 Iowa, 595, 36 Am. Rep. 243. But the engineer, it will be seen from the statement of the evidence just made, was not confined by his duty to the mere inspection of the machinery. He had it in charge, was required to see that it was in good condition, and to repair it when broken or defective. These duties were not separated from the operation of the machinery. The engineer and plaintiff together operated it. The engine furnished the motive of sawing,—the very purpose for which both engine and saw were used. The saw could not be operated without the engine. The engineer was engaged in operating the saw. He was therefore a coemployee of plaintiff in the common business of both."

It is submitted, however, that there is no rational ground upon which the later of these decisions can be based, for there is no reason why an employee should not be regarded as occupying the dual position of a vice principal and of a mere servant. In fact the courts have frequently recognized the possibility of this union of functions. See *McKinney, Fellow Servants*, § 42.

A railroad company is guilty of actionable negligence, under Mich. Laws 1883, p. 191, requiring railroad companies under pecuniary penalty to adjust, fill, or block frogs in their yards so as to prevent the catching of feet therein, in permitting a frog in its yard to remain unfilled or unblocked, with its knowledge, or for such a length of time that knowledge will be presumed, although it has employed persons expressly charged with the duty of keeping such frogs in proper condition. *Ashman v. Flint & P. M. R. Co.* (1892) 90 Mich. 567.

The negligence of a person employed to lay a water pipe in a ditch through a lumber yard, which it was the duty of the master to keep in a reasonably safe condition, in leaving such a yard in a dangerous condition, is attributable

to the master, as regards an employee engaged therein. *Sadowski v. Michigan Car Co.* (1890) 84 Mich. 100. The court said: "Those employed by the master to provide or to keep in repair the place, or to supply the machinery and tools, for labor, are engaged in a different employment from those who are to use the place or appliances when provided, and they are not therefore, as to each other, fellow servants. In such case, the one whose duty it is to provide and look after the safety of the place where the work is to be done represents the master in such a sense that the latter is liable for his negligence."

In *McDonald v. Michigan C. R. Co.* (1895, Mich.) 2 Det. L. N. 774, it was held that a railroad company which imposes on its engineers the duty of inspecting their engines, and provides no other method of inspection, to keep them in a reasonably safe condition, is liable to one of its brakemen for an injury received through the failure of the engine to respond promptly to the airbrake, which defect was known to the engineer, who continued to use the engine after knowing of the defect, whether such conduct be considered as a complete neglect of the master's duty of inspection, or the illegal imposition of such duty upon a fellow servant. The court said: "Such inspection, in the ordinary operation of the road, is the act of a fellow servant, as between the engineer and brakeman, and, as between them, does not constitute the engineer a representative of the master. . . . But if the company makes no other provision for inspection, and chooses to rely upon the reports of its men, deferring repairs until breaks occur, or until the operators, in due course of business, report defects, we must either say that it has neglected the duty of inspection altogether, or that it has imposed one of its duties upon its operatives, and that it does not fall within the limits of fellow service, or that it may avoid the duty which the law imposes, by invoking the rule of fellow servants."

In *Tierney v. Minneapolis & St. L. R. Co.* (1885) 33 Minn. 311, 53 Am. Rep. 35, it was held that where, by a regulation governing the employees in the transfer yard of a railway company, car inspectors were required to inspect incoming cars immediately upon their arrival, and, if out of repair, to mark them "In bad order," indicating that they were to be sent to the "repair track," negligence on the part of the inspectors in failing to properly discharge this duty by reason of which plaintiff was injured while attempting to couple a damaged car without notice of its condition, and without fault on his part, may be imputed to the company. The court said: "In respect to patent defects in the coupling apparatus, brakes, wheels, etc., we may assume that the defendants had undertaken the duty of inspection, and intrusted it to the proper agents. As a rule, also, there is a distinction between the special duties of such persons and the service of other employees who are engaged in handling cars and operating trains. It is not the same in kind as that of switchman, brakeman, or other operative. *Wedgewood v. Chicago & N. W. R. Co.* (1878) 44 Wis. 44; *Schultz v. Chicago, M. & St. P. R. Co.* (1879) 48 Wis. 375. The service of the former class relates wholly to the matter of the care and repair of machinery, the use of which is attended with constant danger to other employees unless maintained in a safe condition; and they represent the master, not in the capacity of superior officers placed over other employees, but because performing the master's duty in respect to safe instrumentalities."

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The negligence of a general agent hired to conduct a business to which the employer gives no personal attention is in law the negligence of the employer himself so far as regards the duties which such employer owes to the subordinate servants. The employer cannot, by abstaining from taking any part in the business, exonerate himself from those duties or from the consequences of a failure to perform them. *Corcoran v. Holbrook* (1875) 59 N. Y. 517, 17 Am. Rep. 369. There a mill owner was held liable for the negligence of his general agent in omitting to repair a chain by which an elevator was raised and lowered, after he had been notified that the apparatus was in a dangerous condition.

This rule is as applicable to individuals as to corporations. *Corcoran v. Holbrook* (1875) 50 N. Y. 517, 17 Am. Rep. 369.

In *Durkin v. Sharp* (1882) 88 N. Y. 225, it was held that the inspection of a railroad track was a duty of the master and if carelessly and negligently performed, even by a competent inspector, the master would still be liable. To excuse him from liability the track must have been carefully inspected by a competent inspector.

In *Fuller v. Jewett* (1880) 80 N. Y. 46 38 Am. Rep. 575, an action against a railroad receiver to recover damages for the killing of a locomotive engineer by the explosion of a boiler, there was evidence that the boiler had been frequently reported and sent to the repair shop for repairs, and the defendant was held not to be excused from liability by the facts that there was no negligence in employing the superintendent of repairs, or in making proper regulations, that the master-mechanic in charge gave proper instructions for the repairing, and that the negligence was that of the workmen directed to make the repairs. The court cited *Filke v. Boston & A. R. Co.* (1873) 53 N. Y. 549, 13 Am. Rep. 545; *Booth v. Boston & A. R. Co.* (1878) 73 N. Y. 38, 29 Am. Rep. 97, and *Mehan v. Syracuse, B. & N. Y. R. Corp.* (1878) 73 N. Y. 585, as being decisive against a defendant, and said: "We understand the principle of these cases to be, that acts which the master, as such, is bound to perform for the safety and protection of his employees, cannot be delegated so as to exonerate the former from liability to a servant, who is injured by the omission to perform the act or duty, or by its negligent performance, whether the nonfeasance or misfeasance is that of a superior officer, agent, or servant, or of a subordinate or inferior agent or servant to whom the doing of the act, or the performance of the duty, has been committed. In either case, in respect to such act or duty, the servant who undertakes, or omits to perform it, is the representative of the master, and not a mere coservant with the one who sustains the injury. The act or omission is the act of omission of the master irrespective of the grade of the servant whose negligence caused the injury, or of the fact whether it was or was not practicable for the master to act personally, or whether he did or did not do all that he personally could do by selecting competent servants, or otherwise to secure the safety of his employees. It is sometimes difficult to determine what is the master's duty, within the rule. But when it is ascertained that the negligence by which an employee is injured relates to this duty, then there is no middle ground, and the case cannot be determined upon any distinction founded upon the particular grade, office, or function of the negligent servant or agent."

In *Bailey v. Rome, W. & O. R. Co.* (1893) 129

N. Y. 302, it was held that "proper inspection to discover defects is a part of the master's duty," and that a railroad company is therefore responsible for an injury caused by a defect in a brake which would have been discovered if the inspectors had performed their duties properly.

A careless or negligent inspection of a boiler by a competent inspector does not relieve a master from liability for a defect not discovered by such inspection. To excuse him from liability the boiler must be inspected by a competent inspector at reasonably frequent intervals. *Egan v. Dry Dock, E. B. & B. R. Co.* (1896) 12 App. Div. 556, *Following Durkin v. Sharp* (1882) 88 N. Y. 225; *Bushby v. New York, L. E. & W. R. Co.* (1887) 107 N. Y. 874.

In *Malone v. Hathaway* (1876) 64 N. Y. 5, 21 Am. Rep. 573 (Church, Ch. J., and Rapallo J., dissenting), it was held that an employer is not liable for the negligence of a carpenter employed to examine and make repairs in the building in which his business is carried on. The majority of the court cited with approval *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, but it seems to be impossible to reconcile the ruling with the other decisions of the same court referred to above.

Warner v. Erie R. Co. (1868) 39 N. Y. 468, is sometimes supposed to be an authority for the doctrine that a railroad company discharges its full duty to its servants in regard to the maintenance of its bridges when it has provided adequate materials for their construction and competent servants to inspect them.

In *Chapman v. Erie R. Co.* (1873) 1 Thomp. & C. 528, the supreme court quoted the headnote of *Warner v. Erie R. Co.* (1868) 39 N. Y. 468, as given at the commencement of the present subdivision, and proceeded to criticize the case as follows: "The rule as thus stated is obviously of small consequence as a protection to the servants or employees of a corporation, when it is considered that a corporation acts entirely through officers and agents, and there can be no other personal negligence committed by, or imputed to, it except the negligence of such officer or agent; and when it is held also that all the agents and employees of a corporation are fellow servants of a common master, it is difficult to see why, under such rules, corporations are not virtually absolved from all the common-law liability of a master to take care of his servants, and protect them from unjust and unreasonable danger and injuries resulting from the negligence of others. But the recent case of *Lanling v. New York C. R. Co.* (1872) 49 N. Y. 531, 10 Am. Rep. 417, shows that the present court of appeals is receding from this extreme ground. This case asserts a sounder and more reasonable rule. Judge Folger, who gives the opinion of the court, says: 'The duty of the master to his servants is to use reasonable care to provide and employ none but competent and skilful servants, and to discharge from his service, on notice thereof, any who fail to continue such.' This criticism, however, appears to be based on a misapprehension of the true purport of the case, which merely decides that in the absence of testimony going to prove negligence in the construction of a bridge or in the selection of the servants employed to supervise and test it, or in the performance of their duties by these servants, the injured servant must fall in his action unless he shows that the managing officers of the corporation had notice, actual or constructive, of the defective condition of the bridge. In other words, there are several states of facts upon which an employer may

be charged with personal negligence, and, if the evidence is inconsistent with the theory that he was negligent in certain specified ways, the servant must fall back upon some other theory. Under the circumstances in *Warner v. Erie R. Co.* (1868) 39 N. Y. 468, where the testimony shows that due care has been exercised by the directors themselves in seeing that sound structures and competent supervising agents have been provided, and that these agents themselves have not been guilty of negligence in the premises, there was no theory to fall back upon except one based upon the hypothesis that the directors had knowledge of the decayed condition of the bridge through some other avenue of information than the supervising agents appointed by them, and with any such hypothesis the evidence was quite inconsistent. That the case really goes no further than this, so far as the actual decision is concerned, is quite apparent from the opinion. But it must be admitted that, by citing with approval the ruling in *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, the court has shown a disposition to countenance that much more sweeping doctrine under which a master is not liable, even for the negligence of a servant to whom he deposes one or more of the duties which the law imposes on him for the benefit of all persons in his employment. The extent of the liability of a master for the negligent act of a competent servant is, however, a very different question from that raised in *Warner v. Erie R. Co.* (1868) 39 N. Y. 468, and the approval of the English case may, for this reason, be regarded as quite supererogatory. Except in so far as the broad principle of *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, may be supposed to have been adopted by the court in *Warner v. Erie R. Co.* (1868) 39 N. Y. 468, it cannot be said that, as was suggested in *Chapman v. Erie R. Co.* (1873) 1 Thomp. & C. 528, the court of appeals has changed its ground in *Lanling v. New York C. R. Co.* (1872) 49 N. Y. 531, 10 Am. Rep. 417, for there the master was held liable for the reason that personal negligence was shown by the retention of an incompetent servant—a species of negligence which was negated by the testimony in *Warner v. Erie R. Co.* (1868) 39 N. Y. 468.

In *Chesson v. John L. Roper Lumber Co.* (1896) 118 N. C. 59, the court said that if carpenters employed to inspect a platform failed to make an inspection, the employer was negligent, especially where there was testimony tending to show that an examination would have disclosed the condition of the platform, and probably have prevented the injury.

It is the duty of the railroad company to place a derrick constructed beside its track, and dangerous to its employees upon its trains when unfastened, in care of some competent person charged with the duty of seeing that it is properly fastened. *Gates v. Chicago, M. & St. P. R. Co.* (1892) 2 S. D. 422.

An employee does not assume the risk of the negligence of his employer or of a foreman in furnishing a tackle block in which the pin securing the wheel is not properly fastened, or in failing properly to inspect and keep the block in repair in that respect. *Houston v. Brush* (1894) 66 Vt. 331.

It is the duty of a railroad company, not only to employ a sufficient number of competent inspectors, but to secure a careful inspection. *Texas P. R. Co. v. O'Fiel* (1890) 78 Tex. 496.

In *Cooper v. Pittsburgh, C. & St. L. R. Co.* (1884) 24 W. Va. 37, the court says that a railroad company cannot devest itself of the duty to furnish reasonably safe machinery and

appliances so as to relieve itself from responsibility for the nonperformance thereof, by delegating the duty to any of its servants in any of its departments; and if it does delegate this duty to any of its servants and vests him with controlling or superior authority in regard thereto, the negligence of such servant is the negligence of the company; also that a brakeman employed on one of the freight trains of a railroad company and an inspector or master mechanic charged with the duty of keeping such machinery, cars, and appliances in repair, cannot be regarded as fellow servants in such a sense as to prevent the brakeman from recovering of the company for an injury sustained by him because of the negligence of such inspector or master mechanic.

For other examples of the same form of statement, see the following cases: *Comben v. Belleville Stone Co.* (1896) 59 N. J. L. 226; *Indiana Car Co. v. Parker* (1885) 100 Ind. 181; *Brazil Block Coal Co. v. Young* (1889) 117 Ind. 520; *Johnson v. Chesapeake & O. R. Co.* (1892) 36 W. Va. 73.

The following extract from the charge of Cockburn, Ch. J., in *Webb v. Rennie* (1865) 4 Fost. & F. 608, may also be quoted in the present connection, as a clear exposition of the doctrine respecting the nonassignability of the master's duties, though it is inconsistent with the subsequent decisions of the House of Lords in *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 328, 19 L. T. N. S. 80, which exploded that doctrine as a whole (see 6, supra): "In the case of a manufacturer employing machinery which might be attended with danger to the persons employed about it, a danger which might be greatly aggravated by the machinery not being in proper condition—as, for instance, in the case of the boiler of a steam engine bursting, as it would be more likely to do if in an improper condition—the master manufacturer might have no means of personally knowing its condition himself, and the question being whether he had used reasonable care and diligence to ascertain it, all that could be reasonably expected of him would be that he should employ some competent person from time to time to examine it. The master must either ascertain the state of the machinery or apparatus himself, or employ some competent person to do so; and if he did employ such a person and a workman was injured in consequence of that person's neglect of his duty in that respect, the master would not be liable to one of his servants for such negligence of a fellow servant in the particular matter."

B. Illustrative rulings expressed in terms of the doctrine of common employment.

The subjoined decisions may be referred to as illustrating the alternative form of statement by which the nonassignability of the duty of inspection may be expressed. An employer is liable for the negligence of the following employees:

An inspector of locomotive boilers. *Texas & P. R. Co. v. Thompson* (1895) 30 U. S. App. 549, 70 Fed. Rep. 944, 17 C. C. A. 524, reiterating doctrine of *Texas & P. R. Co. v. Barrett* (1896) 30 U. S. App. 198, 67 Fed. Rep. 214, 14 C. C. A. 373. *Speer, D. J.*, dissented on the ground that the theory of the defendant as to the cause of the accident had not been brought to the attention of the jury by proper instructions.

A "fire boss" whose duty it is to inspect the working-places in a coal mine, and inform miners as to the condition. *Cerrillos Coal R. Co.* 41 L. R. A.

v. Deserant (1897, N. M.) 49 Pac. 807, following *Northern P. R. Co. v. Herbert* (1885) 116 U. S. 642, 29 L. ed. 735.

Employees charged with the duty of going through a mine inspecting it and seeing whether it is free from explosive gas. *Gowen v. Bush* (1896) 40 U. S. App. 349, 76 Fed. Rep. 349, 22 C. C. A. 196.

An engineer in exercising the permission given him by a railroad company to place the engine in charge of a fireman whom he deems competent. *Harper v. Indianapolis & St. L. R. Co.* (1871) 47 Mo. 567, 4 Am. Rep. 353, citing *Brickner v. New York C. R. Co.* (1870) 2 Lana. 506.

One employed to keep a railroad track in good condition. *Atchison, T. & S. F. R. Co. v. Moore* (1883) 29 Kan. 632.

Carpenters employed to inspect and make needed repairs in a platform which a servant is obliged to use in his work. *Chesson v. John L. Roper Lumber Co.* (1896) 118 N. C. 50.

A carpenter while engaged in making and placing a handle in a hand-car. *Indiana, I. & I. R. Co. v. Snyder* (1895) 140 Ind. 647.

Servant employed to inspect and keep machinery in good condition. *Atchison, T. & S. F. R. Co. v. McKee* (1887) 37 Kan. 592; *Jennings v. New York, N. H. & H. R. Co.* (1895) 12 Misc. 408; *Houston v. Brush* (1894) 66 Vt. 331; *Wells v. Coe* (1886) 9 Colo. 159; *Atchison, T. & S. F. R. Co. v. Mulligan* (1895) 34 U. S. App. 1, 67 Fed. Rep. 569, 14 C. C. A. 547; *Coontz v. Missouri P. R. Co.* (1894) 121 Mo. 652.

A servant charged with duty of furnishing side stakes for a lumber car. *Bushby v. New York, L. E. & W. R. Co.* (1887) 107 N. Y. 374.

Car inspectors. *Macy v. St. Paul & D. R. Co.* (1886) 35 Minn. 200; *Ohio & M. R. Co. v. Pearcy* (1891) 128 Ind. 197; *Little Rock & M. R. Co. v. Moseley* (1893) 12 U. S. App. 514, 56 Fed. Rep. 1009, 6 C. C. A. 225; *Cincinnati, H. & D. R. Co. v. McMullen* (1889) 117 Ind. 439; *Missouri P. R. Co. v. Dwyer* (1886) 36 Kan. 58; *Carpenter v. Mexican Nat. R. Co.* (1889) 39 Fed. Rep. 315; *Cooper v. Pittsburgh, C. & St. L. R. Co.* (1884) 24 W. Va. 37; *Illinois C. R. Co. v. Hilliard* (1896) 18 Ky. L. Rep. 505; *Long v. Pacific R. Co.* (1877) 65 Mo. 225; *Condon v. Missouri P. R. Co.* (1883) 78 Mo. 567; *Illinois C. R. Co. v. Reardon* (1894) 56 Ill. App. 542; *Brann v. Chicago, R. I. & P. R. Co.* (1890) 53 Iowa, 595, 36 Am. Rep. 243; *St. Louis, A. & T. R. Co. v. Putnam* (1892) 1 Tex. Civ. App. 142.

The distinction has been taken that, where the relation sustained by a car inspector to car repairers is merely that of a foreman directing their labors, he is not a vice principal. *Fordey v. Briney* (1893) 58 Ark. 206. But the introduction here of the familiar rule that difference of rank has in itself no bearing upon the question whether an employee is a vice principal or not seems to be altogether out of place, and to have led the court to an erroneous conclusion.

It has also been held in Illinois, under the "consolation" theory, that car inspectors are not fellow servants of employees working on the trains. *Chicago & A. R. Co. v. Hoyt* (1887) 122 Ill. 369; but this is a case in which the injury was received by the car inspector himself.

C. As dependent upon the distinction between the furnishing and the use of agencies.

See also X. 3, *supra*.

One line of distinction between vice principals and coemployees is in the duty, in one instance, to supply or maintain instrumentalities of the service, and in the other of using

the instrumentalities supplied. *Neuts v. Jackson Hill Coal & C. Co.* (1894) 139 Ind. 411.

In the recent case of *Nord Deutscher Lloyd S. S. Co. v. Ingebrigsten* (1894) 57 N. J. L. 402, the court observed that, "In determining whether an employee, through whose negligence defects in the machinery have failed of discovery or repair, is a representative of the master in the discharge of the master's duty to the servant, or is a fellow servant of the latter engaged in a common employment, many incongruous decisions have been rendered," and explained its own views as follows: "On this topic a rational distinction would seem to be that when the employee's duty to inspect or repair the apparatus is incidental to his duty to use the apparatus in the common employment, then he is not intrusted with the master's duty to his fellow servant, and the master is not responsible to his fellow servant for his fault, but that if the master has cast a duty of inspection or repair upon an employee who is not engaged in using the apparatus in a common employment with his fellow servant, then that employee in that duty represents the master, and the master is chargeable with his default. This distinction is noticeable in *McAndrews v. Burns* (1876) 30 N. J. L. 117; *Smith v. Oxford Iron Co.* (1880) 42 N. J. L. 467, 36 Am. Rep. 535; *Collier v. Pennsylvania R. Co.* (1886) 49 N. J. L. 59; *Ross v. Walker*, 139 Pa. 42; *Moynihan v. Hills Co.* (1888) 146 Mass. 586; *Daley v. Boston & A. R. Co.* (1888) 147 Mass. 101, and many other cases."

In other words, where the conditions from which the servant's injury resulted were produced by the ordinary use of the appliance, and not by any defect in the substance, size, or adjustment of the part of the appliance which caused the injury, and the master maintains a thorough and adequate system of constant inspection, and the defect was not known to any of the persons engaged in that inspection, no action can be maintained. *Mensch v. Pennsylvania R. Co.* (1892) 150 Pa. 598, 17 L. R. A. 450.

This compromise is, of course, traceable in a large measure to the influence of the principle by which the servant is presumed to accept the obvious and ordinary risks of the employment. It is thought not to be unfair to charge him, the servant, with the consequences of his knowledge of the fact that small repairs and changes may be necessary in the ordinary routine of business, and that a certain amount of discretion must, in regard to such matters, be left to employees, who cannot be considered as being in any legitimate sense of the word representatives of the master.

The following decisions will show how the courts have interpreted the doctrine under a variety of circumstances.

Cases in which the distinction was referred to, and the employer held to be liable, are these:

A storekeeper who is charged with the duty of seeing that an apparatus is in good condition before it is delivered to the stevedores for use, but is not himself to be engaged in using it, is in that service the representative of the defendant, and is not serving in a common employment with the deceased. *Nord Deutscher Lloyd S. S. Co. v. Ingebrigsten* (1894) 57 N. J. L. 402.

So, on the ground that it was not merely a case of "a defect arising in the daily use of an appliance, for which proper and suitable materials are supplied" (*Cregan v. Marston* (1891) 126 N. Y. 568, cited in this section d, *infra*), the owners of a brewery have been held liable for an injury to an employee caused by the fall

of a beer keg through a run in which the kegs were lowered into a cellar, resulting from the rivet holes in the rods and brackets of the run becoming enlarged by use and rust, where the defect could have been discovered by proper examination and the employee was free from contributory negligence. *Mayer v. Liebmann* (1897) 16 App. Div. 54.

In *Fox v. Le Comte* (1896) 2 App. Div. 61, the court remarked: "As to the defendant's negligence, it is undisputed that if the plunger moved without pressure on the treadle, the press was defective. It was alleged that though this was the case the defendant had no knowledge of the fact. It was not necessary that the defendant should personally have such knowledge. The repair of the press was not a mere detail of the work, as in *Webber v. Piper* (1888) 109 N. Y. 496, but a part of the master's duty to use reasonable care to provide safe appliances for his servants. This duty was committed to the machinist, but, being the master's duty, the machinist in the discharge of it was not a coservant, but represented the master. For his neglect the master was liable."

"A machine may be so constructed, and its operation may be such, as to call for a frequent replacement of one or more of its constituent parts. Such parts when adjusted in the machine become as much a part of it as if included in the original construction, and a defect in one of them is a defect in the machine. The duty of seeing that such parts are not defective is one incumbent on the master. It is not a matter of ordinary repair from day to day, which may be intrusted to a servant. The defendant could not therefore avoid responsibility by delegating this duty to persons whom it believed to be competent, and who were in fact competent to perform it. If the injury to the plaintiff was due to a defect in the punch, which might have been discovered by the exercise of reasonable care on their part, but was not, the defendant is liable for their negligence." *Toy v. United States Cartridge Co.* (1893) 150 Mass. 313.

When a spur track is constructed for permanent use, it is an instrument for the use of those who conduct and manage the trains, and the liability of the master is referred to the principle that he cannot escape responsibility where it is his duty to supply suitable structures, instrumentalities, or appliances by proving that he delegated to a proper agent their construction, superintendence, or repairs, and not to the rule under which it is held, in regard to temporary stagings erected for the repair or completion of buildings, that if suitable workmen and materials are provided his obligation is discharged. *Elmer v. Locke* (1883) 135 Mass. 575.

In *Texas & N. O. R. Co. v. Echols* (1897, Tex. Civ. App.) 41 S. W. 488, it was shown that a remnant stack of ties was liable to topple over and fall upon men at work which rendered the premises unsafe. The court said that "if, by the exercise of such care, its servants and agents charged with the duty of keeping the premises in a safe condition, knew or could have known of the dangerous condition in which the remnant stack of ties was left in time to have removed the danger, and failed to do so, the company would be liable."

The improper adjustment of a brake rod constitutes a "defective appliance," and not a mere "neglect or failure in the detail of the work" within the rule relating to the liability of the master for defects in appliances, where according to the regular course of the business, it was the duty of inspectors to make the adjustment, and not the duty of the train em-

ployees. *Woods v. Long Island R. Co.* (1896) 11 App. Div. 16.

In the following cases the employer was absolved:

Servants entrusted with the making of such ordinary repairs as the use of a machine requires to keep it in order from day to day are not vice principals. *McGee v. Boston Cordage Co.* (1886) 139 Mass. 445.

An employer owes one who is about to enter his service no duty to inspect all the work which has been done by his servants previously, and which ordinarily may be entrusted to them without liability to their fellow servants for their negligence. *O'Connor v. Rich* (1895) 164 Mass. 560, where the servant was injured by the fall of a scaffold erected by his fellow workmen a few days before he entered the service, from suitable materials supplied by the master.

Nor is a master chargeable with negligence because of a defect of which he had no knowledge, in a rope, used to steady a swinging scaffolding upon which his servants were working, where "he did not undertake to furnish the scaffolding as a complete structure, but entrusted the making of it to the servant" whose death was the result of such defect, and his fellow servants. *Adasken v. Gilbert* (1896) 165 Mass. 443.

In *Albro v. Agawam Canal Co.* (1850) 6 Cush. 75, the act of the superintendent which caused the injury did not relate to the maintenance of an appliance in safe condition, but to the improper use of an appliance which was not in any way defective.

An employer discharges his duty when he furnishes an abundance of materials from which his servants can select what they need for a scaffold. He is not required to supervise the selection of every piece of timber out of the mass for every purpose. *Roas v. Walker* (1890) 139 Pa. 42.

Inspection of an engine by the engineer in the ordinary operation of a railway is the act of a fellow servant as between the engineer and brakeman. *McDonald v. Michigan C. R. Co.* (1835, Mich.) 2 Det. L. N. 774.

A railroad company is not liable for injuries to a conductor from the turning of a loose step upon the engine, where the engineer was furnished with proper tools for its repair, and the company had no knowledge, actual or constructive, of its condition. *Miller v. Chicago & G. T. R. Co.* (1892) 90 Mich. 230.

As regards a mechanic working in the repairing of locomotives in a railroad shop, the negligence of the boiler-maker in failing to discover a defect in a boiler is that of a fellow servant, not of a vice principal. *Murphy v. Boston & A. R. Co.* (1882) 88 N. Y. 146, 42 Am. Rep. 240, *Distinguishing Fuller v. Jewett* (1890) 80 N. Y. 46, 38 Am. Rep. 575, as being a case where a locomotive had been placed for use in the hands of a servant in a different department.

Where a coal company receives cars to be loaded, and, owing to the defective condition of the brakes, and the want of the proper blocking, they escape from control while being let down to the place of loading, and cause injury to a servant of the company who is working on another car, the failure to inspect, to set brakes, or block the wheels, is negligence in the use of, and not in the supplying of, instrumentalities, and is consequently the negligence of fellow servants not of vice principals. *Nantz v. Jackson Hill Coal & C. Co.* (1894) 139 Ind. 411 (adopting a suggestion made in *Cincinnati, H. & D. R. Co. v. McMullen* (1889) 117 Ind. 439).

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An employer is not chargeable with negligence for the failure of his foreman employed to superintend mason work to see that the check rope was attached to a derrick employed about the building. *Jenkinson v. Carlin* (1894) 10 Misc. 22.

An employer is not liable for the death of an employee caused by the breaking of a belt on a machine in charge of a fellow servant to whom the employer delegated the duty of inspection, and to whom other belts were supplied,—especially if the deceased knew that the belt in use was unsafe. *Headifen v. Cooper* (1893) 6 Misc. 263.

In *Cregan v. Marston* (1891) 126 N. Y. 568, where the controversy was as to whose duty it was to observe and examine the condition of a rope, and change it when so worn that it became unsafe, the court explained its position as follows: "It is conceded that the defendants kept on hand and ready for use at any moment, an adequate supply of these falls, and of the best and most approved character."

... If one was wanted, word was sent to the office and the new fall at once supplied for use at the dock. Usually the engineer or his assistant made the application, but anybody engaged in the work could give the notice and get the new fall. It does not appear that any such application coming from any of the workmen was ever unheeded or refused. The workmen, therefore, were left in a position of perfect safety as to the sufficiency of the falls against everything save their own negligence or error of judgment. The rope was swinging before their eyes, and would disclose its approaching weakness on the surface before it became rotten or pulpy within, and they were able to know how long it had been used, and so whether prudence required it to be changed. They were at liberty, and knew they were at liberty, to supplant one which exhibited marks of weakness with another both new and sufficient, from the supply kept on hand. They were in the daily habit of observing its condition, and it was specially the custom of the engineer to do so. He had examined it a day or two before the accident and deemed it safe." On this state of facts it was held that the negligence of the engineer, if it existed, was not that of the master.

In *Strourbridge v. Brooklyn City R. Co.* (1896) 9 App. Div. 129, the master procured the timber for a structure from a reputable dealer; as a "lot" or quantity of it was good, but some of the sticks were found defective, or with curls in them. It was therefore necessary to test the timber so that knots or curls should be cut off or rejected. With respect to this test, the court said: "We think that the master discharged its duty when it supplied a sufficient quantity of proper and suitable material; that the choice of material, the selection of sound beams, the rejection of such beams or parts as were defective, work necessarily involved in the erection of structures of wood, were details of the work and strictly the duty of the fellow servants. (*Webber v. Piper* (1888) 109 N. Y. 496; *Butler v. Townsend* (1891) 126 N. Y. 105; *Cregan v. Marston* (1891) 126 N. Y. 568; *Mahoney v. Vacuum Oil Co.* (1894) 76 Hun, 579; *Smith v. Empire Transp. Co.* (1895) 89 Hun, 588.) It is here that the vital distinction occurs between the question of a place to work and that of a part of the work itself; a question of liability to employees who might use the structure when built and the liability to those engaged in building it. It may well be that, after the construction of the trolley carrier, the defendant would be liable to any lineman

who might be injured from its defective condition, whether occasioned by the negligence of the employees who put up the structure or those who selected the materials. Such rule does not apply to the plaintiff."

The rule that a servant has a right to rely on his employer's having examined the place where he is put to work has no application to a case where a servant is sent into a room on the day of the explosion of a flywheel to clear away the ruins. *Kans v. Page* (1897) 168 Mass. 217. The court said: "There are many momentary dangers which, though hidden, it is impracticable to guard against by inspection, and for which on this ground the employer is held not liable. *Whittaker v. Bent* (1897) 167 Mass. 588. There are others which, even if permanent conditions of the business, are obvious without warning, and of which the workmen must take the risk if he accepts employment there. *Leary v. Boston & A. R. Co.* (1885) 139 Mass. 580, 587, 52 Am. Rep. 733; *O'Maley v. South Boston Gaslight Co.* (1893) 158 Mass. 135. There are others which are both transitory and obvious, or at least equally easy to be discovered by employer and employed. When a room has been shattered by an explosion, it is plain to everybody that things are not in their normal condition, that the usual support of part by part has been shaken or interfered with, and that some portion may have been weakened to the point of being ready to fall. If the explosion was of an iron wheel, it is plain that the fragments probably have flown in different directions, and that they may have lodged above or below. When a workman is sent into such a room on the day of the explosion to clear away the ruins, it is manifest that he is taking one of the steps which are necessary to disclose just what has happened. It is not a natural inference on the part of one so sent that the place has been inspected, and it is not a natural interpretation of the offer to take it as implying that the superior knows that it is safe. Such an inference and interpretation are not based on the experience of life; they are mere deductions from the letter of an inaccurately stated rule of duty assumed beforehand to cover the case. Someone must be first in the place of possible danger. The workman sent in to clean it up has no right to assume that he is not the first, nor is the employer bound in formal language to notify him that no one as yet has made certain that nothing will give way."

It is upon the distinction between the maintenance and the use of appliances that those cases hinge which involve the liability of railway companies for injuries caused by the improper loading of their cars.

It has been held that a railway company is liable for an injury to a brakeman caused by his being thrown off the car and under the wheels by the negligent loading of smokestacks on such car by a station agent intrusted with such loading, where the brakeman was not guilty of negligence contributing to the injury. *Atchison, T. & S. F. R. Co. v. Seeley* (1894) 54 Kan. 21. The court said: "An authority is cited to the effect that, where the company has employed a competent inspector to see that the cars are properly loaded and in good condition, it cannot be held liable for the negligence of the inspector in failing to observe that the car was improperly loaded. (*Dewey v. Detroit, G. H. & M. R. Co.* (1893) 97 Mich. 343, 16 L. R. A. 342.) This authority is not satisfactory to us nor in line with the decisions that have been cited. We are unable to see any reason for a distinction between the preparation and in-

spection of the car itself as a fit instrumentality to be placed in a train and the preparation and inspection of a loaded car to be placed in the train for transportation. Each is an instrumentality to be used in connection with the services necessary to be performed by the trainmen in its transportation, and no distinction between them is seen, so far as the obligation of the company or the safety of the employees engaged in handling it are concerned. The inspection in either case is made with reference to the same end, and the person to whom this duty is delegated stands in the place of the company, and the latter is responsible for his acts."

But this decision is opposed to the weight of authority.

The subject was elaborately discussed in *Byrnes v. New York, L. E. & W. R. Co.* (1889) 113 N. Y. 251, where the court said: "We think the defendant had fulfilled its duty to the servants in its employ when it furnished a perfectly safe car and appliances, and when it also provided a system of inspection of cars, and proper persons to inspect them after they were loaded and before they were taken away. The failure to inspect, or, if inspection were made, the failure to rectify the improper loading by which the brake was rendered useless, was not the failure of the master to fulfil his duty to his servant, but it was the negligence of a co-servant in carrying out the orders of the master. The master is not an insurer that all his servants shall perform their duty, and he performs his duty to the servant in this regard in providing a system of inspection and intrusting its performance to competent hands. If, thereafter, such servants are guilty of negligence, the master is not responsible therefor to a co-servant. We do not see that the question is in any way altered by the fact that the car was loaded by the servants of the owner of the lumber which was placed upon it. Whoever loaded it, the master had provided for an inspection of the car before it was to be taken away, and if the inspection were neglected, it was still the same neglect of a servant of the defendant to do that which he ought to have done, and such neglect was not that of the master in fulfilling any of the duties which he owed as master to his servants. It cannot, we think, be properly contended that the master fails to provide a car which is a safe and proper one, or that he fails to provide one with proper appliances, because through the negligent manner in which the car is loaded the appliance is, on that account only, made useless for the purpose for which it was intended." *Ruger, Ch. J., and Andrews and Danforth, JJ., dissented, the latter on the ground that when the car was furnished the deceased, it was a loaded, not an empty car, and at that moment the movement of the brake was obstructed, and therefore the car was imperfect, and unfit for use.*

This case was cited in approval and a similar ruling made, in *Dewey v. Detroit, G. H. & M. R. Co.* 97 Mich. 323, 22 L. R. A. 292, *Rev'g on rehearing* (1893) 97 Mich. 343, 16 L. R. A. 342, (*McGrath, J., dissenting*). At the first hearing the majority had taken the ground that the duty of inspection went to the extent contended for by the plaintiff, and that *Smith v. Potter* (1881) 46 Mich. 258, 41 Am. Rep. 161, holding that a car inspector and a brakeman were fellow servants, had been overruled by *Irvine v. Flint & P. M. R. Co.* (1891) 89 Mich. 419, where it was held that it was as much the duty of a railway company to see that the cars are so loaded that brakemen will have reasonably safe access to the brakes as it is to see that

proper appliances are provided. The further statement that an inspector provided in pursuance of the obligation would be a fellow servant was thought to be erroneous. Other cases relied upon by the majority of the judges were *Van Dusen v. Letellier* (1889) 73 Mich. 492, where it was held that a lumber manufacturer could not escape the responsibility for making proper inspection of the structures on which the lumber was piled by delegating the duty to an employee, and *Morton v. Detroit, B. C. & A. R. Co.* (1890) 81 Mich. 423, where the duty to inspect the parts of cars was held to be non-assignable. The minority drew a distinction between the duty of furnishing a safe place and safe machinery, and the duty of seeing that the appliances are properly used, and considered that the duty of seeing that a car is properly loaded came under the latter head. "The injury" said Montgomery, J. (see p. 347 of the report), "resulted not from any fault in the appliances used, but because in making use of suitable cars and machinery, a fellow servant neglected his duty." The view of the minority prevailed upon the subsequent hearing of the case. The court said (see p. 332 of the report): "The real point in controversy here is whether the duty of the master is to be extended so that he may be made liable for the neglect of a car inspector in not observing that a car is improperly loaded when it is to be put into the train for transportation. There is no complaint here about the car itself. It was proper in construction, and a safe car for use in that service. Upon the first argument of the case in this court the real point in controversy was not so fully pointed out and considered as upon the reargument, and the case was regarded as very similar in principle to *Smith v. Potter* (1881) 46 Mich. 238, 41 Am. Rep. 161, which Mr. Justice McGrath considered as virtually overruled by the later cases cited above. There is, however, a broad distinction between *Smith v. Potter* and the present case. In the former case, the injury complained of was received by reason of a defect in the framework of the car itself, while here the accident is attributable to improper loading. In the later decisions the doctrine of *Smith v. Potter* has been doubted, and the rule broadly stated that the master must furnish to the servant a safe place to work, and safe appliances to work with. . . . But, in regard to the proper loading of cars, quite a different rule must necessarily prevail. The master must undoubtedly exercise care in the selection of inspectors to see that cars are not improperly loaded or overburdened, so that they are dangerous to an employee, but, after this has been done, it cannot be claimed that the master is to be held responsible for the faithful performance of the inspector's duty. Any other rule than this would make railroad companies insurers of the lives and limbs of employees. In the present case, the projection of the lumber over the end of the car was as apparent to the brakeman, if he had taken precaution to make observation, as to an inspector. It requires no special skill or training to ascertain the fact. The duties of a brakeman are known to be dangerous, and when one enters such service he must be held to have assumed the risks of the employment. He must exercise care himself in going between moving cars to make couplings."

The opinion at the first hearing, which was thus reversed was written by McGrath, J., who also composed an elaborate dissenting opinion after the second hearing. Some extracts from the latter may with advantage be given to indicate the arguments adduced to 41 L. R. A.

support the view which was finally rejected. The learned judge said: "The duty of inspecting the car itself, and that of the inspection of its condition with its load upon it, have a common origin. Both spring from the duty of protection which the master owes to the servant. There is no ground for saying that one of these duties may be delegated so as to relieve the master from all liability, and that the other may not; nor is there any reason in saying that the person who inspects the car itself, its appliances, and, instrumentalities, with reference to the safety of those engaged in its transportation, is not a fellow servant, while he who inspects the loaded car for a like purpose, and to see whether it affords proper facilities for the performance of the duties which must necessarily be performed in its transportation, is a fellow servant. In the present case, both duties were delegated to the same person, both are performed with reference to the same end, and the person to whom delegated must be held in the performance of each to occupy the same relation to plaintiff and defendant. It certainly cannot be said that, with reference to stationed machinery, belting, shafting, and gearing, the master must, at his peril, provide the necessary guards and coverings, and arrange the surroundings so as to render the place reasonably safe, yet, as to a train of cars, between which a brakeman is required, in the ordinary discharge of his duties, to go, while one section is being driven against a standing section or car so loaded as to render the position of the brakeman one of greatly increased hazard to life or limb, the master may, in case of injury, escape liability. The employment is at best a dangerous one. It is as essential to the protection of the brakeman that these spaces be kept clear as that the spaces be provided. This danger can be guarded against. As is said by Mr Justice Long, in *Palmer v. Michigan C. R. Co.* (1891) 87 Mich. 290: 'In all cases where the danger can be readily guarded against, the employer is in duty bound to protect the employee at his peril.'

Indianapolis & St. L. R. Co. v. Johnson (1885) 102 Ind. 352, is another authority for the principle that negligent loading is merely the improper use of appliances.

In *Ford v. Lake Shore & M. S. R. Co.* (1889) 117 N. Y. 638, the employees who had loaded cars were held to be fellow servants of a switchman who was injured by a piece of timber which fell from one of them; but on a subsequent appeal the plaintiff was permitted to recover on the ground that it had not established proper rules prescribing the manner in which cars should be loaded with lumber.

Where an express rule of the company makes it the duty of conductors to see that cars are properly loaded an injury which results from improper loading is deemed to be caused by the fault of a fellow servant. *Jarman v. Chicago & G. T. R. Co.* (1893) 98 Mich. 135.

The duty of a station agent to see that a car is properly loaded before it is ordered into a train is a duty which he owes as a servant merely, and not as a vice principal. *Galveston, H. & S. A. R. Co. v. Farmer* (1889) 73 Tex. 85.

The New York and Michigan rule was applied to the case of foreign cars, in *Mexican C. R. Co. v. Shean* (1891, Tex.) 18 S. W. 151.

In some cases an attempt has been made to extend the operation of the principle laid down in these cases so as to exempt the company from liability for its failure to exercise a proper supervision in regard to the condition of the side stakes furnished to secure a load, but this theory has been rejected.

In *Bushby v. New York, L. E. & W. R. Co.* (1885) 37 Hun, 104, it was argued by the defendant's counsel that as car stakes are uniformly furnished by the shipper, the defendant was under no obligation in respect to them, except to inspect them, and that that duty was performed in the present case; but the court held that the defendant could not divert itself of the duty it owed to its employees by leaving that duty to be performed by the shipper, or by making an arrangement with him whereby he undertook to perform it. This view was adopted by the court of appeals in (1887) 107 N. Y. 374. Panforth, J., remarking, the defect complained of was not in the loading, but in the preparation of the car to receive the load,—that is, in the car as a "lumber car."

"In the case of a low-sided gondola car employed in the transportation of lumber, side standards to keep the load in place, whether such standards are for constant use and permanently attached to the car by chains or are unattached and intended for use on a single occasion, are appliances necessary for the proper equipment of the car, and as essential to the safe transportation of the load as is a proper car-body. These side standards to all intents and purposes are part of the car." *Pennsylvania R. Co. v. La Rue* (1897) 55 U. S. App. 20, 81 Fed. Rep. 148, Approving *Bushby v. New York, L. E. & W. R. Co.* (1887) 107 N. Y. 374, and *Distinguishing* *Byrnes v. New York, L. E. & W. R. Co.* (1889) 113 N. Y. 251, and *Ford v. Lake Shore & M. S. R. Co.* (1889) 117 N. Y. 638, as cases in which the fault was not in the character of the car or its appliances, but wholly in the negligent loading of the car by the defendant's servants. Dallas, J., dissented on the ground that the case was one where the company had done its whole duty by supplying standards of the right kind and in sufficient quantity, and was not responsible for the act of a coemployee in using those of the weaker description of timbers at the place where the pressure was unusually great.

Compare also *McIntyre v. Boston & M. R. Co.* (1895) 163 Mass. 189, where the defendant was held liable for defective side stakes, the court saying: "The case is not one where an implement designed for repeated use has been weakened and made unfit for further service by such use; it is rather the case of the furnishing of an implement never fit for use, and evidently unfit. Such a stake could not, without negligence, have been placed where stakes were kept to be used for the purpose to which this was put. We need not inquire whether, if it had been taken from a number of sound and suitable stakes provided for that purpose by a workman whose duty it was to equip the car, the careless taking of this stake would have been negligence of a fellow workman the risk of which the plaintiff must stand, or whether negligence in equipping the car with stakes is something for which the defendant is responsible, whether it intrusts the work to one person or another."

Cases involving injuries from the improper loading of cars often turn upon the question whether the servant assumed the risk as one of those ordinarily incident to the service. With these we are not concerned in this note.

In other cases the liability of a railroad company for injuries caused by foreign cars so loaded that the freight upon them projects over the ends has been referred to the consideration whether it is negligence to receive into a train cars loaded in this manner.

In one case the ground has been taken that its acceptance is merely a fact bearing upon 41 L. R. A.

the question of the company's negligence. *Louisville & N. R. Co. v. Gower* (1886) 85 Tenn. 473. In another it has been held that the court may pronounce the company, as a matter of law, not to be guilty of negligence in exposing a servant to a risk of this character. *Northern C. R. Co. v. Husson* (1882) 101 Pa. 1, 47 Am. Rep. 630; *Day v. Toledo, C. S. & D. R. Co.* (1880) 42 Mich. 523.

It would appear, however, that the responsibility of the company cannot be made to turn on the consideration here relied upon without entertaining a theory of the legal situation which is essentially unlike that of the cases which discuss that responsibility from the special standpoint of a duty to ascertain the condition of the foreign cars which the servants are required to handle and test the right to maintain an action by an examination of the question whether that duty is assignable or absolute. This question can only be material when it has been determined that there has been a breach of duty.

XII. *Employer's liability qualified by the servant's duty to acquaint himself with his environment.*

a. *Generally.*

In the earliest of the cases upon the liability of an employer for injuries received by a servant, it was emphatically declared that "the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself," and the decision was based to a large extent upon the fact that, in employments like the one in question, which did not involve the use of any complicated instrumentalities, "the plaintiff must have known as well as his master, or probably better," whether he would be exposed to any danger. *Priestley v. Fowler* (1837) 2 Mees. & W. 1, Murph. & H. 305, 1 Jur. 387.

To these principles the courts, both of England and the United States, have ever since steadily adhered, such divergencies of view as are disclosed by the actual decisions being due entirely to the differences of opinion which must inevitably arise in practically determining the extent of the responsibility thus cast upon the servant.

The right of the servant to rely on the master's having performed his duty is qualified by the principle which requires the servant to exercise a vigilance and care corresponding to the exigencies of the situation in which he is placed by his employment. No instruction can be complained of which sets this mixture of rights and obligations with reasonable clearness before the jury. *Northern P. R. Co. v. Everett* (1894) 152 U. S. 107, 88 L. ed. 373.

The duty of a servant to use proper care may exhibit itself under several aspects. At present we are concerned only with one, viz., that which it assumes when it is considered as the source of the special obligation of the servant to be reasonably vigilant in observing his surroundings to the end that he may ascertain whether any of the instrumentalities which he is required to use or to which he is brought into proximity while engaged in his work, are in an abnormal condition and therefore likely to injure him. The existence of this obligation enables a master who continued to use a defective instrumentality after he knew, or ought to have known, of its condition to excuse himself, under appropriate circumstances, by one of these three defenses:

- (1) That the servant's injury is traceable to

his having failed to use his faculties of observation in the manner in which a prudent man would have used them under the circumstances, to the end that he might ascertain whether there were any imperfections in his master's instrumentalities. (2) That his injury was proximately caused by his failure to adopt, at the moment when the accident occurred, the course which a prudent man would have selected. (3) That having the opportunity of obtaining knowledge of some particular danger, and being thus chargeable in law with the responsibility attaching to the possession of actual knowledge, he accepted the increased risks, such acceptance being referable either to the implied terms of the contract of service, or to the operation of the maxim, *Volenti non fit injuria*.

A complete review of the decisions which exemplify these three defenses would carry us beyond the scope of the present note. But the effect of the servant's duty to exercise the care appropriate to his position is a matter which is so closely interlaced with the subject we are discussing that some allusion to it seems to be necessary for the purpose of making the position of the employer perfectly plain.

Obviously the servant's duty to keep himself acquainted with his environment may be made the basis, either of a theory that the master was not negligent in being ignorant of the existence of the danger from which the injury resulted (see XII., b, 8, *infra*), or of a theory that, although the master may have been negligent in the premises, the servant's conduct has been such as to debar him from relying on that negligence as a cause of action.

The first of these positions is illustrated by the cases which proceed upon the hypothesis that a temporary want of knowledge on the master's part may be innocent, where it concerns those abnormal conditions which suddenly arise in the everyday use of the instrumentalities, and which could not be guarded against without imposing on him the unreasonably onerous obligation of supervising those instrumentalities at every single moment they are in use. Assuming that the imperfection was one which was open to the observation of a person in the servant's position provided he had used ordinary care, the duty to notice it must clearly have arisen in his case before it can be said to attach to the master at all, and if that duty was not discharged, he, and not the master, must be regarded as the derelict party.

A servant cannot continue to use a machine which he knows to be dangerous at the risk of his employer. *Dynen v. Leach* (1857) 28 L. J. Exch. N. S. 221, per Pollock, C. B.

"The duty which the master owes to his servants is to provide them with safe tools and machinery where that is necessary. When he does this, he does not, however, engage that they will always continue in the same condition. Any defect which may become apparent in their use it is the duty of the servant to observe and report to his employer. The servant has the means of discovering any such defect which the master does not possess." *Baker v. Allegheny R. Co.* (1880) 95 Pa. 211, 40 Am. Rep. 634.

Where the defect in the machine or other appliances from which the danger arises is of such a character, or occurs at such a time, that the employer cannot reasonably be expected to have knowledge thereof, it is the duty of the employee to give him notice, and the neglect of such duty exempts the employer from re-

sponsibility. *Patterson v. Pittsburgh & C. R. Co.* (1874) 78 Pa. 389, 394, 18 Am. Rep. 412.

For instance, an electric-light company is not liable for an injury to an employee caused by the breaking of an electric-light pole, where such breaking was due to a fracture of the pole shortly before the accident, while the employee was taking it down preparatory to setting it up in another place, of which fracture the employee did not inform the company. *Essex County Electric Co. v. Kelly* (1894) 57 N. J. L. 100.

Of course, the servant cannot be debarred from maintaining an action on the ground that he did not report a defect, except where he is also chargeable with a knowledge of that defect. *Dale v. St. Louis, K. C. & N. R. Co.* (1878) 63 Mo. 459.

A mine owner who goes on using a hoisting rope with full knowledge that it is defective cannot escape liability to a miner who is injured by its giving way, on the ground that the plaintiff failed to give information as to its condition, when he had only been in the defendant's employ for twenty days, and the proof shows that the defects could not have been detected by ordinary observation. *Perry v. Ricketts* (1870) 55 Ill. 234.

Original fault on the master's part may also be negated by the fact that a servant of skill and experience in some particular occupation did not suppose himself to be imperiled by the existence of the conditions which ultimately developed the specific danger which caused his injury. Thus, the owner of a mine is not liable for the death of an experienced miner in its employ caused by the caving in of a shaft while sinking it, where such shaft was at the time only 12 feet deep, and the former, on being informed that the shaft needed timbering, immediately began to place the timber, which was being done when the injury occurred. *Stiles v. Kichle* (1896) 8 Colo. App. 393. There, in order to negative in advance the defense of contributory negligence, the following peculiar allegation was inserted in the complaint: "That at the time deceased was killed as aforesaid, he thought, and any man of ordinary prudence, with the knowledge the deceased had of the ground he was working in, would have thought, that said shaft could be timbered before it would cave in." The court commented upon the averment as follows: "If such was the conclusion of an experienced miner, who had done the work, and would have been the conclusion of any man of 'ordinary prudence,' how could defendants be charged with negligence, and made liable for failing to exercise extraordinary and prophetic prudence previous to the preceding Friday? It is clear beyond controversy that deceased had greater knowledge of the shaft and the character of the ground than Hook could have had, and that deceased, a practical miner of years, possessed of all knowledge that could be obtained, voluntarily prosecuted the work and incurred the risk incident to the employment."

Compare the cases cited at the end of XII. b, 8, *infra*.

To this principle there is, of course, the important limitation that the opinion of an experienced servant that there was no danger will not excuse the master, if he has omitted to provide an adequate system of inspection. The gist of the action is, then, not the master's failure to ascertain the existence of the particular danger which caused the injury, but his failure to exercise a proper supervision over the conduct of his business.

In *O'Driscoll v. Faxón* (1892) 156 Mass. 527,

the defendant contended that, upon the whole evidence, no want of due care on his part was shown; and in support of this view it is urged that no notice was given to him that the bank was dangerous, that the plaintiff and his witnesses did not regard it as dangerous; that if the plaintiff, with his experience, was not guilty of carelessness in failing to anticipate that earth from the bank might fall upon the plaintiff, and that, if the cutting of the bank was such as to cause no reasonable apprehension of danger, then the falling of the earth was a mere accident. The court said: "We thing the jury might be allowed to take a broader view of the defendant's responsibility. The duty rested upon him of using reasonable care in providing a safe place for the masons to do their work in building the wall, and the jury might hold him bound to use reasonable care to guard against accidents which at the moment of their occurrence a workman might not anticipate, though himself in the exercise of reasonable care under the circumstance in which he was placed. (*Holden v. Fitchburg R. Co.* (1880) 129 Mass. 268, 276, 37 Am. Rep. 843; *Ryan v. Tarbox* (1883) 135 Mass. 207; *Elmer v. Locke* (1883) 135 Mass. 575.) There was some evidence tending to show that the general plan which was adopted for protecting the bank from falling was inadequate. If the jury were of opinion that it was so, and that the defendant failed to use reasonable care in making it safe against accidents, they might lawfully hold him responsible to one who was himself in the exercise of due care at the time of the injury. Such seems to have been the view taken by the jury, and we cannot say, upon the evidence, that it was the duty of the presiding justice to withdraw the case from their consideration."

The second position, however, is the one which is most frequently taken up in actions of this type. Its rationale, and the various circumstances to which it is appropriate, are sufficiently illustrated by the rulings which are cited for another purpose in the following section.

b. Obligations of the master and servant as to inspection compared.

The principles upon which we have been dwelling are applicable only to cases in which the defect was one which the servant ought, as a careful man, to have observed. In practice, therefore, they are restricted by the important rule which declares that a servant is not ordinarily required to make a detailed examination of his master's instrumentalities, nor to take notice of any defects which would not be apparent to one who usually has neither time nor opportunity for more than a casual hurried glance at the instrumentalities in the condition of which he is interested, and who is entitled to rely on the master's having adequately discharged his duty of inspection.

The cases in which this rule has been stated and applied are very numerous. For the purposes of this note the following will suffice to indicate its scope and effect:

1. General statements of principles involved.

"It is, in most cases, impossible that a workman can judge of the condition of a complex and dangerous machine, wielding irresistible mechanical power, and, if he could, he is quite incapable of estimating the degree of risk involved in different conditions of the machine; but the master may be able, and generally is able, to estimate both." *Clarke v. Holmes* (1862) 7 *Hurlst. & N.* 937, 948, 31 *L. J. Exch. N.* 41 *L. R. A.*

S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 406, per Byles, J.

It is not the business of the servant nor has he the means of ascertaining whether the machinery or structure on which he is employed to work is defective. *Porter v. Hannibal & St. J. R. Co.* (1895) 60 *Mo.* 160.

The duty of inspection is by law imposed upon the master. He is under obligation to search for and discover, if discoverable by proper examination, those things which are hidden from even the careful observation of the servant in the discharge of his ordinary duties. As to those hidden or concealed defects, master and servant are not upon an equality of obligation. The master must search diligently; the servant observe carefully. *Pennsylvania Co. v. Witte* (1896) 15 *Ind. App.* 583, citing *Wabash & W. R. Co. v. Morgan* (1892) 132 *Ind.* 430 and 444; *Linton Coal & Min. Co. v. Persons* (1894) 11 *Ind. App.* 264; *Louisville, N. A. & C. R. Co. v. Quinn* (1896) 14 *Ind. App.* 554; *Pittsburgh, C. C. & St. L. R. Co. v. Woodward* (1894) 9 *Ind. App.* 169; *Salem Stone & Lime Co. v. Tepps* (1894) 10 *Ind. App.* 516.

The servant's duty to use "reasonable care" does not cast upon him the duty to discover latent defects. *Wabash & W. R. Co. v. Morgan* (1892) 132 *Ind.* 430.

"We think it equally well settled that it is not incumbent upon the employee to search for latent defects in machinery or implements furnished him by the employer, but that without such investigation he has the right to assume that they are safe and sufficient for the purpose." *Porter v. Hannibal & St. J. R. Co.* (1879) 71 *Mo.* 66, 38 *Am. Rep.* 454, citing *Lewis v. St. Louis & I. M. R. Co.* (1875) 59 *Mo.* 506, 21 *Am. Rep.* 385; *Porter v. Hannibal & St. J. R. Co.* (1875) 60 *Mo.* 100; *Gibson v. Pacific R. Co.* (1870) 46 *Mo.* 163, 2 *Am. Rep.* 497; *Ford v. Fitchburg R. Co.* (1872) 110 *Mass.* 240, 14 *Am. Rep.* 598; *Snow v. Housatonic R. Co.* (1864) 8 *Allen*, 441, 85 *Am. Dec.* 720.

"It is the duty of the master, not of the servant, to exercise due care and diligence to ascertain whether the appliances furnished are safe and suitable: a servant has a right to assume, without inquiry or examination, that the appliances furnished to him are safe and suitable." *Lasure v. Grantville Mfg. Co.* (1882) 18 *S. C.* 231, *Approved in Carter v. Oliver Oil Co.* (1890) 34 *S. C.* 211.

"An employee is required to observe and avoid all known or obvious perils, even though they may arise from defective machinery and appliances; but he is not bound to search for defects, or make a critical inspection of the appliances which are provided for his use. These are duties of the employer, who is required, not only to furnish reasonably safe and suitable tools and machinery, but to exercise such a continuing supervision over them, by such reasonably careful and skilful inspection and repair, as will keep the implements which employees are required to use in such a condition as not necessarily to expose them to unknown and extraordinary hazards." *Ohio & M. R. Co. v. Pearcy* (1891) 128 *Ind.* 197; *Little Rock, M. R. & T. R. Co. v. Leverett* (1886) 48 *Ark.* 333.

"The servant has a right to presume on the master's compliance with the obligations implied by the contract between them, and the real question in reference to a particular case is whether the servant has had equal opportunities with his employer to observe the defects in the machinery or materials, and, having such opportunities, intends to waive any objection to them." *Dale v. St. Louis, K. C. & N. R. Co.* (1876) 63 *Mo.* 459.

"The employee must also exercise ordinary

care in the use of appliances. The difference in the duty of the master and servant is, the master is bound to look for defects, while the servant is bound only to discover what the ordinary use of the appliance would make known to a man of ordinary prudence. The master is held to know the defect, if by the exercise of ordinary care he might know it. The servant has a right to assume that the master has furnished him safe machinery, unless its condition is such that by the exercise of ordinary care he would have discovered its defects." *Gutridge v. Missouri P. R. Co.* (1891) 105 Mo. 526.

"Unless the defects are such as to be obvious and open to common observation to anyone giving attention to the duties of the occasion, the employee has the right to assume that the employer has performed his duty in respect to the implements and machinery furnished." *Carpenter v. Mexican Nat. R. Co.* (1889) 39 Fed. Rep. 315.

"The master and servant do not necessarily stand upon an equal footing in this regard (the knowledge of dangers). The servant, although a man of ordinary prudence, as well as experience, may be quite incapable of appreciating the degree of risk involved in the use of a certain kind of machinery, while the master may be and generally is. It is the master's duty to inform himself in that regard, for on him is involved the duty of exercising ordinary care to supply safe instrumentalities to his servant; whereas, the latter has a right to assume, in the absence of notice to the contrary, or of something to put him on inquiry, that the master has performed his duty, and hence, to a certain extent to rely on the superior judgment of his master." *Russell v. Minneapolis & St. L. R. Co.* (1884) 82 Minn. 230.

"These extra hazards, which result from the master's failure to perform his duties to his employees, do not come within the risks which the latter assume as a part of their contract of service. For all such extra hazards resulting in injury to the servant, which are not obvious, and of which the servant has no notice, the master is liable. And in such case, it is no answer to an action to say, as is alleged here, that the plaintiff might, by the exercise of proper diligence, have ascertained if the defendant was conducting his business in disregard of a positive duty which he owed the plaintiff as his servant." *United States Rolling Stock Co. v. Wilder* (1888) 116 Ill. 100.

"The burden of furnishing safe machinery, appliances, surroundings, etc., is upon the master, and while the master is not to be held liable for defects and dangers of which the servant is fully informed, yet the servant is authorized to rely upon the acts of the master in that respect, and is under no primary obligation to investigate and test the fitness and safety of the machinery, surroundings, etc., in the absence of notice that there is something wrong in that respect." *Chicago & E. I. R. Co. v. Hines* (1890) 132 Ill. 169.

"While it is true that both master and servant will be held to know that which by the exercise of reasonable diligence they might have learned, still this rule does not by any means place the master and servant upon equality as to the acts necessary to constitute diligence. He is not bound to search for defects, or make a critical inspection of the appliances which are provided for his use. These are duties of the employer." *Pittsburgh, C. C. & St. L. R. Co. v. Woodward* (1894) 9 Ind. App. 169.

"While the employer may expect that an employee will be vigilant to observe, and that he

will be on the alert to avoid all known and obvious perils, even though they may arise from defective tools and machinery (*Atlas Engine Works v. Randall* (1885) 100 Ind. 293, 50 Am. Rep. 798), yet the latter is not bound to search for defects, or inspect the appliances furnished him, to see whether or not there are latent imperfections in or about them which render their use more hazardous. These are duties of the master, and unless the defects are such as to be obvious to any one giving attention to the duties of the occasion, the employee has a right to assume that the employer has performed his duty in respect to the implements and machinery furnished." *Louisville, N. A. & C. R. Co. v. Buck* (1889) 116 Ind. 566, 2 L. R. A. 520.

"A servant is expected to observe such objects only, in the absence of notice, as would in an instant convince him of their danger." *Johnston v. Oregon Short Line R. Co.* (1892) 23 Or. 94.

If an appliance has just been inspected the obligation of the servant to examine it may be said to reach a vanishing point. *Chicago & E. I. R. Co. v. Kneilm* (1894) 152 Ill. 458.

A verdict for plaintiff is proper, where there is evidence that a defect is one which would not have been discovered by simply using the defective appliance, but that it could and would have been discovered by an examination made by a competent person. *Nichols v. Crystal Plate Glass Co.* (1894) 126 Mo. 55.

Compare also, as illustrative of the same general principle, *Ryan v. Fowler* (1862) 24 N. Y. 410, 82 Am. Dec. 315; *James v. Emmet Mining Co.* (1894) 55 Mich. 335; *Boyce v. Fitzpatrick* (1861) 80 Ind. 526; *Nord Deutscher Lloyd S. S. Co. v. Ingebregeten* (1894) 57 N. J. L. 401; *Faren v. Sellers* (1887) 39 La. Ann. 1017; *St. Louis, Ft. S. & W. R. Co. v. Irwin* (1887) 37 Kan. 701; *Davidson v. Cornell* (1890) 31 N. Y. S. R. 982; *Louisville & N. R. Co. v. Orr* (1890) 91 Ala. 554; *Burton v. Missouri P. R. Co.* (1888) 32 Mo. App. 455; *Louisville & N. R. Co. v. Foley* (1893) 94 Ky. 220; *Missouri P. R. Co. v. Lehmberg* (1889) 75 Tex. 61; *Nichols v. Crystal Plate Glass Co.* (1894) 126 Mo. 55; *Norton v. Louisville & N. R. Co.* (1895) 16 Ky. L. Rep. 846; *Covey v. Hannibal & St. J. R. Co.* (1885) 86 Mo. 635; *Cincinnati, H. & D. R. Co. v. McMullen* (1889) 117 Ind. 439; *Ohio & M. R. Co. v. Pearcy* (1891) 123 Ind. 197; *Houston & T. C. R. Co. v. McNamara* (1883) 59 Tex. 258; *Guthrie v. Louisville & N. R. Co.* (1883) 11 Lea, 372, 47 Am. Rep. 286.

"The servant is especially entitled to assume that his master had furnished him with suitable and safe materials, machinery, and surroundings, and relieved him of investigation and inquiry in that regard, where the performance of his duties requires constancy of attention to other matters. A man whose attention is constantly directed to moving cars, and their coupling, cannot possibly give much attention to the ties, switch-bars, etc., over which he may, from time to time, have to pass." *Chicago & E. I. R. Co. v. Hines* (1890) 132 Ill. 169.

The limits of the principle are sufficiently indicated by such statements as these:

"The statement that the servant is under no primary obligation to investigate and test the fitness and safety of the machinery, surroundings, etc., in the absence of notice of defects, is very good law in a proper case. This proposition is not applicable, however, to the case of one who has been in the employment of his master for such a length of time as to require him, in the exercise of ordinary prudence, to take some notice of his surroundings. A man cannot decline to see, and then hold the master liable, excusing his own negligence by saying that he was under no primary obligation to in-

vestigate." Illinois C. R. Co. v. Sanders (1894) 58 Ill. App. 117.

"It is a fair presumption, not only that men take the risks of their employment, but that they are competent to keep themselves out of manifest and unnecessary exposure to danger. It is argued that the storm made the situation one of unprecedented peril to Nye and his fellows, and the court therefore could not say, as matter of law, that the railroad owed no unusual duty for the protection of its employees. But the situation was no more unprecedented for one than for the other, and the danger, though greater in degree, was no different in kind from that under ordinary circumstances, and the more manifest the danger the more the employer was entitled to rely on the presumption that the employee would not unnecessarily incur it." Nye v. Pennsylvania R. Co. (1896) 178 Pa. 134.

2. Statements of the general rule with reference to particular instrumentalities.

The following additional passages from the opinions of the courts will be useful as showing the concrete operation of the general principles laid down above:

"Of the master is required a care and diligence in the preparation and subsequent inspection of such a place as a room in a mine that is not in the first instance demanded of the servant. The former must watch, inspect, and care for the slopes through which and in which the servant works as a person charged with the duty of keeping them reasonably safe would do. The latter has a right to presume when directed to work in a particular place, that the master has performed his duty, and to proceed with his work in reliance upon this assumption, unless a reasonably prudent and intelligent man, in the performance of his work as a miner would have learned facts from as a miner, would have learned facts from himself. . . . The degrees of care required of the master and servant also differ because defects in a piece of machinery or in the roof of a mine that to the eye of a competent inspector, such as the master employs, portend unnecessary and unreasonable risks and great danger may have no such significance to a laborer or miner who has had no experience in watching or caring for machinery or roofs of slopes in a mine, and the latter is not chargeable with contributory negligence simply because he sees or knows the defects unless a reasonably intelligent and prudent man would, under like circumstances, have known or apprehended the risks which those defects indicate." Union P. R. Co. v. Jarvi (1892) 10 U. S. App. 439, 53 Fed. Rep. 65, 3 C. C. A. 433.

"A person when employed and instructed to commence work at a particular place . . . is under no obligation, in order to protect himself from the charge of contributory negligence, to first go all through the building, and make himself familiar with each piece of machinery, and the danger he may incur in case he comes in contact with it in its then condition. It is sufficient for him that in entering upon the active discharge of the duties assigned him, he ascertains what he is expected to do, and the dangers directly connected therewith, and he has a right to assume that in the performance of that particular duty, reasonable facilities therefor will be afforded him, without coming in contact with other unforeseen or unsuspected dangers." Swobda v. Ward (1879) 40 Mich. 423.

"A servant when he goes upon the roof of a building as an employee of his master, to work thereon, has a right to assume, without

particular investigation or inquiry into the fact, that the master has exercised due care and caution in the erection of the building, and has omitted the performance of any duty in respect thereto which should have been observed by an ordinarily careful and prudent man." Diamond State Iron Co. v. Giles (1887) 7 Houst. (Del.) 557.

In Dale v. St. Louis, K. C. & N. R. Co. (1876) 63 Mo. 459, the proof was that the plaintiff was a fireman, and the extent of his knowledge as to the existence of danger was that, in passing over the section of the road on which the accident ultimately occurred, he had observed that it was a rough part of the track, and that the rails were short, and had inferred that it was a bad track from the bumping of the cars in passing over it. The court refused to absolve the company, saying: "No particular inspection of the track was ever made by him nor any report of its supposed deficiencies. It was not his business. Nor does it appear that he was aware of the particular defect which resulted in overturning the locomotive. The defendant, of course, had in its employment persons whose business it was to examine the track and see to its repairs, and it was their neglect if it was not kept in proper condition. It would be a harsh conclusion to say that the plaintiff, who was merely a fireman, would be required to abandon his employment upon a merely speculative apprehension that the defendant had not seen and would not see that the road over which their locomotive and cars passed was properly and safely constructed. The immediate cause of the accident was a defective joint of the rails, of which he could have known nothing as a fireman passing over the road, and which the defendant might have known by the exercise of proper diligence."

A master is liable for injuries to an employee, sustained by the falling of a bale of cotton which he was helping to put in the hold, because hooks by which it was lowered were defective, when it was the duty of others not engaged in handling the cotton to inspect the hooks, and he was ignorant of their condition and was obliged to use them when furnished. Ocean S. S. Co. v. Matthews (1890) 86 Ga. 418.

A workman who is merely employed to load, ride on, and unload an elevator is not necessarily negligent in assuming that the elevator chain is sound. Though the chain is in plain sight, the defects may not be patent to a casual inspection, and, as it is not his duty to carefully examine the chain, he may act on the assumption that the servant to whom that duty is assigned has performed it. Mulvey v. Rhode Island Locomotive Works (1885) 14 R. I. 204.

In Guthrie v. Louisville & N. R. Co. (1883) 11 Lea, 373, 47 Am. Rep. 286, where the plaintiff was injured by a defective maul, the court remarked: "In reference to a case like this, the true rule is, that the duty of the master is absolute to use active diligence to prevent improper or unsafe tools or implements being furnished an employee, by which he may be injured. [Nashville & C. R. Co. v. Elliott (1880)] 1 Coldw. 613, 78 Am. Dec. 508. In reference to this matter the employee may well rely, to some extent, at least, on the faithful performance of duty on the part of his employer, and therefore what might be ordinary care in avoiding an independent danger, might well not be required to the same extent to guard against a breach of duty on the part of another, which the party could have no reason to anticipate. The employee had no duty to perform, under the facts in this case, as to the repair of the tools; nor was he called on to in-

spect them to see whether the master might not have neglected his duties in this reference. There being no special care imposed by the nature of his position, nor obligation to inspect the tools, there could be no want of it, or negligence, or carelessness, in not doing what he was not bound to do by the nature of his employment and the legal obligations arising out of the relations existing between the parties. We do not intend by this, however, to say that the employee is not bound to proper attention, and bound to freedom from actual negligence in avoiding risks incident to his employment. The defendant cannot complain that the employee did not suspect or anticipate a breach of legal duty on his part, nor watchfully guard against danger from such breach. It is not for him to object that the plaintiff has relied on his faithful discharge of his duty, nor to insist that he should have inspected the tools he was ordered to use for the purpose of seeing whether the master had not violated his duty. The proof shows he was ordered to take the place of Dual in this case, who was using this maul, and it was but natural that he should have done so without suspicion; and the failure to examine before using was not carelessness on his part."

In *Pennsylvania Coal Co. v. Kelly* (1895) 156 Ill. 16, it was held that one who had opportunity to inspect any defect in the latch of the bucket that caused the accident, for some time before the accident and continued to work with such bucket, was not thereby chargeable with notice of the condition of the latch. The court said: "It was the unquestioned duty of the defendant to furnish plaintiff a safe bucket, and he had a right to assume that it had performed that duty, and was not bound to make a personal inspection of the same before using it. . . . If the servant must, at his peril examine for himself, what becomes of the primary duty of the master to see that safe and suitable machinery and implements are furnished his employee?"

In *Griffin v. Boston & A. R. Co.* (1889) 148 Mass. 143, 1 L. R. A. 698, respecting a broken coupling link, the court said: "The history of this broken link is not disclosed,—whether it was new or old, whether originally sufficient or insufficient, worn or not worn, whether it was furnished by the defendant itself as a part of its own equipment, or whether it came from some other railroad. These facts it is reasonable to assume were not within the plaintiff's knowledge, or means of knowledge. The railroad train was under the management of the defendant. The defendant knew, or had the means of knowing, where and by whom the train was made up, of what cars it was composed, and what degree of care and diligence had been observed in making it safe to run."

"The law applicable to the facts in this case is that the servant was not bound to investigate and find out at his peril whether the common master had used reasonable care in the selection of those employed in the same branch of service, but, on the contrary, he was warranted in assuming his employer had discharged his duty in that respect, and until notice to the contrary was brought home to him, he could act upon such assumption." *Charles Pope Glucose Co. v. Byrne* (1895) 40 Ill. App. 20.

8. Rule where the servant has equal or superior knowledge or means of knowledge.

Sometimes the servant's right of action is made to depend upon whether he possessed, in comparison with the master, "equal" or "superior" knowledge or means of knowledge; and 41 L. R. A.

we even find courts taking opposite sides in pronouncing upon the effect of this equality or superiority of information.

Thus, on the one hand, we have cases in which the equality of the servant's means of knowledge has been declared to be a sufficient reason for absolving the master.

In *Ogden v. Rummens* (1863) 3 Fost. & F. 731, Bramwell, B., charged the jury that, if they thought that the employer had no knowledge and no reasonable means of knowledge of the danger at the time the arch fell, or that the deceased had the same knowledge or means of knowledge, then they should find for the defendant; but in the opposite view of the case, for the plaintiffs.

In *Dunlap v. Richmond & D. R. Co.* (1888) 81 Ga. 130, an engineer employed by the month to run trains upon the road of his employer consented to go for temporary service on another road, and was injured by reason of the bad condition of the track, and the want of adaptation of the engine (which belonged to his employer) to the track in its actual condition. The court held that he could not recover, saying: "It is not alleged that the employer knew either of the bad condition or the want of adaptation. For aught that appears, the parties were on equal terms as to their knowledge or information touching both these matters. Had the engineer needed information more than he had, he should have obtained it or declined to go. The question is, whether he had a right to take for granted, as against his employer, that the track of the other company was not defective, but in a fit condition to be used under this particular engine with safety. Did the employer owe to him the diligence of seeing that this was so, before requesting him to go, and accepting his consent to do so? The employer could not by authority of the contract order him to go, for the duty of going was not embraced in the contract of employment. Had he objected and been discharged for it, his wages for the unexpired month would have gone on notwithstanding. We think the case is much like that of a farmer sending his hired man to plough for a neighbor a few days. If the neighbor's field is not safe, has sink-holes in it, for instance, or the plough is not adapted to the soil, and from one or both of these causes the hired man is injured, his employer, it seems to us, would not be to blame, and would not be responsible, unless he knew the facts which exposed his servant to unusual peril, and concealed his knowledge, or failed to communicate it."

On the other hand, we find it laid down that an employee's mere means of knowledge of defects in machinery or appliances is not equivalent to actual knowledge, as he has the right to presume that the employer has used due and reasonable care in seeing that they are not defective. *Norfolk & W. R. Co. v. Nunnally* (1892) 88 Va. 546.

The same principle was affirmed in *Porter v. Hannibal & St. J. R. Co.* (1879) 71 Mo. 66, 36 Am. Rep. 464, where the court said: "The doctrine that the servant cannot recover if he had equal means with the master of ascertaining the defect, is not applicable to a case of latent defects in machinery, but only to cases where the defect is obvious to the senses, or would have been disclosed to an ordinarily observant man in the ordinary use of the machinery in the business the servant was engaged in within the time the injured servant operated such machinery before the accident, or in the case of the negligence of a fellow servant and probably others, but certainly not to the one now under consideration, if we adhere to the doctrine announced in this case,

when here on a former occasion. If the servant, as was then held, is not, and the master is, required to exercise diligence to discover defects in machinery with which the servant is employed to work, the latter may recover, although he may have had equal means of ascertaining its defects, if in fact he was ignorant of their existence and they were not patent or such as would have been disclosed by operating it as above stated. If the master did not know of the defect, and reasonable care on his part would not have disclosed it, he would not be liable. If, however, by the exercise of reasonable care the employer could have discovered, although a like exercise of care on the part of the servant would also have disclosed to him, a latent defect, yet, if in fact he did not know it, the master would be liable, although the servant's opportunities to ascertain it were equal to those of the master. The servant has a right to assume that the machinery or implements furnished him by the employer are safe and suitable for the business, and he is not, while the master is, required to examine them for that purpose. The master is chargeable with knowledge which he might have acquired by the exercise of due care, the same as if he actually possessed it, whereas, the servant has the right to assume that all necessary examinations have been made by the master, and is not required, either in person, or by another employed by him for the purpose, to examine the machinery as to its fitness and sufficiency."

In *Muldorney v. Illinois C. R. Co.* (1873) 36 Iowa, 470, it is held that an employee having the same knowledge or means of knowledge that his employer has will not be held to have incurred all the risks of the employment incident to the use of defective cars or machinery, if he does not object thereto when attempting to use cars having bumpers of different heights. The court said: "It is the duty of the employer to exercise reasonable care to furnish safe machinery, and to discover defects therein. But the employee is not under like obligation to resort to means for the discovery of defects. He has a right to presume that his employer has done his duty, and complied with the requirements of the law. And it is only when he has knowledge of defects in the machinery which he is required to use, and continues to use them without objection, that he is presumed to waive the defect. (*Kroy v. Chicago, R. I. & P. R. Co.* (1871) 32 Iowa, 357.) . . . Of course, the situation of the plaintiff and his means of knowledge may be proved in order to enable the jury to determine the fact of his knowledge of the condition of the machinery with which he works. But it is his knowledge, and not his means of knowledge, which affects his right to recover." The court also refused to hold that knowledge of the condition of the bumpers would be imputed from the fact alone that they were of different heights.

The same doctrine in substance is declared in *Nichols v. Crystal Plate Glass Co.* (1894) 126 Mo. 55.

For other examples of the use of the same phrase respecting equal means of knowledge, see *Bailey, Personal Injuries Relating to Master & Servant*, pp. 198 et seq.

In some cases we even find the equality of the means of knowledge possessed by the master and servant somewhat unnecessarily referred to, when the action is already conclusively barred by the inability of the servant to prove knowledge on the master's part. See, for example, *McCarthy v. Mulr* (1893) 50 Ill. App. 510.

A little consideration will show that any 41 L. R. A.

argument based upon these expressions is, in most instances, merely barren and unprofitable logomachy. The master's nonliability is really predicated from the fact that the servant, under circumstances, possessed either actual or constructive knowledge of the risk to which he was exposed, and is therefore regarded as having assumed that risk, or as having been guilty of contributory negligence in continuing to expose himself to it. Whether the servant's knowledge was equal to, or greater or less than, that of the master is wholly immaterial. If his knowledge amounts to a full appreciation of the conditions the law will preclude him from maintaining the action. Should it fall short of that appreciation, it cannot be pleaded in bar of the action at all, and the master's case will not be strengthened by drawing a comparison between his own knowledge and that of the servant.

This aspect of the matter is clearly stated in the following passage of the opinion in *Pittsburgh, C. C. & St. L. R. Co. v. Woodward* (1894) 9 Ind. App. 169: "Where the danger is open and obvious to either master or servant, it might doubtless be properly said that master and servant stand upon an equality. *Brazil Block Coal Co. v. Hoodlet* (1891) 129 Ind. 327. But even then the servant's assumption of the risk depends not upon the equality of his opportunities with those of his master, but upon the fact that by the exercise of reasonable care he ought to have known of the danger, and is therefore held to have known it. It is conceded by counsel for both parties that the defect in this case was a latent one. We think it clear that as to such a defect the master and servant are not upon an equality. The duty resting upon them is different, and the acts required of them to constitute care with reference to the discovery of the defect are different. It could not, therefore, have been correctly said that the servant assumed the risk because his opportunities to observe the defect were equal to those of his master." *Pittsburgh, C. C. & St. L. R. Co. v. Woodward* (1894) 9 Ind. App. 169.

But the difference of opinion disclosed by the conflicting decisions as to the disabling consequence of the possession by the servant of equal means of knowledge is more apparent than real, for both the courts which affirm and the courts which deny that, under such circumstances, the servant is precluded from recovering damages, merely intend to assert the proposition that this disability ensues where the failure of the servant to ascertain the existence of the danger and to govern himself accordingly is due to his failure to exercise that degree of care which a prudent man in his position would have exercised. There is no force in the objections to the rule that a servant who has the same means of knowledge cannot maintain an action unless it be assumed that this phrase implies that the employee is bound to be as vigilant as the master in searching for defects, and there is absolutely no authority for putting such a construction upon the phrase, except in cases where the servant is especially charged with a duty of inspection.

Examples of such cases are the following: *Fort Wayne, C. & L. R. Co. v. Gruff* (1892) 132 Ind. 13; *Louisville & N. R. Co. v. Orr* (1890) 91 Ala. 554; *Austin v. Appling* (1891) 88 Ga. 54; *Kans v. Page* (1897) 168 Mass. 217.

But in the absence of specific evidence the court will not presume that the duty of examining the appliance which caused the plaintiff's injury rested upon him. *Goodrich v. New York C. & H. R. R. Co.* (1880) 116 N. Y. 393, 5 L. R. A. 750.

Where the servant professes to have special skill in the work for which he is hired and the master disclaims the possession of such skill, the obligation of ascertaining the peculiar construction of the appliances to be handled and the proper mode of handling them rests on the servant and not on the master. Hence, an instruction is erroneous which leaves the jury to infer in such a case that the master was bound to know the character of an appliance and the manner in which it should be used so as to prevent injury. *Ray v. Jeffries* (1887) 86 Ky. 367.

Possibly the only cases in which this process of determining the rights of the parties by instituting a comparison between the extent of the opportunities of knowledge possessed by each of them respectively has any real practical significance are those in which it is used with the result, either of disabling the employer from relying on the defense that his ignorance of the danger was excusable, or of strengthening the inference that he was not negligent in failing to observe it.

Thus, on the one hand, where a rule of a railroad company makes it the duty of all employees to report omissions of duty, and the negligent acts of the culpable servant took place on the train on which the plaintiff was working, it is more reasonable to suppose they were done in his presence, or under his observation, than to imply knowledge on the part of the company, and to imply that, having failed to report the acts of negligence, he intended to assume the additional risk. *Cameron v. New York C. & H. R. Co.* (1895) 145 N. Y. 400.

So, negligence cannot be imputed to an employer for failure to shore up a ditch in which an employee, injured by the caving in of the sides thereof, was working, where the latter and those at work with him were better informed than the employer as to the danger to be apprehended from the liability of the earth to cave, and the shallowness and other physical characteristics of the ditch were not such as to suggest danger, either to the employer or the employees. *Fairmount Cemetery Asso. v. Davis* (1894) 4 Colo. App. 570.

"If a defect in a car was such as to deceive human judgment, the company, as well as the plaintiff, stands excused. And whatever diligence he exercised in seeing to the apparent safety of the vehicle goes to the credit of his employer, as well as to his own credit." *Central R. & Bkg. Co. v. Kenney* (1877) 58 Ga. 485.

In *Reid v. Central R. & Bkg. Co.* (1888) 81 Ga. 604, a nonsuit was held to have been properly granted, where, so far as the testimony shows, the rope furnished to the plaintiff for the purpose of cleaning out a well was a good rope, and it was also in evidence that it was carefully examined by both the plaintiff and the overseer of the road, that there was no defect in it which would be discovered by the use of ordinary care, and that both parties pronounced the rope good.

In *Alton Lime & Cement Co. v. Calvey* (1892) 47 Ill. App. 343, the defendant's foreman testified that if the plaintiff had been careful he might have seen the dynamite before he struck the rock which caused the explosion. The court's comment upon this evidence was that, if it was true, the company, whose duty it was not to allow any dynamite to remain in the quarry that by the exercise of proper diligence could have been discovered, should have had it removed.

In *Walsh v. Whiteley* (1888) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 596, 38 Week. Rep. 876, 53 J. P. 38, the plaintiff admitted 41 L. R. A.

that he had not complained of the machine during the thirteen years he had worked with it because it had "never entered his head that it was dangerous."

On the other hand, the fact that only one out of ten employees engaged in handling a chain noticed any defect in it, is in itself evidence that the defect was not such an apparent one as to put them or their employers on their guard. *Kinney v. Corbin* (1890) 132 Pa. 341.

So, it has been said that "where the railway company has furnished, in the first instance, such reasonably safe tools and implements to the employee, to be used in the performance of the work he undertakes to do, and the tools become worn, or some latent defect exists of which the company has no knowledge, or by the exercise of ordinary care and diligence it could not have discovered, and the employee using them has the same means of knowing the condition of the tools that the company has, and the tools are by each considered reasonably safe, and the employee is injured by the use of them, it is a mere accident or misfortune, for which the company is not liable." *Missouri, K. & T. R. Co. v. Young* (1896) 4 Kan. App. 219.

XIII. *Whose knowledge is imputed to the employer.*

As to the circumstances under which the knowledge of certain employees that a rule is habitually violated will be held to justify the inference that the rule is virtually abrogated see the forthcoming note on the Master's Duty to Make Rules.

a. *General principles.*

As a general rule it may be laid down that a master is chargeable with the knowledge which any employee who is intrusted with the performance of any of the nonassignable duties of the master acquires with regard to the condition of the instrumentalities to which those duties relate, while he is engaged in the performance of such duties. See *Goldie v. Werner* (1894) 151 Ill. 551.

This doctrine is merely a special application of the more general rule that notice to an agent of a corporation or individual relating to a matter of which he has the management and control is notice to his employer. *Pittsburgh, Ft. W. & C. R. Co. v. Ruby* (1871) 38 Ind. 294, 10 Am. Rep. 111; *Ohio & M. R. Co. v. Collari* (1881) 73 Ind. 261, 38 Am. Rep. 134; *Crown Coal Co. v. Hiles* (1892) 43 Ill. App. 310.

"It is the officer to whose care is committed any particular department of a company's business who is expected to use ordinary care in the conduct thereof, and whose negligence therein is the negligence of the company." *Patterson v. Pittsburgh & C. R. Co.* (1874) 76 Pa. 380, 18 Am. Rep. 412.

The practical considerations upon which the doctrine is based were thus tersely stated by Byles, J., in *Clark v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 902, 10 Week. Rep. 405. "If a master's personal knowledge of defects be necessary to his liability, the more he neglects his business and abandons it to others the less will he be liable."

In *Sangamon Coal Min. Co. v. Wiggerhaus* (1887) 122 Ill. 279, one of the instructions informed the jury that if they believed, from the evidence, that an agent of the defendant whose duty it was to fix said door or cause the same to be fixed, was notified that the opening of the door across the gangway was difficult and hard, then such notice was notice to defendant, etc. The plaintiff contended that

notice to a servant of appellee is not notice to the common employer, but the court said: "We do not think it important to discuss the doctrine indicated by the objection urged. It is, we think, sufficient to say that, when a duty is imposed upon and entrusted to an agent by a corporation, notice to such agent of matters falling within his line of duty is notice to the corporation. The instruction, we think, stated the rule correctly."

In *Baltimore & O. R. Co. v. McKenzie* (1885) 81 Va. 71, the court refused to adopt the theory contended for by the railroad company, that it was not bound by the knowledge which employees charged with the duty of keeping its tracks in good order possessed as to its defective condition, saying: "To hold otherwise would be to hold that a corporation, whose lines—as we know from the record in the present case—extend into several states of the Union, and over which numerous employees are daily carried, is, so far as the guarding of its track is concerned, virtually without a representative at all. It would be to declare that to be law, which is consistent neither with reason nor sound policy, and the evil consequences of which it is easy to imagine. But if this be not the correct view, and if in the present case the company is not affected by notice to Flynn and Foster, how, it may be asked, could notice affect it? Would notice to an executive officer suffice? And if so, to whom? We are at a loss to answer. On the other hand, let it once be settled that the humblest watchman who walks the track is, within the scope of his employment, the representative of the company, that he has eyes to see, ears to hear, and lips to communicate to his superiors the knowledge he acquires as to the condition of the track, or of impending danger, and the law upon this important subject will be placed upon such a footing as that none can misapprehend, and all reasonable men must approve it. That such is the law is clear, we think, not only upon reason, but from the authorities already referred to; from which it will appear that, in cases like the present, the proper inquiry is not, What is the rank of the servant? but, Does he represent the company? And if he does, then the result is the same,—no matter whether his rank be high or low, whether he be the president of the company, or the conductor of a train, a section master, or a common watchman."

It is, of course, immaterial that the individual servant who acquired the knowledge had left the master's employment when the injury in suit occurred. The master's liability, so far as it depends upon his imputed knowledge, is complete in law, as soon as the actual knowledge of the servant would have reached him if such servant had used due diligence in imparting the information which he possessed. *Bland v. Shreveport Belt R. Co.* (1896) 48 La. Ann. 1057, 36 L. R. A. 114.

Still less should a verdict for the plaintiff be directed where there is evidence which goes to show that the dangerous condition from which his injuries resulted had been discovered by a former foreman of the defendant corporation, and actually communicated by him to its officers. *Linton Coal & Min. Co. v. Persons* (1894) 11 Ind. App. 264.

Declarations of an agent of the master, made after an accident, will not bind the master unless they are of such a character as to show that he had previous knowledge of the defect in the machinery. *Baker v. Allegheny R. Co.* (1890) 95 Pa. 211, 40 Am. Rep. 634.

On the other hand, admissions or statements of the general manager of a railroad 41 L. R. A.

company, made directly after an accident, as to the condition of a road while he is in the line of his duty and upon being informed by an agent of the road of the wreck, are admissible, both as showing knowledge of the corporation as to the improper construction and condition of the road before the accident, and also because it is his business, as the alter ego of the company, to know the condition of the road, and what he says under such circumstances is said dum ferret opus. *Krogg v. Atlanta & W. P. R. Co.* (1886) 77 Ga. 202.

b. Illustrative cases of notice to various employees.

1. Servant in complete control of the master's business.

It is an obvious consequence of the general principles stated in the preceding section that as an employee who stands in the master's shoes in respect to the control of the entire business is his representative in the performance of each and all of the nonassignable duties incumbent on the master, the knowledge of such employee must necessarily be imputed to the master. Thus, it has been held that the master is chargeable with knowledge acquired by any of the following agents:

A general manager. *Krogg v. Atlanta & W. P. R. Co.* (1886) 77 Ga. 202; *Goggin v. D. M. Osborne & Co.* (1896) 115 Cal. 437; *Delaney v. Hilton* (1883) 18 Jones & S. 341.

A partner who personally manages a concern. *Mellors v. Shaw* (1861) 1 Best & S. 437, 30 L. J. Q. B. N. S. 333, 7 Jur. N. S. 845.

A superintendent. *Patterson v. Pittsburg & C. R. Co.* (1874) 76 Pa. 389, 18 Am. Rep. 412; *Huntingdon & B. T. Mountain R. & Coal Co. v. Decker* (1876) 82 Pa. 119 (1877) 84 Pa. 419; *Pantzar v. Tilly Foster Iron Min. Co.* (1885) 99 N. Y. 388; *Frazier v. Pennsylvania R. Co.* (1860) 88 Pa. 104, 80 Am. Dec. 467; *Caldwell v. Brown* (1866) 53 Pa. 453; *Quincy Coal Co. v. Hood* (1875) 77 Ill. 68; *Texas Mexican R. Co. v. Whitmore* (1883) 58 Tex. 276; *Deweese v. Meramec Iron Min. Co.* (1895) 128 Mo. 423, Aff'g (1893) 54 Mo. App. 476; *Speiman v. Fisher Iron Co.* (1870) 56 Barb. 151; *Eureka Co. v. Bass* (1896) 81 Ala. 200, 60 Am. Rep. 152; *Bowers v. Union P. R. Co.* (1885) 4 Utah, 215.

A "general agent having charge of a mill, with power to purchase all supplies and discharge operatives." *Corcoran v. Holbrook* (1875) 59 N. Y. 517, 17 Am. Rep. 369.

A "foreman in exclusive control." *Louisville, N. A. & C. R. Co. v. Graham* (1890) 124 Ind. 89.

A "foreman and manager." *Higgins v. Williams* (1896) 114 Cal. 176.

A "mine-boss." *Rima v. Rossie Iron Works* (1890) 120 N. Y. 433.

A captain of a ship. *The A. Heaton* (1890) 43 Fed. Rep. 592; *The Norway v. Jensen* (1869) 32 Ill. 375.

A like principle is applicable where the notice has been received by one who customarily superintends a mill in the absence of a superior officer. *Chapman v. Southern P. Co.* (1895) 12 Utah, 30.

A complaint which alleges that a plaintiff was injured by the negligence of the defendant's superintendent, in furnishing for the plaintiff's use a newly invented blasting powder, "without first informing himself whether it could be safely used," is not demurrable on the theory that it does not show that the injury was caused by the negligence of the defendant. *Speiman v. Fisher Iron Co.* (1870) 56 Barb. 151.

2. Servants charged with the duty of seeing that the place of work is safe.

The subjoined decisions furnish specific ex

amples of the operation of the principle which renders nonassignable the duty to provide a safe place of work.

A railroad company is affected with knowledge of defects which make its track an unsafe place of work, where such knowledge is in the possession of any of the following servants:

Any agent appointed to keep its track in repair. *Porter v. Hannibal & St. J. R. Co.* (1879) 71 Mo. 66, 36 Am. Rep. 454; *Wellman v. Oregon Short Line & U. N. R. Co.* (1892) 21 Or. 530; *Elledge v. National City & O. R. Co.* (1893) 100 Cal. 282 (roadmaster).

A night watchman intrusted with the duty of guarding a track at a dangerous place. *Baltimore & O. R. Co. v. McKenzie* (1885) 81 Va. 71.

A division superintendent. *Illinois C. R. Co. v. Welch* (1869) 52 Ill. 183, 4 Am. Rep. 593.

Division engineer. *Illinois C. R. Co. v. Welch* (1869) 52 Ill. 183, 4 Am. Rep. 593.

A section boss or foreman. *Lewis v. St. Louis & I. M. R. Co.* (1875) 59 Mo. 495, 21 Am. Rep. 385; *Hollenbeck v. Missouri P. R. Co.* (1897, Mo.) 38 S. W. 723; *Clowers v. Wabash, St. L. & P. R. Co.* (1896) 21 Mo. App. 213.

A section boss and overseer of the road. *Skidmore v. West Virginia & P. R. Co.* (1895) 41 W. Va. 293 (principle assumed to be correct); *Riley v. West Virginia C. & P. R. Co.* (1885) 27 W. Va. 145.

A yardmaster. *Bessex v. Chicago & N. W. R. Co.* (1878) 45 Wis. 477.

An engineer. *Nashville & C. R. Co. v. Elliott* (1860) 1 Coldw. 611, 78 Am. Dec. 506. (There the imputed knowledge was in respect to the condition of one of the company's bridges, but the precise rank and functions of the engineer are not stated.)

A master-builder. *Bunnell v. St. Paul, M. & M. R. Co.* (1882) 29 Minn. 305.

Other examples of the same principle are found in the rule which charges any employer with notice of what is known to a superintendent of the construction of a bridge. *Brothers v. Cartter* (1873) 52 Mo. 372, 14 Am. Rep. 424.

Or to an employee whose duty it is to select the materials for a scaffold. *Goldie v. Werner* (1894) 151 Ill. 551.

The knowledge of a boss placed in control of the work of excavating a ditch, that it is in a dangerous condition, is imputed to his employer. *Van Steenburgh v. Thornton* (1895) 68 N. J. L. 160.

The knowledge of a master mechanic that the door of a round house under his charge is in an unsafe condition, is imputed to the railroad company. *Missouri P. R. Co. v. Tasse* (1893, Tex. Civ. App.) 22 S. W. 687.

A mine owner is affected with the knowledge of a timberman whose duty it is to see to the propping of the roofs of the tunnels that they are in a safe condition. *Consolidated Coal Co. v. Schelber* (1896) 65 Ill. App. 304.

And with the knowledge of a "fire boss" whose duty it is to find out where dangerous gases have accumulated. *Cerrillos Coal R. Co. v. Deserant* (1897, N. M.) 49 Pac. 807.

Where there is evidence that defects in a railroad track at a place where a train was derailed had been pointed out to the foreman of a repair gang, the question whether the company had notice of the defects before the accident occurred should be submitted to the jury. *Gage v. Delaware, L. & W. R. Co.* (1878) 14 Hun. 446. (The report does not mention whether the basis of the decision was that the foreman was a vice principal.)
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3. *Servant charged with the duty of providing and maintaining appliances.*

The general rule is that the knowledge of a servant employed to repair appliances is imputed to the master. *Texas & P. R. Co. v. Thompson* (1895) 30 U. S. App. 549, 70 Fed. Rep. 944, 17 C. C. A. 524; *Covey v. Hannibal & St. J. R. Co.* (1885) 86 Mo. 635 (Citing *Porter v. Hannibal & St. J. R. Co.* (1879) 71 Mo. 66, 36 Am. Rep. 454); *Krogg v. Atlanta & W. P. R. Co.* (1886) 77 Ga. 202; *Dedrick v. Missouri P. R. Co.* (1886) 21 Mo. App. 433; *Dutsl v. Gelsel* (1856) 23 Mo. App. 676; *St. Louis & S. W. R. Co. v. Threat* (1896) 12 Tex. Civ. App. 375; *Northern P. R. Co. v. Herbert* (1896) 116 U. S. 642, 20 L. ed. 755.

Thus, railroad companies have been held chargeable with the knowledge of the defective condition of a car possessed by any employee appointed by a railway company to look after the condition of its cars, and see that the machinery and appliances used to move and stop them are kept in repair. *Northern P. R. Co. v. Herbert* (1896) 116 U. S. 642, 20 L. ed. 755 [a yardmaster]; *Norfolk & W. R. Co. v. Ampey* (1896) 93 Va. 108 [a conductor].

With the knowledge of the foreman of a switch crew under whose supervision a train is made up, that one of the cars is defective. *Reed v. Burlington, C. R. & N. R. Co.* (1887) 72 Iowa, 166.

With the knowledge of the foreman of a railroad company's machine shops, that an engine is defective. *Ohio & M. R. Co. v. Stein* (1894) 140 Ind. 61.

With the knowledge of an assistant roadmaster and assistant foreman in control of a trackman, that a handcar is defective. *Atchison, T. & S. F. R. Co. v. Napole* (1896) 55 Kan. 401.

With the knowledge of an agent who made and adjusted the handles of a hand-car that unsuitable material had been placed in the handles. *Indiana, I. & I. R. Co. v. Snyder* (1896) 140 Ind. 647.

With the constructive knowledge of a section foreman that the wood used for making the handle of a hand-car is decayed. *McGhee v. Bell* (1897, Ky.) 38 S. W. 702. (Reversed on rehearing in 19 Ky. L. Rep. 267, but merely on the ground that the evidence showed that the servant was fully aware of the danger, and voluntarily used the hand-car at his own risk.)

With the knowledge of an employee in full control of the work of building a culvert that a derrick is defective and unsafe. *Kansas P. R. Co. v. Little* (1877) 19 Kan. 287.

With the knowledge of the foreman in control of a pile-driver crew that the machine is defective. *Schultz v. Chicago, M. & St. P. R. Co.* (1879) 48 Wis. 875.

So, a receiver operating a railroad is chargeable with the knowledge of a master mechanic as to the defective condition of any appliances under his control. *Kain v. Smith* (1882) 89 N. Y. 375.

A private corporation is chargeable with the knowledge of a bookkeeper having authority to purchase supplies. *Eureka Co. v. Bass* (1886) 81 Ala. 200, 60 Am. Rep. 152.

A street railway company is liable for an injury to a driver from the breaking of a hame strap of poor quality and insufficient for the service, where the company has knowledge of the defect through the foreman of its car barn, who is its representative in that behalf, and through its manager. *Toledo Consol. Street R. Co. v. Yunker* (1893) 9 Ohio C. C. 262.

The knowledge of the overseer of the yards

of a stock company as to the defective condition of a drawhead is imputed to the company. *Union Stock Yards Co. v. Larson* (1893) 38 Neb. 462.

Where a stevedore has full charge of the loading and unloading of a vessel, which furnishes the tackle, and his foreman called the attention of the mate of the ship to the unsafe character of one of the slings used in lowering cotton, the vessel is liable where one of the gang of the stevedore is injured by the breaking thereof. *The Phoenix* (1888) 34 Fed. Rep. 760.

In *Chicago & E. I. R. Co. v. Rung* (1882) 104 Ill. 641, it was held that a jury might properly find a railroad company liable for an injury caused by a defect in an engine which had been frequently reported by the engineer to his immediate superior, the court taking the ground that "upon the principle that everyone is presumed to do his duty, it was reasonable to assume that through the foreman the company obtained the requisite notice, whether he had immediate charge of the machinery or not." This ruling seems to be opposed to the general current of authority, and is perhaps attributable in some degree to the influence of the "superior servant" limitation upon the doctrine of common employment which prevails in Illinois.

Compare *Chicago & N. W. R. Co. v. Jackson* (1870) 55 Ill. 492, 8 Am. Rep. 661, where it was held that, as employees having charge of the inspection and repair of railway cars are superior in authority to a brakeman, he cannot be prejudiced by their negligence, and notice to them of a defect is notice to the company. But doubtless the ruling under these circumstances would be the same whether the "superior servant limitation" is acknowledged or not.

In *Brabbitt v. Chicago & N. W. R. Co.* (1875) 38 Wis. 289, an action against a railroad company for injuries sustained by a brakeman while coupling cars, owing to a defect in the engine, the following instruction was held correct: "If the company had any individual in their service, whose duty it was made by the company itself to take charge of the repairs of engines, to whom engineers were to report when engines became out of repair, and whose duty it was made by the company to act on such reports,—to see that the engines were put in repair,—I must instruct you that if such notice was given to any person thus acting in behalf of the defendant in this case, such notice is good notice to the company."

In *Johnson v. Missouri P. R. Co.* (1888) 96 Mo. 340, it was insisted that the trial judge erred in overruling defendant's objection to the reception of the evidence of two blacksmiths, Smith and Hardy, which tended to show that the hammer which caused the injury had not been repaired with reasonable skill. But the court said: "The petition alleges that the hammer in question had been repaired at defendant's own shops, and it was owing to the imperfect and brittle condition and flaws in the hammer negligently furnished him, that plaintiff was injured. Under these averments, the evidence was admissible, and also as bearing upon the question of defendant's knowledge as to the defective condition of the hammer, the repair of it having been made or done by defendant's agent in its repair shops, thus making the knowledge of the agent the knowledge of its principal; and in this respect this case is distinguishable from the case of *Gutridge v. Missouri P. R. Co.* (1887) 94 Mo. 468."

▲ *Employee having power to hire and discharge servants.*

The language used in the above-cited cases 41 L. R. A.

indicates that although the officers mentioned would, from the nature of their functions, always exercise some power in regard to the employment of a larger or smaller number of subordinates, the doctrine which charges the master with their knowledge is not based upon that fact. In other cases the exercise of these powers is itself the controlling element.

As the special object of conferring this kind of authority upon an employee is to insure that only competent servants shall be hired and retained, the logical conclusion from the general principles stated at the beginning of this subdivision is that, so far as respects the imputation of knowledge to the master, the possession of such authority can be material only when the issue raised is whether the master was aware of the servants' unfitness. In some states, however, as a consequence of certain peculiar modifications of the doctrine of common employment, the delegation of the power of employment casts a more extended responsibility in this regard upon the master.

The doctrine deduced from the former conception of the effect of the possession of this power by an employee is that, as the duty of the master to provide competent servants is absolute and nonassignable, such employee must be a vice principal in respect to the function of ascertaining the qualifications of the subordinates under his immediate control, and seeing that none of them are so unfit for their places that they are likely to imperil the safety of those with whom they work. Any knowledge, therefore, whether it be actual or constructive, which he may acquire as to the incompetency or unfitness of his subordinates, is imputed to the master. The following cases will indicate the scope of this rule:

Knowledge of a servant's unfitness is imputed to an employee where such knowledge is possessed by a general agent for hiring and discharging men of the class to which the servant belongs. *Lauing v. New York C. R. Co.* (1872) 49 N. Y. 521, 10 Am. Rep. 417; *Baulec v. New York & H. R. Co.* (1874) 59 N. Y. 356, 17 Am. Rep. 325; *Chapman v. Erie R. Co.* (1874) 55 N. Y. 579; *Gilman v. Eastern R. Co.* (1866) 13 Allen, 433, 90 Am. Dec. 210; *Maxwell v. Hannibal & St. J. R. Co.* (1884) 85 Mo. 95; *McDermott v. Hannibal & St. J. R. Co.* (1885) 87 Mo. 285; *Texas Mexican R. Co. v. Whitmore* (1883) 58 Tex. 276.

"It is not the company, but the officer having charge of this department of their business, that is expected to use ordinary care in the employment of proper conductors and other servants. His carelessness in this respect is theirs. [*Wright v. New York C. R. Co.* (1858) 23 Barb. 80.] It was therefore quite relevant and important to show that Thomas A. Scott, the superintendent, did not know that the conductor was a careless officer; supposing that the employment and oversight of conductors was part of the functions of the superintendent, which does not appear in the evidence but seems to have been assumed. Standing for the company in this respect his knowledge becomes one of the very issues in the cause, and the court was in error in rejecting the evidence." *Frazier v. Pennsylvania R. Co.* (1890) 38 Pa. 104, 80 Am. Dec. 467.

This general principle has lately been declared to be applicable also to the case of an officer entitled to suspend a servant of the company temporarily. *Baltimore & O. R. Co. v. Henthorne* (1896) 43 U. S. App. 113, 73 Fed. Rep. 634, 19 C. C. A. 623. The court said, on the contention that knowledge must have been brought home to the division superintendent or to the

superintendent of motive power, whose office was several hundred miles distant: "It would be exceedingly difficult to bring home in any way the knowledge of an engineer's incompetency to these two officers under the circumstances. For the safety of the road, the company was obliged to intrust to many other agents than those mentioned the power to suspend incompetent servants, in order that the company's property, and the persons whose lives were in its custody, should not be exposed to extraordinary dangers. Clearly, the men whose duty to the company it was to exercise this power were those through whom the company sought its knowledge of the manner in which its servants were discharging their duties. They were agents for the very purpose of discovering habitual negligence, and of preventing danger from its presence, when discovered, by immediate suspension. We entirely concur with the court below in holding that an officer entitled to suspend a servant of the company temporarily is an officer who has authority to receive notice for the company of the incompetency of the person to be suspended. If, as was testified to, Fitzgerald, the yard master, had power to suspend the engineer from a further discharge of his duties when he found that he was intoxicated, if the master mechanic had the power to suspend an engineer pending inquiry for any dereliction of duty, if the train master had the same power, then all these officers were persons whose knowledge of the incompetency of employees under their supervision was the knowledge of the company, and the failure on their part to use due diligence in observing the competency and sobriety of those whom it was their duty to suspend for incompetency or inebriety was the negligence of the company. This obligation of a railway company to use due diligence in the selection and retention of its employees is one which, in view of the assumption of risk by the employees of any casual negligence of their fellow servants, it is most important to maintain, and it should not be frittered away by limiting those whose knowledge shall be the knowledge of the company to one or two officers so far removed from possible knowledge as to make it a hopeless task to bring the incompetency of subordinate servants to their notice."

"We think," said the court in *Pittsburgh, Ft. W. & C. R. Co. v. Ruby* (1871) 88 Ind. 294, 322, 10 Am. Rep. 111, "that notice to an agent of a corporation, relating to any matter of which he has the management and control, is notice to the corporation, and we do not see any reason why this rule is not applicable here. *Danville Bridge Co. v. Pomroy*, 15 Pa. 151; *Mechanics' Bank v. Schaumburg*, 38 Mo. 228. As it was the duty of the master of transportation to communicate all matters concerning his agency to his principal, it may be presumed that he did so. But whether he did so or not, notice to him is notice to his principal, when it relates, as it did here, to the business which he was transacting for the company. He was placed in his position that he might make himself acquainted with the conduct of those who were placed under his direction and control, and he seems to have had the power to appoint and remove, promote and degrade, those who were engaged in the business of which he had the oversight. All that we have decided in this case, on this point, is that the fact that the master of transportation was present on one occasion when Kiser is alleged to have been guilty of negligence, was competent evidence to go to the jury, and from which, and the other circum-

stances, the jury might find that the company had notice of the carelessness of Kiser, or with the use of proper diligence might have had such notice."

Knowledge of the incompetency of engineer, possessed by trainmaster, fireman of roundhouse, and yardmaster, is imputed to the company. *Francis v. Kansas City, St. J. & C. B. R. Co.* (1896) 127 Mo. 658.

Knowledge of a yard master empowered to employ and discharge employees in a railway yard, and also of a yard foreman by whom a minor was put to work in the yard, as to such minor's minority and inexperience, is binding upon the railway company. *Missouri P. R. Co. v. King* (1898) 2 Tex. Civ. App. 122.

In *Illinois C. R. Co. v. Jewell* (1867) 46 Ill. 99, 92 Am. Dec. 240, the fact that the incompetency of an engineer was known to some officers of the company was held sufficient to make it liable, but it is not stated what officers these were—apparently not the directors.

As illustrating the other theory of the consequences of delegating the power of employment, the following cases may be noted:

In *Texas* an employee with power to hire and discharge hands, and to exercise the control over them by which that power is customarily accompanied, is deemed a vice principal, not merely for the purpose of receiving notice of the incompetency of his own subordinates, with a view to the protection of other employees, but also for the purpose of ascertaining the condition and quality of the appliances with which they are required to work, and guarding those subordinates themselves against injury therefrom. *Texas Mexican R. Co. v. Whitmore* (1883) 58 Tex. 276.

Thus, the knowledge of a superintendent authorized to employ and discharge hands and to direct and control workmen under him, as to the dangerous character of the machinery at which he sets an employee to work, is imputed to the employer. *Connor v. Saunders* (1894) 9 Tex. Civ. App. 58.

So, the knowledge of a foreman as to the dangerous disposition of a steer which an employee is directed to remove is chargeable to the employer, where the employee was subject to the orders of one who had authority to employ and discharge such employees, and had by him been placed under the orders of such foreman. *International & G. N. R. Co. v. Smith* (1895, Tex. Civ. App.) 80 S. W. 501.

The same doctrine is recognized in *Illinois*. *Richardson v. Cooper* (1878) 88 Ill. 270.

Thus, notice to a foreman who has been put in charge of workmen using an elevator, of the defective condition of the cable by which the same is operated, binds the master and renders him liable for an injury to a servant who is without fault, from the parting of the cable. *Falgenau v. Abrahamson* (1896) 66 Ill. App. 352.

b. Employees whose knowledge is not imputed to the master.

The effect of the above decisions will be more clearly understood when we contrast them with others in which it was held that the master was not chargeable with knowledge. The rulings of course reflect the various views which are entertained as to extent to which a master may assign his duties to his agents.

Under the rigorous English doctrine (see *X.*, *b. supra*), which repudiates the vice principal theory altogether, it will necessarily follow that the knowledge of defects in machinery which is possessed even by such an officer as the chief engineer of a steamboat will not be imputed to the owners so as to render them lia-

ble for an injury to the third engineer. *Searle v. Lindsay* (1861) 11 C. B. N. S. 429, 31 L. J. C. P. N. S. 108, 8 Jur. N. S. 746, 5 L. T. N. S. 427, 10 Week. Rep. 89.

But the American cases under this head are all applications to various groups of facts of the converse of each of the general principles reviewed in the preceding subdivisions.

Knowledge of a servant of a defect in the appliances furnished by the master to another servant is not chargeable to the master unless the former servant had "authority to deal in reference to the matter which the notice affects, as a vice principal." *Brown v. Hershay Land & Lumber Co.* (1896) 65 Mo. App. 162.

In other words, the master will not be regarded as negligent in not knowing of a defect which is not known to any officer or agent for whose negligence the master would be responsible. *Smoot v. Mobile & M. R. Co.* (1880) 67 Ala. 13.

"To charge the master with knowledge, the notice must be brought home to the person whose duty it is to furnish or repair the machinery when that is necessary." *Richardson v. Cooper* (1876) 83 Ill. 270.

In the following cases this general principle has been applied to various groups of facts:

The knowledge possessed by a carpenter in a railway shop, of the timber used in the manufacture of the handle of a hand-car is that of a mere fellow servant of one who uses it, and is not imputed to the company. *Inulana, I. & I. R. Co. v. Snyder* (1893, Ind.) 82 N. E. 1129.

Where a railroad employee is thrown from a car while setting a brake, in consequence of the absence of any nut to hold the wheel on top of the brake rod, and there is no evidence that the brake was out of order when at the last car inspecting station or at any previous time, and the testimony merely goes to prove that another employee not an inspector, nor in any way responsible for the condition of the car, testified that he had noticed the defect three or four hours before the accident, no negligence on the part of the company is shown. *Chicago & E. I. R. Co. v. Hagar* (1882) 11 Ill. App. 498.

Notice of a defect in a railway track, given to an official of the company who is not in charge of that part of the track, is not notice to the company. *Union P. R. Co. v. Springsteen* (1889) 41 Kan. 724.

A master builder is not chargeable with knowledge which is imparted merely to a foreman superintending a branch of the work quite distinct from that on which the injured servant was engaged. *Richardson v. Cooper* (1878) 83 Ill. 270.

The temporary physical unfitness of a conductor for service is not presumed to be known to the railroad company, when the only person who was aware of his condition was a subordinate employee whose duty it was to call the conductors in a certain order, when trains were ready, and, if one could not go, to call the next. *Michigan C. R. Co. v. Dolan* (1875) 32 Mich. 510.

Under the "consociation" theory, a night watcher employed by a railroad company to note and report upon the conduct of the foreman of a night crew whose duty it is to make up trains is a fellow servant with the foreman. *Chicago & E. I. R. Co. v. Geary* (1884) 110 Ill. 383; *Following Chicago & N. W. R. Co. v. Moranda* (1879) 93 Ill. 302, 34 Am. Rep. 168, as to general rule.

A complaint by a switchman in railway yards, of the incompetency and inexperience of a fireman, made to a switchman having direc-

tion of the work of the former and certain other switchmen, but having no authority to employ and discharge any employee, will not affect the company with notice so as to render it liable for personal injuries sustained by a switchman because of such inexperience and incompetency. *Galveston, H. & S. A. R. Co. v. Eckols* (1894) 7 Tex. Civ. App. 429.

An instruction is erroneous which allows the jury to find for the defendant, if any of its servants knew of the defect which caused the plaintiff's injury. *St. Louis S. W. R. Co. v. Threat* (1896) 12 Tex. Civ. App. 375.

Or one which singles out an agent of the employer upon whom none of the duties devolve which would supervene as a result of knowledge of a defect and predicate a right to recover upon his knowledge. *Covey v. Hannibal & St. J. R. Co.* (1883) 36 Mo. 635.

In *Sioux City & P. R. Co. v. Finlayson* (1884) 16 Neb. 578, 49 Am. Rep. 724, the following instruction was sustained: "Even if the agents of the defendant who had charge of the engines on defendant's road, and the duty of their repair, did not positively know that the engine was unsafe, yet if it was in fact unsafe, and they had received such reports in regard to it as ought to have put them on their guard, and to have led, by the use of proper diligence, to knowledge of the facts, the defendants must be held to the same liability as if their agents had actual knowledge." The objection made to the instruction was that "It held the defendant liable, regardless of who of its agents had knowledge of the defects of the engine, or to whom reports of such defects were made." But the court said that the proposition could not be maintained, as the instructions as a whole, and the entire case, made it perfectly plain what agents were referred to.

Where the servant with whose knowledge it is sought to charge the master is not one of those whose knowledge is, as a matter of law, imputed to the master, liability can be brought home to the master only by showing that the danger was actually reported. *Kidwell v. Houston & G. N. R. Co.* (1877) 3 Woods, 313. There the principle was applied with somewhat doubtful propriety in a case where a defect in a car had been reported by the plaintiff to the car inspector, and by the car inspector to the master mechanic. A demurrer to the petition was sustained on the ground that it did not appear that the master mechanic had the power of appointment and removal. The standard of pleading thus applied is extremely strict, and at the present day most courts would probably hold that the precise capacity and powers of the master mechanic were matters to be disclosed by the evidence.

In *Kain v. Smith* (1882) 89 N. Y. 375, the knowledge of a master mechanic was held to be imputable to a receiver operating a railroad.

Of course, where no relation whatever exists between the person notified and the injured person's employer, there is no principle upon which the latter can be charged with notice. Thus, an employer is not liable for an accident to a servant caused by an insufficient fastening of a ladder, of which he had no other notice than that the architect, who was not his agent, discovered its dangerous condition ten minutes before. *Quinn v. Fish* (1893) 6 Misc. 105.

XIV. Duties of a master after learning of a danger to which his servant is exposed.

a. Introductory.

If we leave out of consideration the defense of contributory negligence, which is in no re-

spect dependent upon, nor characteristic of, the relation of master and servant, the only grounds on which a master can be absolved from liability for the consequences of any extraordinary risk to which the servant may be exposed through the abnormal condition of the instrumentalities of the business are: (1) that the master did not know, either actually or constructively, that such a risk existed, and (2) that the servant was aware of its existence, and agreed to accept the responsibility for any accident which it might cause. From this principle it is an obvious deduction that the master, after receiving notice of the existence of an extraordinary risk, may escape responsibility by the adoption of one or other of two courses. He may either remove the cause of the risk by the immediate restoration of the defective or unusually dangerous instrumentality to its normal condition, or, if an immediate restoration is impossible, impart his knowledge to his servants to the end that they may have an opportunity of deciding whether they will take the risk upon themselves and continue working. Whether the acceptance of the risk in the latter case is qualified or absolute depends upon whether the notification which the servants received of its existence was or was not accompanied by a promise to effect a restoration with reasonable despatch. But this is a subject which falls outside the scope of the present note, since the giving of a promise is merely a voluntary act on the part of the master, and not a positive duty for the violation of which he can be sued. The general rule has been thus tersely stated: "If the master knew, or under the circumstances ought to have known, that a machine in use was out of repair and dangerous, it is his duty to see that it was put in proper repair, or to warn those using it of the danger, if they were ignorant of it." *Rice v. King Philip Mills* (1887) 144 Mass. 229, 59 Am. Rep. 80. Compare *Louisville, N. A. & C. R. Co. v. Bates* (1897) 146 Ind. 564.

The following cases also recognize the duties to which the employer thus becomes subject in the alternative, after the danger comes to his knowledge: *Alton Lime & Cement Co. v. Calvey* (1893) 47 Ill. App. 343; *Denver, T. & Ft. W. R. Co. v. Smock* (1897) 23 Colo. 456; *Carlson v. Oregon Short Line & U. N. R. Co.* (1892) 21 Or. 450.

The mere fact that the master may have provided for an effective system of inspection is wholly immaterial after any particular risk has been found to exist. Inspection is merely a preliminary proceeding which is necessary to enable the master to ascertain whether the instrumentalities are defective or not, and when it has served its purpose by disclosing an imperfection, other obligations come into play.

"It is not sufficient," as has been remarked in one case, "to be simply cautionary when a manifest danger exists that may and ought to be removed." *Bean v. Western N. C. R. Co.* (1890) 107 N. C. 731. There the fact that a railroad company employed a track walker, whose duty it was to examine and see, just after a train had passed a dangerous point, whether rock had fallen, was held to be no excuse for allowing a mass of rock to remain in such a position and condition that it fell upon the track and injured an employee, where the danger was obvious.

It should be observed that the master's liability depends upon different considerations, according as his failure to obtain knowledge is a specific issue in the case or not. If such failure is relied upon and demonstrated to be

due to the want of proper care, it is evidently quite unnecessary to inquire into the character of the master's conduct after the time when he should have been in possession of the knowledge. On the other hand, if actual knowledge is brought home to the master, and the plaintiff makes such knowledge the starting point and foundation of his charge, not averring or attempting to prove any dereliction of duty in the matter of keeping watch upon the condition of the instrumentalities, his cause of action is not complete unless he demonstrates, not only that the master possessed knowledge of the existence of some extraordinary risk, but that he did not take such steps as a prudent man would have taken under the circumstances.

The defectiveness of a machine, and the master's knowledge of it, do not alone constitute actionable negligence. "The character of the machine and the operator's knowledge being established, it still remains a question of fact whether, under all the circumstances, a case of actionable negligence has been made out. That which caused the danger may have been irremediable, and it is no violation of duty by an employer to put one in his employ at the operation of a dangerous machine if the employee is fully informed as to its character, and voluntarily accepts the employment. Wherever force is applied to machinery there is more or less danger to those operating it; so that the duty of the employer towards his employee is not to furnish a perfectly safe machine, but one as safe as can be provided in the exercise of ordinary care and prudence. Whether the employer is negligent in this regard does not depend solely upon the fact that the machine is known by him to be a dangerous appliance, but whether, with such knowledge, he neglected to do what a person of ordinary care could and would have done under such circumstances." *Findlay Brewing Co. v. Bauer* (1893) 50 Ohio St. 565.

It cannot reasonably be contended that a tool or implement which has become worn and defective by use, but which still answers its purpose, should be cast aside as dangerous unless there is some apparent cause of danger in its continued use. It is an error, therefore, to instruct the jury that, irrespective of any probability of danger or harm, if a tool was defective and such defect might have, by the use of ordinary care and diligence, been known by the defendant, the defendant was liable to the plaintiff for the injury he received. *Little Rock & Ft. S. R. Co. v. Duffey* (1890) 35 Ark. 602.

The care which an employer is bound to use on any particular occasion on which the conditions are rendered specially perilous from some cause, which is not operative under the normal circumstances of the employment, must of course be proportioned to the danger to which he knows his servants will be exposed. *Inter-State Consol. Rapid Transit R. Co. v. Fox* (1889) 41 Kan. 715. (A case where men were at work on a trestle over which trains were run at intervals, and the company did not take such precautions as were proper in view of the morning's being very foggy.)

b. Duty to remove the causes of the unusual risk; illustrative cases.

The subjoined rulings will serve as examples of the manner in which the courts have applied to different groups of facts the rules which require the master to rectify any abnormal conditions in his instrumentalities which he may discover, and to warn his servants that those abnormal conditions exist.

1. Machinery and appliances.

In *Mad River & L. E. R. Co. v. Barber* (1856) 5 Ohio St. 541, 67 Am. Dec. 312, the court remarked: "The duty imposed on the company by the relation occupied by the conductor was to use reasonable and ordinary care and diligence in furnishing him with sufficient, sound, and safe cars and machinery for the train. This duty required, not only that the company should use proper skill and diligence in procuring and furnishing sufficient and safe cars and machinery, but also when notified that they had become insufficient and unsafe, or when they had been in use as long as they could with safety be used, to take them off the road until repaired and made sufficient and safe."

A railway company is bound to discover and remedy a defect in an engine within a reasonable time, where there is clearly something wrong with it and has been for a considerable time, and is liable for injuries to a switchman whose hand is caught between two deadwoods while he is making a coupling, owing to the engineer's inability to control the engine. *Lake Erie & W. R. Co. v. McHenry* (1894) 10 Ind. App. 525.

"It is culpable to use cars or engines of any particular pattern which an ordinary inspection would show to be defective." *Mason v. Richmond & D. R. Co.* (1892) 111 N. C. 482, 18 L. R. A. 845.

If a foreign car comes to a company with defects visible or discoverable by ordinary inspection, it should either refuse to receive it, or immediately repair it sufficiently to make it reasonably safe. *Chicago, St. L. & P. R. Co. v. Fry* (1891) 131 Ind. 319; *Atchison, T. & S. F. R. Co. v. Myers* (1894) 24 U. S. App. 295, 63 Fed. Rep. 793, 11 C. C. A. 439; *Gottlieb v. New York, L. E. & W. R. Co.* (1885) 100 N. Y. 462.

A railroad company which fails to put in good order the couplings on cars which have been injured in a wreck of which the company knows or ought to know is liable for an injury to a brakeman caused by such failure. *Norfolk & W. R. Co. v. Amper* (1896) 93 Va. 108.

An electric-light company is guilty of negligence in failing to replace a cable in use on an elevator by which employees ascend to an electric-light tower, or to make any examination to see if it is defective, after notification that it has become broken and ragged. *Welden v. Brush Electric Light Co.* (1889) 78 Mich. 268.

Other cases to the same effect in relation to machinery are *Atchison, T. & S. F. R. Co. v. Sadler* (1887) 38 Kan. 128; *Johnson v. Armour* (1883) 18 Fed. Rep. 490; *Johnson v. Boston Tow-Boat Co.* (1883) 135 Mass. 209, 46 Am. Rep. 458.

An employer is not, as matter of law, free from negligence toward an employee injured by the fall of a freight elevator, although it had just been repaired by an expert, where it was of class of rather poor elevators and the manager in charge knew of defects which were not repaired at all. *Goggin v. D. M. Osborne & Co.* (1896) 115 Cal. 437.

Where a locomotive boiler explodes killing the fireman, and there is evidence that the engine was frequently taken to the repair shops for repairs, that it would not hold water, nor sustain a full head of steam, the question of the employer's negligence is one of fact for the jury. *Kirkpatrick v. New York C. & H. R. R. Co.* (1879) 79 N. Y. 240.

In *Rodney v. St. Louis S. W. R. Co.* (1895) 127 Mo. 676, the duty with respect to a car

discovered to be defective was discussed as follows: "The defendant did not discharge its full duty to the plaintiff by inspecting and marking the car. The duty to furnish reasonably safe appliances and machinery for the use of its servants in the course of their employment was not only an imperative, but a continuous, duty. It ran, so to speak, with the defective car from the moment it was discovered to be defective, continually calling upon the master to repair it, or to warn those of its servants, whom it required in the course of their employment to handle it, of its dangerous character. These duties were not only imperative and continuous, but they were personal duties of the master, to whomsoever delegated, and if neglected by those to whom they were delegated, their negligence was the negligence of the master."

Where there is evidence that the eye-bolt was smaller than those used by defendant at the time of trial; that the breaking of the chains had formerly been of frequent occurrence; and that larger eye-bolts had been adopted since the accident, the proof of negligence on the part of defendant is slight, but is sufficient to justify the submission of the question to the jury. *Painton v. Northern C. R. Co.* (1880) 83 N. Y. 7.

Sometimes the duty to remove the cause of the danger may take the form of a duty to furnish special appliances in view of the possibility that the servant may be occasionally exposed to dangers against which those appliances will be an adequate protection. Thus, as a railroad company is bound to know that foreign cars may often have drawheads of different heights, and to appoint inspectors to ascertain the existence of this as well as other dangers incident to the handling of such cars, it is error to rule that the want of the crooked links which are necessary for the safe coupling of such cars is one of the risks assumed by a brakeman. *Bennett v. Greenwich & J. R. Co.* (1896) 84 Hun. 216.

2. Place of work.

If a railway corporation knows of the improper construction of its roadbed, and that the cross-ties and other superstructures are rotten, and if it fails to make suitable repairs, this is negligence which makes it liable for any injury that may occur on that account to anyone, whether he be a servant of the corporation or not, notwithstanding the failure to repair was owing to the negligence of the general manager or superintendent of the road, or road master, or section boss. *Krogg v. Atlanta & W. P. R. Co.* (1886) 77 Ga. 202.

It is error to direct a verdict for a defendant railroad company which has continued to use, after notice, a locomotive so defective that water leaking from it forms ice which makes it hazardous for switchmen to couple moving cars. *Flynn v. Wabash, St. L. & P. R. Co.* (1885) 18 Ill. App. 235.

An employer who, after a sufficient period to enable him to discover the defect, fails to replace a barrier whose absence renders a plank walk over a pit containing a shaft dangerous, but not so imminently dangerous that no prudent person will use it, is liable for injuries to a servant from falling into such pit while in the performance of his duty because of the absence of such barrier. *Bennett v. Standard Plate Glass Co.* (1893) 158 Pa. 120.

A mining company is liable for injury to a workman by the fall of a stone from a slope under which he is set to work, where he does not know that pebbles and stones in unusual

numbers have been falling there during the day, but this fact is known to the superintendent of the mine, who orders him to work there, without first having the stones raked off, or taking any other precautions to prevent accidents. *Deweese v. Meramec Iron Min. Co.* (1895) 128 Mo. 423, Aff'd without comment (1893) 54 Mo. App. 476.

It is the duty of a foreman who discovers that a charge of dynamite has been left in a quarry, to make diligent search to have it all removed, or at least to warn the employees so as to put them on their guard. *Alton Lime & Cement Co. v. Calvey* (1893) 47 Ill. App. 343.

An employer who knows that a tall and heavy pole is merely resting on the surface of the ground, with nothing but guys to retain it in an upright position, and that his servants are engaged in removing a pile of coal around its lower section, is bound to know that their safety requires the presence of a competent person to supervise the work of taking it down while the removal of the coal is in progress. *Trainor v. Philadelphia & R. R. Co.* (1890) 137 Pa. 148.

While men are rightfully at work on a trestle over which a railroad is operated, with the knowledge of the officers and persons operating the road, who know that the men are thereby placed in great danger, it is the duty of the company to operate and run its trains with care proportionate to the danger; and if it does not do so it is guilty of culpable negligence. *Inter-State Consol. Rapid Transit R. Co. v. Fox* (1889) 41 Kan. 715.

So far as the danger of making repairs in a railroad bridge may be increased by the damaged condition of the track from natural causes a trackman assumes the risk of such enhanced danger; but if it were increased by the neglect of the master to use proper care before the storm to keep the bridge in repair, or to ascertain the condition of the track or bridge after the storm, or to take such due and proper precautionary measures to prevent accidents to its employees as the exigencies of the situation might require, such risks are not assumed. The fact that he knew the track to be in a dilapidated condition and out of repair will not relieve the master from the discharge of his duty in the premises. *Carlson v. Oregon Short Line & U. N. R. Co.* (1892) 21 Or. 450.

In *Knapp v. Sioux City & P. R. Co.* (1887) 71 Iowa, 41, a request of defendant for the following instruction was held to have been rightly refused for the reason that it failed "to present the thought that defendant's employees used proper care in the inspection of the road, and in the exercise of such care, there was 'an apparent necessity' discovered by them to make the repairs required. . . . If the jury find from the testimony that the officers of the defendant employed skilful and competent men to look after and keep in repair its track, and furnished the requisite men and material to do the work and keep the track in good repair, and if you further find from the testimony that the track was frequently inspected by them, and that the old ties were taken out and replaced by new ties as often as there was any apparent necessity for so doing, you cannot find that the defendant was negligent in keeping and maintaining its track."

In *Union P. R. Co. v. Jarvi* (1892) 10 U. S. App. 439, 53 Fed. Rep. 65, 70, 3 C. C. A. 433, the roof in a dip slope where the accident happened was composed of a clay rock about 3 feet thick, which defendant's inspectors knew to be a treacherous rock needing constant watching, as it was of a kind that water disintegrated, while the only way it could be properly tested

was by sounding it with the hand or a pick or cane. It had not been so tested or sounded for weeks although the chief inspector testified that it needed watching; that through the greater part of this dip slope the roof had proved so poor that the defendant had supported it with timber; that it had not done so at this point, and that at a point but a few feet distant, where the two slopes joined, this rock had so crumbled and fallen that defendant had blasted it all down, and removed it, two months before; and there was testimony that the roof at the place of the accident had long been wet. It was held to be a fair question for the jury whether or not the failure to protect this particular portion of the roof by timbers, or to remove it by blasting, was not a lack of ordinary care.

In *Pantzar v. Tilly Foster Iron Min. Co.* (1885) 99 N. Y. 368, where a piece of a cliff fell upon the plaintiff, the evidence was conflicting. On the part of the defendant it tended to show that the cliff was composed of gneiss, a mineral naturally marked by seams, joints, and foliations, and that it was in the frequent and continued habit of causing it to be examined, but that no appearances indicating immediate danger had been observed before the accident. Plaintiff's evidence showed that a large crack, parallel with and about 10 feet back from the upper angle of the face of the cliff, had long existed and was plainly visible; that the superintendent and foreman were warned of its dangerous character; that after an experiment which showed that it was increasing in width, they still took no precautions to support the rock while the workmen were engaged under it, although such precautions were practicable and frequently adopted in other mines, such as the use of braces of timbers or blasting off the overhanging rock. Also that a wall would have furnished a support to the projecting mass. The plaintiff's evidence also tended to show that the rock broke off at the place where the crack had been observed, and that with the fall the crack disappeared. The court upheld a verdict for the plaintiff, saying: "It must therefore, be assumed from the verdict of the jury that it was determined that the rock fell from a cause of which the defendant had notice, and that precautions which would have prevented the injury were not adopted, although they were practicable and of easy and safe application."

The falling of the roof of a mine is not one of the ordinary hazards of the service of a driver therein, where the employer upon notice of the condition of the roof has appointed a timberman to secure it, and the roof has been left in an insecure condition. *Consolidated Coal Co. v. Scheiber* (1896) 65 Ill. App. 304.

A railroad company which has notice of the violation of a rule adopted for the protection of an employee is charged with the duty of taking the necessary steps to correct the evil and obviate the injury. *St. Louis, A. & T. R. Co. v. Triplett* (1891) 54 Ark. 239, 304, 11 L. R. A. 773.

A master is bound by promulgating a proper rule or otherwise, to change a practice which, to its knowledge, has for a long time been followed by one set of his servants to the peril of another set. *Dolng v. New York, O. & W. R. Co.* (1897) 151 N. Y. 579, Reversing (1893) 73 Hun, 270. The practice complained of was the shunting of cars onto tracks leading to a repair shop, without adopting proper precautions for preventing the cars from running through doors of the shop, and for warning such employees as might be at work there.

The duty of the master to make rules will be

fully treated in note to be shortly published in this series.

So far as regards the master's liability, the same result as if the cause of the danger were actually removed may obviously be attained if he refrains from ordering the servant to work in a place which has been ascertained to be dangerous. *Consolidated Ice Mach. Co. v. Klefer* (1888) 26 Ill. App. 486.

A master who is notified that posts upon which girders are to be set are insecurely fastened is guilty of little less than criminal negligence in sending carpenters to work upon them without bracing them. *Herdler v. Buck's Stove & Range Co.* (1896) 136 Mo. 3.

3. Servants.

The action which a master is bound to take after circumstances tending to prove the incompetency or unfitness of a servant have come to his knowledge is different according as those circumstances are such as to leave no doubt as to the incompetency or unfitness, or are merely such as would put a prudent man on inquiry as to the servant's capacity for his work.

On the one hand, therefore, it is the duty of the master to a servant to discharge any servants who, to his knowledge, have ceased to be competent and skilful. *Laning v. New York C. R. Co.* (1872) 49 N. Y. 521, 10 Am. Rep. 417; *Michigan C. R. Co. v. Dolan* (1875) 32 Mich. 509; *Poirier v. Carroll* (1883) 35 La. Ann. 699; *Evansville & T. H. R. Co. v. Guyton* (1888) 115 Ind. 450.

If the company continues the employee in its service after receiving such notice, it does so at its own risk, notwithstanding the fact that it may have made inquiry and decided that such servant was not negligent or incompetent. It is bound by the fact, whatever it may be. *Ross v. Chicago, M. & St. P. R. Co.* (1881) 2 McCrary, 235 (in charge to jury).

Where an employee was injured through the negligence of an engineer, evidence that the latter had frequently shown his recklessness and unfitness, and, notwithstanding complaints against him, was retained by the master, makes a case on which the plaintiff is entitled to recover, unless it is overthrown by a successful defense. *Northern P. R. Co. v. Mares* (1887) 123 U. S. 710, 31 L. ed. 206; *Loe v. Chicago, R. I. & P. R. Co.* (1894) 57 Mo. App. 350.

"When a master employs a competent and careful servant he has the right to rely upon the presumption that he will continue careful and skilful, and when notified that he has become careless, he is not ordinarily bound to discharge such servant without an investigation into such charge, unless such notice is accompanied by such evidence as leaves no doubt of the truth of such charge. A rule that would require the master to discharge a servant, careful and competent when employed, without investigation upon a charge of carelessness, would be a harsh one, and would often result in great injustice to employees." *Lake Shore & M. S. R. Co. v. Stupak* (1889) 123 Ind. 210. In that case the material charge against the defendant was that with notice of the negligence and carelessness of an engineer, it carelessly and negligently retained him in its service. The court said: "The jury found that the appellant had knowledge of the careless habits of Pool before the day on which the injury occurred, but this does not authorize us to say, as a matter of law, that it negligently retained him in its service after such knowledge."

An employer is not bound to discharge a servant merely because of his ill repute; but he is 41 L. R. A.

culpable if he retains in his employ a servant with a bad repute well founded. *Gier v. Los Angeles Consol. Electric R. Co.* (1895) 108 Cal. 129.

Reputation is not proof of incompetency, for a man's reputation may be at variance with his character or in accord with it. *Gier v. Los Angeles Consol. Electric R. Co.* (1895) 108 Cal. 129.

The retention of a servant by the defendant's superintendent, after being informed by a servant of a single dereliction of duty, may be justifiable, but the receipt of such information imposes upon the superintendent greater vigilance in observing the conduct of such servant afterwards. *Chapman v. Erie R. Co.* (1874) 55 N. Y. 570.

All that a master is bound to do in regard to a servant who has been guilty of one act of negligence is to use ordinary care in investigating the cause of the accident and the competency of the servant. If by such an investigation the facts ascertained were such as would justify a prudent man in retaining the servant, the master is not liable as for negligence. *Baulec v. New York & H. R. Co.* (1872) 62 Barb. 623.

After the knowledge of the master has been established it is still for the jury to say where he was negligent in retaining the servant. *Hoey v. Dublin & B. Junction R. Co.* (1870) Ir. Rep. 5 C. L. 206.

Where the officers of a railroad company have had their attention directed to the intemperate habits of an employee it is their duty to make careful and frequent investigation as to the fact if they retain him in their service. Whether they performed this duty is a question for the jury to pass upon, for such information is sufficient to put them upon their guard. *Michigan C. R. Co. v. Gilbert* (1881) 46 Mich. 176.

A finding by the jury that the defendant had knowledge of the careless habits of its engineer before the day on which the injury occurred does not authorize it to be said, as a matter of law, that the defendant negligently retained him in its service after such knowledge. *Lake Shore & M. S. R. Co. v. Stupak* (1889) 123 Ind. 210.

A case which seems to be wholly opposed to the general current of authority is *Texas & N. O. R. Co. v. Tatman* (1895) 10 Tex. Civ. App. 434, where it was held, for reasons which are not explained in the opinion, that the mere fact that a railroad company knows that its servants are negligent and careless will not render it liable to one for injuries inflicted on another by such negligence. This ruling is certainly wrong unless the court intended to make a distinction between habitual and isolated acts of negligence.

a. Length of time during which the employer has had knowledge of a danger.

That the master is liable if he does not at least begin to remove the cause of danger within a reasonable time after it is brought to his notice is a point upon which there is no difference of opinion.

If defects in fact exist, and are sufficiently patent to be discovered by careful inspection, the longer they are permitted to remain the greater the negligence. Hence it is not error to allow a plaintiff to prove that a defective switch which caused a derailment had been in the same condition for several weeks previously. *Kansas City, M. & B. R. Co. v. Webb* (1893) 97 Ala. 162.

After defects in tools used by the employee

have been called to the attention of the employer, and reasonable time has expired within which the employer ought to have furnished new or perfect tools, their continued use is gross negligence of the employer. *Atchison, T. & S. F. R. Co. v. Sadler* (1887) 38 Kan. 128.

A master is liable for injuries caused by a defective elevator which he fails to repair within a reasonable time after the defect comes to his knowledge. *Johnson v. Armour* (1883) 18 Fed. Rep. 490.

A verdict finding a railroad company liable for the death of a brakeman killed while making a coupling, by steel rails which projected over the end of a flat car, will not be set aside, where the conductor in charge of the train observed the position of the rails thirty hours before the accident, and the company's practice was to side-track a car when in bad order, or to adjust rails when thus misplaced so that they should not project beyond the end of the car. *Corbin v. Winona & St. P. R. Co.* (1896) 64 Minn. 185. It should be observed that by the Minnesota statute of 1894, § 2701, the doctrine of common employment was abolished as to railroad companies.

A railroad company which has actual notice of the defective condition of a foreign car several hours before a servant is injured in handling it is liable for negligence if not in failing to repair it, at least in failing to place some sign upon it, warning employees of its condition. *Denver, T. & Ft. W. R. Co. v. Smock* (1897) 23 Colo. 456.

An employer whose machinery is defective and unsafe because of its long-continued use and wear and improper adjustment, of which defects and the consequent unsafe and dangerous condition of the machinery it has due notice and knowledge several weeks before an accident to an employee, is negligent where it fails without excuse to make the necessary repairs. *Romona Oolitic Stone Co. v. Phillips* (1894) 11 Ind. App. 118.

In *Quincy Coal Co. v. Hood* (1875) 77 Ill. 68, it was said that if the defendant company's superintendent had received notice of the dangerous condition of the roof of one of the gangways in its mine, long enough before the accident to have given time to repair, this was sufficient to make the company liable for an injury caused by the fall of the roof.

In *Norfolk & W. R. Co. v. Gilman* (1891) 88 Va. 230, a railroad had for four years kept a chained log at the end of a wharf to arrest its cars, instead of providing a stronger structure fit for such a purpose. The court said: "Was not this negligence? The structure was temporary only, and not safe. This was known to the company, as better timbers were ordered, and yet, knowing the danger, and advised of the need, days were allowed to run into weeks, weeks into months, months into years, and still the temporary and unsafe structure had not been replaced by the permanent and substantial contrivance in use elsewhere, and which, if it had been in place on this wharf, would have arrested without danger these slowly moving cars. This was negligence beyond question, and this was the negligence in this case which caused the injury, and without which it would probably not have happened."

Under an employers' liability act worded like that of Alabama (Code, § 2590), a master cannot avail himself of the defense that the defect or obstruction by which an employee was injured was due to the act of a stranger, where it was not remedied or removed within a reasonable time after notice. *Highland Ave. & B. R. Co. v. Walters* (1890) 91 Ala. 435.

See also IV., supra.

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Some authorities have undertaken to apply the converse of this principle in a form which would relieve the master from liability unless his knowledge, actual or constructive, was obtained sufficiently long before the injury was received to have enabled him to adopt remedial measures. Rulings to this effect under the common law are *Erskine v. Chino Valley Beet-Sugar Co.* (1896) 71 Fed. Rep. 270; *Johnson v. Armour* (1883) 18 Fed. Rep. 490.

All the other decisions in which the same view has been explicitly adopted seem to have been rendered in construing the employers' liability act of Alabama, but as the measure of the employer's duty has been declared to be essentially the same under that act as under the common law (*Willson v. Louisville & N. R. Co.* (1887) 85 Ala. 269) these rulings may be appropriately referred to here.

Mere notice of a defect in a machine or appliance, it has been said, "will not render an employer liable for negligence in failing to remedy it unless he had a reasonable time and opportunity for doing so after receiving the notice." *Seaboard Mfg. Co. v. Woodson* (1891) 94 Ala. 143, (1892) 98 Ala. 378, holding that a complaint is demurrable which merely alleges that a defect was known to some person intrusted by the master with the duty of seeing that the "ways, works, machinery, or plant were in proper condition" (Code, § 2590), and fails to state how long before the accident the defect was so known.

In *United States Rolling Stock Co. v. Weir* (1892) 96 Ala. 396, it was held, following this case, that an instruction to the effect that the jury must find for the plaintiff if the defect which caused the injury was, or with proper diligence might have been, known to the defendant or his agents at the time the injury was suffered, is erroneous. The defendant must have had sufficient time to remedy the defect after its discovery before he can be chargeable with negligence in failing to effect the remedy.

The same view reappears in the ruling that defects in a track, when they arise, do not at once fasten a liability upon the railroad company. It is only after they have existed long enough for diligent supervision to discover and remedy them, that liability attaches. *Kansas City, M. & B. R. Co. v. Webb* (1892) 97 Ala. 162.

These rulings last cited do not, it is submitted, take proper account of the fact that the servant is, for the purposes of the argument, to be considered as having no knowledge of the defective conditions, since it would otherwise be a controlling issue whether he would be precluded from recovering on the ground of an assumption of the risk or of contributory negligence.

That it is always a material question, whether the master exercised reasonable care and diligence in removing a danger after he had knowledge of its existence may be conceded. *Alton Lime & Cement Co. v. Calvey* (1893) 47 Ill. App. 343.

But it seems inequitable and unreasonable to declare that the servant should always be the one to suffer, simply because the employer has been reasonably prompt in taking the necessary steps for the repair of the defective instrumentality. The true rule, it is submitted, is that the duty of the master under these circumstances is not, as a matter of law, fully discharged, unless he at least sees that the servant is notified of the danger to which he will be exposed, while the abnormal conditions to which that danger is owing are being rectified. This would seem to be the rationale of a

ruling by the supreme court of Pennsylvania that, where an employer is informed that certain machinery upon his premises, out of sight of his employees, is in a dangerous condition, and he takes steps to renew it, but, before such renewal is made, one of the employees, having no notice of the dangerous condition of the machinery, is injured by its breaking in the ordinary course of his employment, the question of the employer's negligence is for the jury. *Murphy v. Crossan* (1881) 98 Pa. 495.

The language of the court in *Indianapolis & C. R. Co. v. Love* (1858) 10 Ind. 554, is even stronger: "If a defect existed in the road which was known to the company, but which it was impossible for them to immediately remove or remedy, and in consequence thereof the road was unsafe, but not impassable, and yet they should place an employee upon the road, and suffer him, in ignorance of said defect, to attempt to operate it, and injury should thereby result to him, certainly there would be a liability."

See also the cases cited in section a of this subdivision as to the double duty incumbent on the employer after he has ascertained the existence of a given danger.

d. Duty to instruct the servant.

The cases on this subject will be fully reviewed in a note which will shortly be published in this series.

XV. Knowledge as an element of liability under statutes.

See also XIV. c, *supra*.

The statutes affecting servants fall into two categories: (1) those which specifically deal with the relations between employers and employed; (2) those which are applicable to all members of the community. The decisions under such statutes, so far as they are pertinent in the present connection, will be classified with reference to this consideration.

a. Decision under employers' liability acts.

As to the burden of proof under these statutes, see XVII. a, *infra*.

1. Statutes modifying the doctrine of common employment.

Several statutes have been passed both in England and the United States, the main object of which has been to qualify the rigor of the common-law principle which disabled the servant from recovering damages for an injury caused by the negligence of a fellow servant. In effect, therefore, the result of these enactments has been simply to extend the area within which personal negligence will be imputed to the master, and not to relieve the servant of the burden of establishing the existence of the various essential factors which go to make up the conception of negligence. Knowledge on the part of the master being one of those factors, it would follow, quite apart from any, explicit provisions in the statutes themselves that no intention to alter the common law in this direction would be imputed to the legislature. But the absence of such an intention is not a mere matter of implication so far as regards the three most elaborate of the statutes, namely, those of England, Massachusetts, and Alabama. All these declare that the servant shall not be entitled to recover, unless the defect which is relied upon as a cause of action "arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of some person in 41 L. R. A.

the service of the employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition." 43 & 44 Vict. chap. 42, § II, 1; Ala. Code, § 2590, subs. 5; Mass. Stat. 1887, chap. 270, § 1, subs. 1.

Such a provision, it is manifest, is simply declaratory of the common-law rule that, without proof of the master's knowledge, he cannot be held liable for an injury caused by the defective condition of his instrumentalities, and so it has been uniformly held. *Walsh v. Whiteley* (1888) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 536, 36 Week. Rep. 876, 53 J. P. 38; *Morgan v. Hutchins* (1890) 59 L. J. Q. B. N. S. 197; *Griffiths v. London & St. K. Docks Co.* (1884) L. R. 13 Q. B. Div. 259, 53 L. J. Q. B. N. S. 504, 51 L. T. N. S. 533, 33 Week. Rep. 35, 49 J. P. 100, per Fry, L. J., Followed in *Rudd v. Bell* (1887) 13 Ont. Rep. 47; *Ragotte v. Canadian P. R. Co.* (1888) 5 Manitoba L. Rep. 365.

Under the Alabama statute negligence in causing, or failing to discover or remedy, a defect is essential to liability. *Wilson v. Louisville & N. R. Co.* (1887) 85 Ala. 269.

The common-law rule that a master is not liable for an injury caused by a latent defect,—that is to say, one which was not discoverable by the exercise of reasonable care on his part,—is equally applicable to actions brought under these statutes. *Louisville & N. R. Co. v. Campbell* (1893) 97 Ala. 147; *Coffee v. New York, N. H. & H. R. Co.* (1891) 155 Mass. 21.

The mere fact of age and long use of a stick which broke while being used as a lever, causing the death of an employee, will not justify a finding that the employer ought to have known the stick to be defective so as to render him liable under the Massachusetts employers' liability act. *Allen v. G. W. & F. Smith Iron Co.* (1894) 160 Mass. 557.

Under the original Massachusetts act the common-law rule established by *Mackin v. Boston & A. R. Co.* (1883) 135 Mass. 201, 46 Am. Rep. 456 (see X., b, 6, *supra*), that a railway company was not liable for the negligence of its car inspectors, was declared not to have been changed in regard to foreign cars received merely for forwarding. *Thyng v. Fitchburg R. Co.* (1892) 156 Mass. 13. Compare also *Coffee v. New York, N. H. & H. R. Co.* (1891) 155 Mass. 21.

But this decision is possibly no longer a correct statement of the law since the passage of the amendatory act of 1893, chap. 359, declaring that the mere fact of a car being in possession of a railroad company makes it a part of its "ways, works, or machinery."

As regards foreign cars used for its own benefit, there seems to be no question that the company's duty in regard to them under the statutes is that of furnishing, and not merely of inspection, of appliances, and that, for this reason, the reasoning which led the court in *Mackin's Case* (1893) 135 Mass. 201, 46 Am. Rep. 456, to the conclusion that car inspectors were not vice principals, is no longer of any effect. See *Bowers v. Connecticut River R. Co.* (1894) 162 Mass. 312 (a case where a loaded car was received for transportation); *Spaulding v. W. N. Flynt Granite Co.* (1893) 159 Mass. 587 (where the car was borrowed).

In *Walsh v. Whiteley* (1888) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 536, 36 Week. Rep. 876, 53 J. P. 38, the question was whether there was any evidence of any defect in the condition of the machinery within the meaning of § 1, subs. 1, of the English employers' liability act. The court said: "We think there was not. To determine the meaning of the words 'defect in the condition of the machin-

ery' we must look not only at § 1, subs. 1, but also at § 2, subs. 1. Reading those sections and subsections together, we think there must be a defect implying negligence in the employer. The negligence of the employer appears to be a necessary element without which the workman is not to be entitled to any compensation or remedy. It must be a defect in the condition of the machine, having regard to the use to which it is to be applied or to the mode in which it is to be used. It may be a defect either in the original construction of the machine, or a defect arising from its not being kept up to the mark, but it is essential that there should be evidence of negligence of the employer or some person in his service intrusted with the duty of seeing that the machine is in proper condition. It must be a defect in the original construction or subsequent condition of the machine rendering it unfit for the purposes to which it is applied when used with reasonable care and caution, and a defect arising from the negligence of the employer."

The scope of this decision has been still further extended in a later case in which it was held that a "defect" exists within the meaning of the employers' liability act (43 & 44 Vict. chap. 42) § 1, subs. 1, and § 2, subs. 1, where a machine is defective with reference to danger and the defect is within the knowledge of the employer, and that the danger which may arise from the unguarded condition of a cog-wheel comes within this description. *Morgan v. Hutchins* (1890) 59 L. J. Q. B. N. S. 197, where Lord Esher said: "The argument in the present case is that there is no defect in machinery if the machine in question is in itself a proper one for the work it is to perform. It must be carried to this length, that if the machine contains a secret defect which causes danger to the workman, but which does not affect the purposes for which it is to be used, then this is not a defect within the meaning of the act. Now this leather pressing machine cannot be worked without workmen; without labor it is useless as a machine. Surely this fact of itself is something that has to do with the condition of the machine. If its condition be such that the workman cannot do his part with safety, is that or is it not, a defect in the condition of a machine the working of which is a necessary performance? It seems to me that unless we hold the defect complained of here to be one within the subsection in question, the act might as well have never been passed."

The construction put upon the clause of the Massachusetts act making the master liable for the negligence of "a person exercising superintendence" appears from such rulings as these (Stat. 1887 chap. 270, § 1, subs. 2).

A person employed to drill in a stone quarry does not assume the risk that the superintendent will negligently attempt to remove a charge of gunpowder by drilling into a hole that has been charged, before ascertaining that the charge has been exploded. *Malcolm v. Fuller* (1890) 152 Mass. 160, Distinguishing *Kenney v. Shaw* (1882) 133 Mass. 501, decided before the statute was passed.

That the superintendent of a quarry has assumed to inspect exploders used by the employees will not affect the owner's liability to an employee caused by a defective exploder, where it was no part of the owner's business to have an inspection made, unless he knew and consented to the superintendent's performing the work as a part of that which he was employed to do. Such an inspection is regarded as supererogatory and outside of the scope of his employment. *Shea v. Wellington* (1895) 163 Mass. 364.

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Under the provision of Ala. Code 1886, § 2590, subs. 1, negligence in causing, or failing to discover or remedy, a defect is essential to liability, and the measure of the master's duty to the servant is essentially the same, whether the right of recovery is referred to the statute or to common-law principles. *Wilson v. Louisville & N. R. Co.* (1887) 85 Ala. 269.

Where one of the counts is framed under the same provision, and alleges that the defective condition of a brake "was not remedied or discovered owing to the negligence of the defendant, or of some person in his employ intrusted with and exercising superintendence, or whose sole or principal duty was superintendence," it is error to exclude testimony going to show that no inspection was made of a foreign car which came from a certain line. Such evidence, if it is offered merely for the purpose of showing a single omission of duty, is incompetent for the reason that the car inspectors are the fellow servants of the trainmen. But it has a tendency to show under what rules, instructions, and superintendence the inspectors were acting, and that these were insufficient to provide proper inspection. *Coffee v. New York, N. H. & H. R. Co.* (1891) 155 Mass. 21.

Under the corresponding clause of the Alabama act (Code, § 2590, subs. 5), the reference of negligence has been held to be "sure and certain," where a foreman in charge of a hand-car, with knowledge that the operators are at times in the habit of turning loose the lever on a down grade and standing without support, suddenly applies the brakes on such a grade without notice to the operators and without looking to see whether they are holding to the lever. *Kansas City, M. & B. R. Co. v. Crocker* (1891) 95 Ala. 412.

According to Lord Watson the English act of 1880 has greatly diminished the responsibility of the master, so far as it depends upon his knowledge of the danger to which the servant was exposed. In *Smith v. Baker* [1891] A. C. 325 (p. 356), he commented thus upon § 2, subs. 3, of that act, specifically requiring the servant to notify his employer or his superior officer of the existence of any "defect or negligence" which has come to his knowledge. "I think the object and effect of the enactment are to relieve the employer of liability for injuries occasioned by defects which were neither known to him nor to his delegates down to the time when the injury was done. At common law his ignorance would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect, and so far the provision operates in favor of the employer." (Followed in *Webster v. Foley* (1892) 21 Can. S. C. 580).

A law requiring mine owners to provide hoisting machinery which will keep the miners safe "as far as possible" is not complied with, where a valve of the hoisting engine of a mine cage is defective, to the knowledge of the officers of the defendant, so as to allow the steam to escape through it and start the engine automatically, and the mining company is liable for the death of a miner caused by such unexpected starting. *Consolidated Coal Co. v. Mehl* (1888) 31 Ill. App. 252.

2. Statutes embodying common-law rules.

In *Gier v. Los Angeles Consol. Electric R. Co.* (1895) 108 Cal. 129, it was contended that the provision of the Civil Code, § 1970, which exempts an employer from liability for the negligence of the fellow servant of the plaintiff unless he has failed to use ordinary care "in

the selection" of such servant did not apply to cases in which negligence in retaining only was shown; but the court declined to accept this view, remarking that, if necessary, it would not hesitate to construe the employer's acts, under such circumstances, as constituting a new selection of the negligent employee, but that this was not requisite, because § 1971 declared generally that the employer must "in all cases indemnify his employee for losses caused by his want of ordinary care," and that such want might be shown as well by the retention of an unfit employee after knowledge of the fact, as by a failure to use due diligence at the time of his selection.

Under the similar provision of the Dakota Civ. Code, § 1131, it has been held to be culpable negligence on the part of a railroad company to allow machinery to remain out of repair, when its condition is brought to the notice of an officer [here a yard master] whose knowledge is imputed to the company, or might have been ascertained, upon proper inspection, by its agent charged with the duty of keeping them in repair. *Northern P. R. Co. v. Herbert* (1888) 116 U. S. 642, 29 L. ed. 755.

3. Acts imposing liability for wilful omissions of duty.

Under the Missouri act March 23, 1881, §§ 14, 16, giving a right of action for an injury caused by the "wilful failure" of the owner, etc., of a coal mine to keep a supply of timber for props when required, it is a condition of recovery that defendant had notice that the timber and props were required, and, with such notice, neglected and refused to supply them. *Leslie v. Rich Hill Coal Min. Co.* (1892) 110 Mo. 81.

Where there is no reason but the lapse of time for supposing that repairs are needed in a structure, the failure to repair does not constitute "wilful neglect" within the purview of a statute (Ky. Gen. Stat. chap. 57, § 8) giving the widow, etc., of one killed by such negligence a right to recover punitive damages. *Reinder v. Black & P. Coal Co.* (1890) 12 Ky. L. Rep. 30.

Under the same statute, the fact that a car by which a brakeman was killed while coupling it with another was improperly loaded by reason of the fact that lumber projected over the end so as to interfere with the space necessary for coupling, or even the fact that the conductor knew that the car was improperly loaded, does not of itself show wilful neglect; but to constitute such neglect it must appear that the conductor or other person in charge of the train knew, or by the use of ordinary care could have known, that the car was so improperly loaded as to imperil the life of the servant or employee. *Louisville & N. E. Co. v. Brice* (1898) 84 Ky. 298.

4. Statutes modifying the rules of evidence.

The 2d section of Ohio Stat. April 2, 1890, runs as follows: "If the employee of any such corporation shall receive any injury by reason of any defect in any car or locomotive, or the machinery or attachments thereto belonging, owned, and operated, or being run and operated by such corporation, such corporation shall be deemed to have had knowledge of such defect before and at the time such injury is so sustained, and when the fact of such defect shall be made to appear in the trial of any action in the courts of this state, brought by such employee, or his legal representatives, against any railroad corporation for damages, on account of such injuries so received, the same shall be prima facie evidence of negligence on

the part of such corporation." Construing this provision in *Columbus, H. V. & T. R. Co. v. Erick* (1894) 51 Ohio St. 146, the court said: "The presumption of knowledge of the defect, before and at the time of the injury, is, by this statute, chargeable to the company; and this statutory presumption cannot be overcome by proof of facts which only raise a presumption that the company did not have such knowledge. Competent and careful inspectors are presumed to properly inspect the cars and their attachments, but such presumption would not overcome the statutory presumption of knowledge of defects before and at the time of the injury. It would take an actual and proper inspection, or its equivalent, to overcome the statutory presumption of knowledge of such defects."

Under the same provision a railroad company is liable for an injury to an employee from the sudden starting of a locomotive by reason of leaky valves, although it may not have had actual notice of the defect. *Lake Shore & M. S. R. Co. v. Raits* (1894) 10 Ohio C. C. 70.

By virtue of the provisions of the 3d section of the same statute, a chief inspector of cars, having other inspectors under him, is not the fellow servant of a brakeman. *Columbus, H. V. & T. R. Co. v. Erick* (1894) 51 Ohio St. 146.

b. Damage acts.

The common-law rule that a servant cannot recover for injuries caused by defective machinery in the absence of knowledge, actual or constructive, on the employer's part, is applicable to actions brought under the various damage acts allowing the representatives of deceased persons to sue for the injury. *Elliott v. St. Louis & I. M. R. Co.* (1878) 67 Mo. 272 (a ruling upon 1 Wagner's Stat. (Mo.) p. 520, § 3).

XVI. Pleading.

The rules of pleading in the type of cases now under discussion have necessarily been touched upon to some extent in foregoing discussions of general principles; but it will be of service to the practitioner if we collect in one subdivision the authorities bearing directly upon the subject.

a. Necessity for an averment of knowledge on the master's part.

The principle underlying all the cases cited in the foregoing portion of this note, that the employer cannot be held liable to a servant on the ground of negligence unless he is proved to have had knowledge, actual or constructive, of the abnormal condition of his instrumentalities which caused the servant's injury, has been considered by most courts to involve the corollary that an averment to the effect that the employer had such knowledge is essential to the sufficiency of the servant's declaration.

This averment was contained in the following English cases decided under the old rule of pleading: *Tarrant v. Webb* (1856) 18 C. B. 797, 25 L. J. C. P. N. S. 261; *Roberts v. Smith* (1857) 2 Hurlst. & N. 218, 26 L. J. Exch. N. S. 819, 3 Jur. N. S. 469; *Williams v. Clough* (1858) 3 Hurlst. & N. 258, 27 L. J. Exch. N. S. 325; *Brown v. Accrington Cotton Spinning & Mfg. Co.* (1865) 3 Hurlst. & C. 511, 34 L. J. Exch. N. S. 208, 13 L. T. N. S. 94; *Davies v. England* (1864) 83 L. J. Q. B. N. S. 321, 10 Jur. N. S. 1235; *Mellors v. Shaw* (1861) 1 Best & S. 437, 30 L. J. Q. B. N. S. 333, 7 Jur. N. S. 845; *Hall v. Johnson* (1865) 3 Hurlst. & C. 569, 34 L. J. Exch. N. S. 222, 11 Jur. N. S. 190, 11 L. T. N. S. 779, 13 Week. Rep. 411; *Griffiths v. Gidlow* (1858) 3 Hurlst. & N. 648, 27 L. J. Exch. N. S.

404; *Senior v. Ward* (1859) 1 El. & El. 385; *Ashworth v. Stanwix* (1861) 30 L. J. Q. B. N. S. 183, 3 El. & El. 701, 7 Jur. N. S. 467, 4 L. T. N. S. 85.

The rule of pleading under the judicature act is the same. See *Griffiths v. London & St. K. Docks Co.* (1894) L. R. 13 Q. B. Div. 259, 53 L. J. Q. B. N. S. 504, 51 L. T. N. S. 533, 33 Week. Rep. 35, 19 J. P. 100, cited in b. *infra*.

A complaint is insufficient which neither alleges that the defendant had notice of the defect which caused the injury, nor states any facts from which such notice may be inferred. *Pennsylvania Co. v. Congdon* (1893) 134 Ind. 220.

In *Jordan v. Wells* (1878) 3 Woods, 527, permission was refused to bring suit against a receiver where petitioner merely alleged that "a person unskilled in running locomotives had been put in charge" by such receiver, and omitted to state that he employed the engineer with knowledge of his incompetency.

That a complaint which does not allege specifically the master's want of knowledge is defective and demurrable, is the established rule in Indiana where the old system of pleading is still in full vigor. *Evansville & T. H. R. Co. v. Duell* (1893) 134 Ind. 156, relying on the following cases: *Indianapolis & C. R. Co. v. Love* (1858) 10 Ind. 554; *Columbus & I. C. R. Co. v. Arnold* (1869) 31 Ind. 174; *Pittsburgh, Ft. W. & C. R. Co. v. Ruby* (1871) 88 Ind. 294, 10 Am. Rep. 111; *Brasil & C. Coal Co. v. Cain* (1884) 98 Ind. 282; *Slaterry v. Toledo & W. R. Co.* (1864) 23 Ind. 81; *Sullivan v. Toledo, W. & W. R. Co.* (1877) 58 Ind. 26; *Bogard v. Louisville, E. & St. L. R. Co.* (1895) 100 Ind. 491; *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 151; *Lake Shore & M. S. R. Co. v. Stupak* (1886) 108 Ind. 1; *Indiana, B. & W. R. Co. v. Dalley* (1887) 110 Ind. 75; *Lake Shore & M. S. R. Co. v. Stupak* (1890) 123 Ind. 210.

To the same effect, see *Chicago, St. L. & P. R. Co. v. Fry* (1892) 131 Ind. 319; *Arcade File Works v. Juteau* (1896) 15 Ind. App. 461; *Illinois C. R. Co. v. Jewell* (1867) 46 Ill. 99, 92 Am. Dec. 240; *Carruthers v. Chicago, R. I. & P. R. Co.* (1895) 55 Kan. 600.

An allegation that the defendant had knowledge of the defective condition of machinery includes actual and imputed knowledge, and sufficiently presents the issue whether there has been a negligent failure to inspect the machinery. *Lake Erie & W. R. Co. v. McHenry* (1894) 10 Ind. App. 525.

The same court, however, has recognized the doctrine that a complaint may be sufficient, even without a specific allegation of knowledge, where the facts stated raise the presumption that the defendant had such knowledge, as where the complaint is of the negligent maintenance of a low overhead bridge without any tell-tales to warn the trainmen. *Pennsylvania Co. v. Sears* (1894) 136 Ind. 460.

This ruling seems to be decidedly inconsistent with the position it has taken in other cases, and embodies what is virtually the same principle as that which is applied in the cases referred to below, which repudiate altogether the theory that a specific allegation of knowledge is necessary.

In jurisdictions where the new forms of pleading are observed there is no difficulty about the application of this liberal doctrine. Thus, it may be enforced with perfect propriety where the defendant is alleged to have been negligent in regard to inspection, for such an averment clearly charges him with a failure to know what he ought to have known.

In *Wedgwood v. Chicago & N. W. R. Co.* (1877) 41 Wis. 478, the complaint was demurred 41 L. R. A.

to on the ground that it did not contain any allegation that the master had notice of the defect which caused the injury. But the court held the complaint sufficient, saying: "It is charged that the company carelessly and negligently omitted the usual and proper inspection of the car, or improperly inspected it, and also allowed the projecting bolt at the end of the car to remain without being cut off. The plaintiff was wholly unaware of the dangerous position of this bolt, and, while performing his duty, was thrown down by it and injured. These facts would seem to bring the case within the rule which imposes liability on the master for an injury to the servant occasioned by a defect in machinery furnished the servant to operate, where the master has been guilty of negligence in furnishing such machinery, or, knowing of a defect therein, fails to notify the servant of its existence. It is true, the defendant in the present case is a railroad corporation, and can only act through officers or agents. But this does not relieve it from responsibility for the negligence of its officers and agents whose duty it is to provide safe and suitable machinery for its road which its employees are to operate."

So, also, a declaration is not demurrable which, although it does not charge the defendant with knowledge of the defects which caused the injury, avers that such defects "would have been known to the defendants but for the want of all proper care and diligence on their part." *Noyes v. Smith* (1856) 28 Vt. 59, 65 Am. Dec. 222.

Under the old rules of pleading it was held that a declaration in an action for injuries received by a servant in executing certain work outside of the scope of his employment is insufficient where it merely alleges that the defendants required the plaintiff to do that work, well knowing at the time that the plaintiff was unfit for such duty, and contains no averment that the defendants knew there was danger in the work, or even that the work was dangerous. *Smyly v. Glasgow & L. Steam Packet Co.* (1868) 16 Week. Rep. 463.

In some cases it has been held that the employer's knowledge need not be affirmatively averred where there is a general allegation of negligence.

This is the accepted doctrine in West Virginia. *Hoffman v. Dickinson* (1888) 31 W. Va. 142.

In South Carolina also it has been held that in an action to recover damages for an injury done by a master to his servant, an allegation that the injury was sustained by reason of neglect of duty on the master's part in furnishing proper machinery for the work required of the servant is not insufficient in failing to allege further that the master knew of the defect in the machinery; as want of knowledge, through no absence of due diligence in acquiring it, is a matter of defense, and therefore need not be set forth as a part of plaintiff's cause of action. *Branch v. Port Royal & W. C. R. Co.* (1892) 35 S. C. 405. The court said: "We think, therefore, that knowledge on the part of the defendant company in this case of the defect in the machinery, by reason of which the injury complained of was sustained, constitutes no part of the plaintiff's cause of action, but is a matter of defense. Indeed, to hold otherwise would, as it seems to us, in violation of the well-settled rule as to the degree of negligence which would make the master liable to his servant, require a much higher degree of negligence; for where a master knowingly furnishes his servant with machinery so defective as to be unsafe, he displays such a reckless dis-

regard of human life, that his conduct could not properly be characterized as exhibiting anything less than the grossest negligence. If, therefore, knowledge on the part of the master of the defect in the machinery constitutes an essential element in the cause of action, then it follows that the only degree of negligence for which a master could be held liable for an injury sustained by his servant, by reason of a defect in the machinery with which he is furnished to do the work for which he is employed, would be the grossest negligence; but if it is held, as we do hold, that want of knowledge on the part of the master is a matter of defense, which, if shown, may excuse the failure to perform an acknowledged duty, then no such consequence follows, and the well-settled rule of ordinary negligence may be applied."

In Illinois the inference that a specific allegation that the defendant knew of the defect which caused the servant's injury is not necessary where the duty to keep the instrumentality free from defects and the breach of that duty are averred, has been deduced from the general principle that the law charges every accountable person with a knowledge of his duty, and of what he has or has not done. A complaint, therefore, which sets out the master's duty and its nonfulfillment must, in this point of view, be regarded as embracing, by implication, an allegation that he knew what his obligation was in the premises, and his own failure to do what was incumbent upon him by reason of that obligation. *Chicago & E. I. R. Co. v. Hines* (1890) 132 Ill. 161.

In Missouri a distinction seems to be taken between cases in which the breach of duty is one of failing to repair, and those in which the breach is a failure to provide instrumentalities.

If the former omission is the gravamen of the complaint, the petition must allege that the master had knowledge, actual or constructive, of the condition of the instrumentality. *Current v. Missouri P. R. Co.* (1885) 86 Mo. 62.

On the other hand, it is held that a petition, in an action by a servant against a master for furnishing defective machinery, setting forth the facts, need not specifically allege that the master knew, or might have known, of the defect, or aver absence of knowledge or means of knowledge of defect on the part of the plaintiff. *Crane v. Missouri P. R. Co.* (1885) 87 Mo. 588. The court said: "To sustain the allegation in the petition that defendant negligently furnished a car that was defective and unsafe, the plaintiff would be required to prove the fact that the car was unsafe; and, also, the fact that defendant either knew, or by ordinary care might have known, of the defect, because without such proof the charge of negligence would be unsustainable. The charge that defendant negligently furnished a defective and unsafe car, stating wherein it was defective, is as broad as if the charge had been that the defendant furnished such car, which it either knew, or might have known by due care, was defective and unsafe. In either case he would have to make the same proof." This case was followed in *Johnson v. Missouri P. R. Co.* (1888) 96 Mo. 340.

In *Hall v. Missouri P. R. Co.* (1881) 74 Mo. 208, we find the following ruling: "A petition which alleges that defendant, a railroad company, negligently and carelessly permitted a loose iron rail to remain upon the path alongside the track used by switchmen in the necessary discharge of their duties, is not defective by reason of the omission to allege that defendant had knowledge, or by ordinary attention to its duties would have known, that the rail

lay upon the path. The omitted statement is substantially contained in the allegation made." This case may perhaps be explained on the theory that the petition implied alleged negligence in regard to inspection. Otherwise it is not very easy to reconcile it with the distinction apparently made by the court between a failure to repair, and a failure to provide, appliances.

At one time the same relaxation of the common rule was admitted in Indiana. *Louisville, E. & St. L. Consol. R. Co. v. Utz* (1892) 123 Ind. 265; *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 151; *Cleveland, C. C. & I. R. Co. v. Wynant* (1895) 100 Ind. 160; *Ohio & M. R. Co. v. Percy* (1891) 128 Ind. 197. See also *New Albany Forge & Rolling Mill v. Cooper* (1892) 131 Ind. 363, noted in XVII., a. infra.

But these cases were definitely overruled by *Evanville & T. H. R. Co. v. Duel* (1893) 134 Ind. 156. There the court made the following comments on two earlier cases: "In *Jenney Electric Light & P. Co. v. Murphy* (1888) 115 Ind. 566, it is said, on page 568: 'If an employee, reposing confidence, as he has a right to, in the prudence and caution of the employer, relies upon the adequacy of the implements put into his hands to work with, and upon the safety of the place assigned him to work, and sustains injury in consequence of the failure or neglect of the employer to disclose latent defects or perils which the latter knew, or which he should have known of by the exercise of reasonable diligence, the employee is entitled to remuneration for his loss,'—citing numerous authorities. While we do not regard this holding as at variance with any of the cases cited by us, we cite it as probably suggesting this conclusion: That where the defect or peril is latent, it should appear affirmatively that the master knew of it, or such facts should be pleaded as to show that by reasonable diligence he should have known it. . . . The case of *Ohio & M. R. Co. v. Percy* (1891) 128 Ind. 197, is suggested as in conflict with the earlier cases cited in this opinion. If such conflict existed we should not hesitate to hold with the great weight of authority against the pleading in question here; but in that case, as we understand it, the turning point is upon the allegations of the Jurators of the defect complained of, for such time as that the court held the defendant to have had imputed knowledge of the defect. The allegation was that the defect existed on the day of the injury, 'and for many days prior thereto.' Whether that case can be upheld is not now a question before us."

The converse of the above principle is exemplified in such rulings as these:

A count alleging that the defendants, well knowing that certain carcasses of animals were diseased and infectious, employed the plaintiff, who was ignorant that they were diseased, to cut them up, whereby the plaintiff became infected and was injured, discloses a good cause of action. *Davies v. England* (1864) 33 L. J. Q. B. N. S. 321, 10 Jur. N. S. 1235.

In an action against a railroad company for damages sustained by reason of a defective switch-lock, causing a derailment of an engine and cars, the complaint is sufficient, which alleges the duty of defendant in the premises, and also knowledge of, and negligence concerning, the defective machinery, and plaintiff's freedom from contributory negligence. *Ohio & M. R. Co. v. Heaton* (1894) 137 Ind. 1.

A complaint alleging the building of a railroad bridge of insufficient height over its track; that the company had knowledge of the fact, and that it was unsafe for its brakemen; that

plaintiff was ignorant of the fact; that while in the course of his employment he was struck by the bridge and injured,—is good on demurrer. *Baltimore & O. & C. R. Co. v. Rowan* (1886) 104 Ind. 88. The court said: "It will not do, we think, to say that these facts were not sufficient to constitute a cause of action against appellant for the recovery of such damages as appellee sustained. It seems to us that a railroad company is, and ought to be, required to construct and maintain its roadway and appendages, and its overhead structures, in such manner and condition that its employee or servant can do and perform all the labors and duties required of him, with reasonable safety."

Where the plaintiff was hurt while he was undertaking to pass over a revolving shaft, the negligence of the defendant is sufficiently alleged, where there is an averment to the effect that it was negligence to construct the shaft without a covering so as to protect employees from it while the machinery was in operation, as it was dangerous in that condition; that the danger was known to the defendant, or might have been known by the exercise of reasonable care; and that such danger was not known to appellant. *Miller v. Itasca Cotton Seed Oil Co.* (1897, Tex. Civ. App.) 41 S. W. 866.

b. Necessity for an averment of ignorance on the plaintiff's part.

It is well settled that "an employee cannot recover for an injury suffered in the course of his business from defective machinery, unless the employer knew or ought to have known of it, and the employee did not know it, or had not equal means of knowing it." *Hayden v. Smithville Mfg. Co.* (1861) 29 Conn. 548.

To bar the servant's action, "the unfitness of the instrumentality must have been unknown to him, or such as a reasonable exercise of skill and diligence in his department of service would not, have discovered to him." 2 *Thomp. Neg.* 971. Quoted with approval in *Stiles v. Ritchie* (1896) 8 Colo. App. 393.

This was the English rule of pleading before the passage of the judicature act of 1873, and it remained unaltered by that act.

In *Griffiths v. London & St. K. Docks Co.* (1884) 41 L. R. 13 Q. B. Div. 259, 53 L. J. Q. B. N. S. 504, 51 L. T. N. S. 533, 33 Week. Rep. 35, 49 J. P. 100, Affirming L. R. 12 Q. B. Div. 493, and Approving *Williams v. Clough* (1858) 3 Hurlst. & N. 258, 27 L. J. Exch. N. S. 325, as a whole, but not expressing any opinion as to the suggestion of Bramwell, B., that the declaration ought to have gone further and shown that the servant had not the means of knowing the danger, it was said by Bowen, L. J.: "The old form of declaration used to show that the danger which caused the accident was known to the master and unknown to the servant. Both these allegations are material, because without them there is no cause of action, and unless it was proved at the trial directly, or that there were facts from which it might be inferred, that the servant was ignorant of the danger, he would be nonsuited."

In the same case also it was remarked by Brett, M. R.: "The question is whether a prima facie cause of action is shown in the statement of claim in this action. Now where it is an action by a servant against his master for the wrongful condition of machinery on the premises on which the servant is to act, or of the condition of the means by which the services of the servant are to be fulfilled, if the servant confines the allegations in his statement of claim to alleging the existence of dan-

ger in any of these things owing to the negligence of the master, he shows no cause of action. That was decided many years ago by *Priestley v. Fowler* (2) (1837) 3 Mees. & W. 1, Bluph. & H. 306, 1 Jur. 987. If the danger is one which was known to the master and not to the servant, the knowledge of the master and the want of knowledge of the servant make together a cause of action, and as it is necessary that these two things should exist in order to form a prima facie cause of action, it is necessary that they should be shown to exist in the statement of claim."

Watling v. Oastler (1871) L. R. 6 Exch. 73, 40 L. J. Exch. 43, 23 L. T. N. S. 815, 19 Week. Rep. 388, was distinguished on the ground that the ignorance of the plaintiff was to be inferred from the averment in the declaration "by reason of the premises" which involve such ignorance (per Bowen, L. J.).

A complaint is not demurrable on the ground that because it alleges a defect in a coupling apparatus to have been "patent and open to the inspection of the railway company if an examination of the same had been made," it shows the defect to have been one which was obvious to ordinary careful observation, and consequently one which the plaintiff might have avoided by the exercise of due care. The words will be construed as meaning that the defect was one which could have been easily discovered in a careful examination by the company's inspectors. *Louisville, N. A. & C. R. Co. v. Howell* (1896) 147 Ind. 266.

The same rule has been laid down in some American cases: *Big Creek Stone Co. v. Wolf* (1894) 133 Ind. 496; *Norfolk & W. R. Co. v. Jackson* (1888) 85 Va. 489; *Bogenachuts v. Smith* (1860) 84 Ky. 330.

But although such an averment is most commonly inserted, it would scarcely be held indispensable by any court which has adopted the more liberal theories of modern pleading which are accepted in most of the states.

In West Virginia the petition need not allege ignorance on the plaintiff's part. *Hoffman v. Dickinson* (1888) 81 W. Va. 142.

Some cases require the servant to allege also his own freedom from contributory negligence. Whether such an averment is necessary depends upon the view which may be held as to the burden of proof in regard to that defense, and upon the strictness with which the formal rules of pleading may be adhered to. But the question does not involve any elements peculiar to actions by injured servants, and for the decisions on the subject reference must be had to general treatises on negligence.

If the plaintiff's want of skill is relied on for the purpose of showing that the injuries did not proceed from the plaintiff's own carelessness, it must be shown that the work required skill. This will not be inferred from averments that the defendants knew they had not employed a skillful person to do the work, and knew that the plaintiff was unskilled, and an unfit and improper person. *Smyly v. Glasgow & L. Steam Packet Co.* (1868) 16 Week. Rep. 483.

c. What particularity is required in the servant's petition.

In an action for injuries caused by the defective condition of an engine, a complaint is sufficiently specific which alleges that the throttle leaked, and that there were other defects known to the defendant and unknown to the plaintiff. *Wabash & W. R. Co. v. Morgan* (1892) 132 Ind. 430.

A count charging the employer with liability

by reason of the known incompetency of a servant is not demurrable because it does not set out the particulars of the incompetency. *Johnston v. Canadian P. R. Co.* (1892) 50 Fed. Rep. 584.

The exact time that a railway company has known of the defective condition of an engine, and of the incompetency and carelessness of an engineer, is not so material that the court will grant a motion to make a complaint more specific, on the ground that it merely alleges that these facts have been long known to the defendant. *Wabash & W. R. Co. v. Morgan* (1892) 132 Ind. 430.

A plaintiff is not required to state in his complaint the names of the officers of the defendant through whom he expects to bring notice to the defendant of the negligent habits of the engineer in charge of a train upon which the plaintiff was injured. *Lake Shore & M. S. R. Co. v. Stupak* (1890) 123 Ind. 210.

An averment of knowledge is sufficient. The evidentiary facts showing how the defendant knew need not be alleged. *Consolidated Coal Co. v. Scheiber* (1896) 65 Ill. App. 304.

As a matter of pleading, it is not material whether the alleged defect, provided it is pointed out with particularity, was in the construction or arose from the want of repair. *Gutridge v. Missouri P. R. Co.* (1887) 94 Mo. 408.

A general averment that the defendant violated his duty in being ignorant of the quality of a flagstone on which the plaintiff was required to stand in doing his work is not sufficient. The complaint must set forth the facts out of which the duty to furnish such an agency arises, and also allege knowledge on the master's part that it was of such a quality as to expose to danger anyone who stood upon it. *Potts v. Plunkett* (1859) 9 Ir. C. L. Rep. 290.

But certain formal defects are cured by the verdict:

In *St. Louis, I. M. & S. R. Co. v. Harper* (1894) 44 Ark. 524, the court, in discussing a complaint, said: "Critically considered his complaint charges an injury to a servant by a coservant, and nothing more. It is the well-established rule of this court that the master cannot be made to respond in damages for this. The defendant, however, made no objection to the sufficiency of the complaint, but denied all knowledge of defects in the exploded engine, as well as a want of care on its part, and permitted the plaintiff to introduce evidence tending to show that the boiler of the engine which caused the injury was defective, and that the agents of the company who were charged with the duty of repairing it, ought to have known of the defects. After verdict for the plaintiff the complaint may be considered as amended to conform to this proof, and the defendant can take nothing by the motion in arrest of judgment. The court was right in overruling it."

d. *Necessity for an agreement between the allegations and the proof.*

Where a workman in the employ of a telegraph company is injured through a defective telegraph pole, the allegation of negligence is sustained by proving the danger from the defect in the pole, and that it was known to the defendants. *Byron v. New York State Printing Teleg. Co.* (1857) 28 Barb. 39.

A declaration alleging that the defendant carelessly and negligently permitted a railroad track and a car to become and remain defective is sustained by evidence that they became and remained defective through his personal negligence in not discovering and remedying the defects, if he took upon himself

that branch of the business. *Fifield v. Northern R. Co.* (1860) 42 N. H. 225.

In *Michigan C. R. Co. v. Doan* (1875) 82 Mich. 510, the special incompetence alleged in the proof was that, when the offending servant was awakened by the person whose duty it was to awaken and call the conductors who were to run trains, he told the caller he did not feel able to go, and the latter told him he would have to go because there was no one else to go. The court remarked that it was questionable whether the declaration averred anything which would authorize proof of general incompetence; but there was, in their opinion, no proof either that the servant was incompetent, or that there was any reason to suppose it; that question was regarded as immaterial.

In *Current v. Missouri P. R. Co.* (1885) 86 Mo. 62, the charge in the petition was that a handhold was "imperfectly, defectively, and dangerously constructed, in this, that it was not fastened to the brakestaff securely and safely," etc. The court said: "The plain meaning of this charge is that the handhold was so constructed originally that the defect was in the design itself. Such being the cause of action alleged, in order to make a good petition, it was necessary to state that the company negligently or carelessly adopted that hand-brake or continued to use it after ascertaining its unfitness. We are inclined to the opinion that the petition does not state any cause of action. But, however that may be, it certainly was error to admit evidence that the hand-brake was out of repair, and that the company neglected to repair it. No such cause of action was stated in the petition, and there was an entire failure of proof of the cause of action alleged. There was no evidence adduced by plaintiff tending to prove that the brakewheel or handhold was imperfectly, defectively, or dangerously constructed, but only that from use its fastening to the brakestaff had been weakened."

Where there is no allegation in the complaint that the defendant had been negligent in ascertaining the habits of its engineer, or that it has failed to avail itself of the means at its command to ascertain such habits, so much of the special verdict as finds that the defendant had ample means of knowing such habits will be regarded as a finding outside the issues, and will be disregarded by the supreme court. *Lake Shore & M. S. R. Co. v. Stupak* (1889) 123 Ind. 210.

In an action for injuries received by plaintiff while in defendant's employ in digging a shaft, where the complaint avers that, as a consequence of the careless manner in which the shaft was constructed, and the neglect of defendant in not planking or properly securing the sides thereof, without any fault on plaintiff's part, the sides of the shaft fell in upon him, and that defendant, "well knowing in the premises the danger of said shaft to those employed therein," negligently, etc., directed plaintiff to proceed to the bottom thereof and dig there, without advising him of the danger, etc., and the negligence shown by the proof (if any) is that defendant, being aware of the existence of a fissure in the side of the shaft (at a point where it caved in) neglected to inform plaintiff of it, the cause of action proved is substantially alleged in the complaint, or, at the least, the variance is not such as to mislead the defendant, and may be disregarded. *Strahlendorf v. Rosenthal* (1872) 30 Wis. 674.

XVII. *Burden of proof; opinions as evidence.*

As to statutes modifying the rules of evidence see, I, a, 4, *supra*.

a. *Burden of proof.*

The propositions of law upon which a verdict may be predicated for the plaintiff are (1) that there must have been a defect by reason of which the plaintiff was injured, and (2) if that is found, that the defendant must have been guilty of negligence in respect to it, which might be established by showing either that the defendant knew of such defect, or, as some of the authorities express it, ought to have known it, or, as more accurately expressed in others, that the defendant failed to exercise reasonable care and diligence to examine and ascertain whether the chain was defective, and that the exercise of such care would have discovered it. *De Graff v. New York C. & H. R. R. Co.* (1879) 76 N. Y. 125.

To entitle a servant to recover for defects in the appliances of the business, he is ordinarily required to show, (1) that the appliance in question was defective; (2) that the employer knew, or ought to have known, of the defect; (3) that the employee did not know of it, and that the injury complained of resulted in spite of ordinary care on his part. *Norfolk & W. R. Co. v. Jackson* (1888) 85 Va. 489.

Where a railroad employee is injured while uncoupling cars, to create a liability, he must show, (1) the defective condition of the car; (2) an injury resulting therefrom; (3) notice, actual or presumptive, of such defect to the owner; (4) that the party injured was in the exercise of ordinary care. *Chicago, B. & Q. R. Co. v. Montgomery* (1884) 15 Ill. App. 205.

In an action against a railroad company for the death of an engineer, an instruction that, if the jury find that such injuries and death were the result of defect or defects in the engine operated by the deceased; that the company operating the road knew of such defects, or might have known of them by the use of such care as a person of ordinary prudence would have used under similar circumstances; and that deceased did not know of such defects, and could not have known of them by the use of ordinary care and prudence, the plaintiff is entitled to recover,—is substantially correct. *Missouri P. R. Co. v. Henry* (1889) 75 Tex. 220, 220.

That the burden of proving the employer's knowledge of the danger to which the servant was exposed lies on the plaintiff, is necessarily implied in all the cases cited in the foregoing subdivisions of this note. The following additional cases may be referred to as laying down this principle in specific terms. *Johnson v. Chesapeake & O. R. Co.* (1892) 36 W. Va. 73; *Arcade File Works v. Juteau* (1896) 15 Ind. App. 461; *Disher v. New York C. & H. R. R. Co.* (1883) 94 N. Y. 622; *Mentzer v. Armour* (1883) 18 Fed. Rep. 375; *Mason v. Richmond & D. R. Co.* (1892) 111 N. C. 482, 18 L. R. A. 845; *Columbus, C. & I. Cent. R. Co. v. Troesch* (1873) 68 Ill. 545, 18 Am. Rep. 578; *Stafford v. Chicago, B. & Q. R. Co.* (1885) 114 Ill. 244; *St. Louis, A. & T. H. R. Co. v. Corgan* (1891) 49 Ill. App. 229; *Snodgrass v. Carnegie Steel Co.* (1896) 173 Pa. 223; *Condon v. Missouri P. R. Co.* (1883) 78 Mo. 567; *St. Louis, I. M. & S. R. Co. v. Gaines* (1885) 46 Ark. 555; *Atchison, T. & S. F. R. Co. v. Ledbetter* (1885) 34 Kan. 326.

In *Hudson v. Charleston, C. & C. R. Co.* (1889) 104 N. C. 491, a judgment for the plaintiff was reversed on the ground that the trial judge erroneously charged the jury that if they found the appliance which caused the injury to be defective "it devolved on the defendant corporation to show that its condition was not, and could not by the exercise of reasonable care have been known to its officers."

41 L. R. A.

In *Atchison, T. & S. F. R. Co. v. Ledbetter* (1885) 34 Kan. 326, the appellate court set aside a verdict for the plaintiff, explaining its views as follows: "All the authorities hold that a railroad company in a case like the present is liable only for negligence, and that it devolves upon the plaintiff to show the negligence; or, in other words, that it devolves upon the plaintiff to prove all the facts which constitute or make apparent the alleged negligence. In the present case the plaintiff has failed to make any such showing. He has not shown, nor was it shown, that the railroad company had any knowledge of the defect existing in the draw-bar or in some of its accompanying appliances prior to or at the time of the injury, or that such defect had existed for any considerable length of time; nor what was the nature or character of the defect,—that it was obvious or manifest, or could have been discovered by the exercise of reasonable care and diligence, or by any of the ordinary tests employed by car inspectors; nor that the car had not been properly inspected by the car inspectors at one or both of the yards at Emporia; and not showing any of these things we think the plaintiff has failed to show negligence on the part of the railroad company,—failed to show a cause of action against the railroad company,—and therefore he is not entitled to recover upon his present presentation of this case."

The same rule prevails in regard to actions brought under the various employers' liability acts which contain a provision making the master liable where the defect in the machinery or appliance which an employee was required to use "arose from, or was not discovered or remedied owing to, the negligence of the employer or some one in his employ charged in that behalf." The burden of proving that there was a defect answering this description is upon the employee alleging it. *Louisville & N. R. Co. v. Davis* (1890) 91 Ala. 487.

When the plaintiff has shown that the master ought to have known, the law does not put upon him the additional burden of knowing that the master knew what it was his duty to know. *Ocean S. S. Co. v. Matthews* (1890) 86 Ga. 418. The court said: "It being shown, therefore, by the plaintiff in this case, that he did not know of the defective condition of these implements, and that it was not his duty to inspect and apply them, but that his employment confined him to the lower hold of the ship where he did not and could not see them; and it being further shown that the defendant, whose duty it was to provide safe and suitable implements, on the contrary provided and employed implements which at and before the time of the injury were obviously unsafe and unfit, and on their face showed that they had been so long enough for their unsafe condition to have been discovered by the master in the exercise of ordinary diligence, it is not too much to assume that the defendant ought to have known of this condition; and it is asking little enough to require it to show that it did not know, or offer some excuse for not knowing. This defense, if it existed, could easily have been made; the proof must have lain within the defendant's reach; the hooks were in its possession—presumably so, at least; and if the plaintiff's evidence as to the condition of the hooks was untrue, the defendant could easily have disproved it. But it did not even attempt to do this; it neither denied nor explained; it introduced no evidence."

In the absence of an allegation that an employee was incompetent at the time he was employed, the court will presume that the master made all proper inquiries and investigations

Before hiring him. *Davis v. Detroit & M. R. Co.* (1870) 20 Mich. 105, 4 Am. Rep. 364.

Another way in which the rule as to the burden of proof may be stated is that the mere fact of there being a defect in the instrumentalities of the master, and of the servant's being injured thereby, does not justify the presumption that the master was negligent.

No presumption of negligence on the part of the master arises where "It does not appear that an appliance was originally defective, or that it had been so long in use as to render the duty of inspection necessary, or that the master had due notice of the defect." *Kinney v. Corbin* (1890) 132 Pa. 341.

The mere fact that an appliance furnished by an employer for the use of his employee was defective is insufficient to create a presumption of negligence so as to shift the burden of proof from the employee to the employer, but it must appear that the defect is an obvious one, or such as to be discoverable by the exercise of reasonable care. *The France* (1894) 20 U. S. App. 212, 59 Fed. Rep. 470, 8 C. C. A. 185, Reversing (1893) 53 Fed. Rep. 843.

The mere fact that a hammer bursts into pieces and injures a servant who is using it does not prove that a master was negligent in supplying it. *Georgia R. & Bkg. Co. v. Nelms* (1880) 53 Ga. 70.

Where the handle of a ladle for the carriage of molten metal breaks while it is being used in the same way as it has been for fifteen years previously, the presumption is that it was of originally sufficient strength, and where the source of the weakness which caused it to give way is, upon the evidence, left a mere matter of conjecture, a verdict should be directed for defendant. *Reilly v. Campbell* (1894) 20 U. S. App. 334, 59 Fed. Rep. 990, 8 C. C. A. 438.

The mere fact that a railroad car was found to be defective after the accident is not evidence sufficient to sustain a verdict for a plaintiff who bases his right of action upon the failure of the company to inspect the car properly. *Perry v. Michigan C. R. Co.* (1895) 108 Mich. 130.

In *Johnson v. Chesapeake & O. R. Co.* (1892) 36 W. Va. 73, a verdict for the plaintiff was set aside where there was uncontradicted testimony on the part of the defendant's car inspector to the effect that he had examined the car which caused the accident the morning before that accident occurred, and found all appliances in good condition; and all the evidence tending to prove knowledge bore reference only to the condition of the car after the accident.

The breaking of the crossbeams fastened to the flanges of an elevated railroad while an employee is at work thereon is insufficient to show negligence on the part of the railroad company unless the exercise of proper care in inspection would have shown the defective nature of the beam, and the want of such care was a failure in the performance of a duty owed by the company. *Stourbridge v. Brooklyn City R. Co.* (1896) 9 App. Div. 129. See also *Joliet Steel Co. v. Shields* (1893) 146 Ill. 607; and the cases cited in VIII., supra.

In *Murphy v. Great Northern R. Co.* (1897, Minn.) 71 N. W. 682, the facts were these: "The defendant railroad had in its general yards at St. Paul a large, heavy transfer table, built upon wheels, which rested upon rails, and was movable, the whole machinery being placed in a large pit, and used for transferring heavy material from its shops to its railroad cars. Iron braces connected different parts of this machinery a few inches from the ground. This table was operated either by compressed

air, cranks, or by employees pushing it by hand; some of the employees, while doing so, standing inside the braces. Plaintiff, while in this position, and pushing the table with his shoulder, came in contact with a block 2 feet 10 inches long, 8½ inches wide, and 4½ inches thick, which was lying between the rails, and, being unable to stop the moving of the table, plaintiff was forced into the angle of the braces, and caught by the block, whereby his leg was broken. Plaintiff had on two or three previous occasions shortly before this accident, and only a few hours before, on the day of the accident, pushed this table in the same manner. The block was no part of the table, and no part of the instrumentalities by which it was moved, and it was not shown by what means it was placed between the rails, whether by accident, a wrongdoer, or an employee. No one had ever seen it there before, and the length of time it had been in that position was not proved. The transfer table, with its appurtenances, had no defects, and was suitable for the purpose for which it was constructed, and the defendant's other employees assisting in moving the table were competent for the work in which they were engaged." Upon this evidence the court held the defendant not to be liable, laying down the following propositions in its syllabus of the case: "In actions of this kind the negligence of either party is to be measured by the conditions of things existing at the place where the injury took place, and then known to exist by each party. . . . The defendant having furnished suitable instrumentalities for the work to be performed, competent workmen to assist in the work, and being without notice in fact of the dangerous obstruction, and as its existence for so short a time did not imply notice there is no presumption that the accident happened in consequence of a failure of duty on the part of defendant towards plaintiff. . . . The mere happening of an injury to the servant is not evidence of negligence on the part of the master, and under the circumstances the burden of proving negligence on the part of the defendant rested upon the plaintiff.

A less rigorous rule, however, is applied where it is merely a question whether the complaint is sufficient. Thus, where there is an allegation that the place at which the servant was directed to deposit hot slag was covered with water, it will be presumed, as against a demurrer, that this fact was known to the defendant. *New Albany Forge & Rolling Mill v. Cooper* (1892) 131 Ind. 363.

A corollary from the general rule is that a jury is not entitled to find a verdict upon a mere conjecture.

From the fact that a coupling pin in cars which a switchman is attempting to couple was fastened in the drawhead, a jury may possibly draw the inference that the coupling pin, link, drawhead, and other coupling apparatus were defective, but they cannot, upon that inference, have the further one that the officers of the company knew, or by the use of ordinary care might have known, of such defective condition. *Missouri, K. & T. R. Co. v. Thompson* (1895) 11 Tex. Civ. App. 658.

It is not justifiable to infer that the pin which holds a brake-rod in its place had dropped out before the car left a station 30 or 40 miles distant, and upon that inference to base the further inference that the car had not been properly inspected at that station. *Bailey v. Rome, W. & O. R. Co.* (1888) 40 Hun. 377.

Where the plaintiff can only show that while he was in the exercise of due care an accident happened which caused him the injury com-

plained of, the court will not infer that the car was in an unfit condition to be placed upon the road, and that the defect was of such a nature that it ought to have been discovered by appellant's servants. *Chicago, B. & Q. R. Co. v. Montgomery* (1894) 15 Ill. App. 205.

The mere fact that there is a custom to inspect all foreign cars will not justify the inference that any particular car was inspected. *Eddy v. Prentice* (1894) 8 Tex. Civ. App. 58.

The presumption that a drawhead was defective at the time an inspection was made, and that the defect might have been discovered by a proper examination, cannot be raised upon the fact that it gave way and injured a brakeman, where it appears that its dangerous condition might have been occasioned by the violence of the impact of the cars at the time the injury was received. *Perry v. Michigan C. R. Co.* (1895) 103 Mich. 180.

Where the master has shown that he adopted proper rules, which, if they had been observed, would have prevented an accident which occurred through the act of a fellow servant of the plaintiff, the presumption is that the act of the offending servant was in violation of the rules, and the master is not liable, unless such servant was incompetent and his incompetency was, or ought to have been, known to the master. *Pittsburg, Ft. W. & C. R. Co. v. Powers* (1874) 74 Ill. 341.

Where a hoisting appliance, in the handling of which the injury was received, was a comparatively new one, of the kind customarily used, and neither the servant who had the custody of it, nor any of the persons whose duty it was to supply, repair, or use appliances of a similar sort had observed any defect in it, and the evidence shows that, at the time the accident occurred, it was being used in such a manner as to bring an unusual strain upon the part which gave way, and that it gave way precisely at a moment when it was subjected to a sudden jerk by the slipping of another portion of the apparatus, the inference is rather that the accident should be attributed to the unnecessary strain than to any defect in its condition. *The France* (1894) 20 U. S. App. 212, 59 Fed. Rep. 479, 8 C. C. A. 185.

A railroad company cannot be held liable as for a negligent inspection of a foreign car, where the evidence is equally consistent with the theory that the failure to discover the defect was due to the delinquencies of the car inspectors at the regular inspecting stations, and with the theory that such defect was not brought to its notice owing to the omission of the trainmen to perform their duty to report the existence of any defects which they might discover in the cars under their charge while upon the road. *Chicago & A. R. Co. v. Bragolier* (1882) 11 Ill. App. 518. It was said to be "probable from the evidence that the defect in this car [which was in the ratchet] could be discovered only when it was in motion; that when stationary the ratchet would hold, but when the car was in motion, the action of the wheels upon the brakes would shake it loose." Therefore a presumption of the negligence of car inspectors "involved a presumption, equally strong, that the conductors and brakemen along the line of road were likewise negligent in not discovering and reporting the alleged defects to their superiors. Their opportunities for discovering the defect in question were fully equal to those of the car inspectors. For their negligence in this particular, appellant would not be responsible to appellee, as they were his fellow servants."

But where all the details of the construction
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of a bridge and its inspection are before the jury, the case of a servant who is injured by the fall of the bridge does not stand merely on the fact that the structure gave way, and it is not error to leave the jury to say whether the defendant's want of reasonable care in the erection and inspection of the bridge occasioned the injury complained of. *Bowen v. Chicago, B. & K. C. R. Co.* (1888) 95 Mo. 268.

A case which goes very far in breaking in upon the rule that the plaintiff has the burden of showing that the defendant had notice of the defect is *Guthrie v. Maine C. R. Co.* (1889) 81 Me. 572, where the court held that having in a train a car with defective appliances furnishes prima facie evidence of an omission of duty on the part of the company, and that, if there was any explanation, it was within the power of the company to give it. In *Carruthers v. Chicago, R. I. & P. R. Co.* (1895) 55 Ill. 600, an attempt was made to reconcile this ruling with the more commonly accepted doctrine upon the ground that the defect in question (broken drawbar and bumper) was a patent one of which the company was bound to take notice. Possibly the case may be brought in line with the other authorities to the extent of its being consistent with them upon the actual facts in evidence. But the Maine court, so far as can be discovered from its reported opinion, did not intend to rely upon the patent character of the defect, or the presumption that the company had notice of it. The broad rule is laid down that "in all cases where a wrong, a fault, or an omission of duty even, is proved, from which damages result, the wrong, fault, or omission implies a neglect, in the absence of other evidence, which requires explanation from the apparently guilty party."

The following passage from the opinion of *Doster, Ch. J.*, who differed from the majority of the court on this particular point of the burden of proof in *Atchinson, T. & S. F. R. Co. v. Swarts* (1897) 58 Kan. 235, is worth quoting: "Proof of the necessary length of time is supplied by a presumption arising out of the case. That presumption is, that a defect existed under the very eye of the master; as it were, was observed by, and therefore known to him. Such presumption supplies the place of proof by the plaintiff, and throws upon the company the burden of proving that the defect did not exist for a sufficient length of time to charge it with knowledge. In this case, the jury found there was a hole in the switch track. That switch track was in the company's yards; a place, as has been repeatedly said, under the constant, daily, to a large extent nightly, observation of the company's managing agents. It is incredible that such a hole could exist at that place and not be known to someone whose duty it was to fill it up. No conceivable cause for its existence, other than the attrition of the elements or the designed digging of the same by the company's employees for some proper purpose, can be said to exist. In the latter case, the company, of course, had knowledge. If caused by the elements, it must have been of gradual deepening and widening.—It was not to be blown out or washed out in the course of a few hours' time. If produced by some unusual or extraneous circumstance, it rested upon the company to prove it."

In *Goodman v. Richmond & D. R. Co.* (1886) 81 Va. 576, the court held that, where a ladder broke under ordinary use, the employer was rightly found liable, as for negligence, for the reason that it offered no evidence to show when it had been inspected, or that it was in proper and safe condition.

These decisions are referable to the principle, *res ipsa loquitur*, for an adequate discussion of which reference must be had to general treatises on negligence.

There is also some judicial authority for a similar principle in a case which turned on whether the master had knowledge of the incompetency of the servant through whose negligence the plaintiff was injured. In *Murphy v. Pollock* (1863) 15 Ir. C. L. Rep. 224, it was held by Deasy, B., and Pigot, C. B., that, inasmuch as the mode and circumstances of the employment of a servant are matters peculiarly within the knowledge of the employer, and not ordinarily within the knowledge of a servant, the submission of evidence from which a jury may reasonably draw the conclusion that the fellow servant whose conduct was the proximate cause of the plaintiff's injury was incompetent, casts upon the employer the onus of showing that he exercised due and reasonable care in the employment of that servant.

b. Admissibility of opinions as evidence.

It is not error to permit a man who has been in the hardware business to testify that, in his opinion, a fracture in a brakestaff was an old one. *Moon v. Northern P. R. Co.* (1891) 46 Minn. 106.

Whether a defect would have been discovered if a proper examination had been made is not a question upon which expert evidence is admissible. *Allen v. Union P. R. Co.* (1891) 7 Utah, 239.

An expert witness may give his opinion as to the effect of the breaking of strands of wire upon the ultimate strength of the cable, or the process of crystallization, the result of time and friction, and as to the probable life of a cable under given circumstances; but it is not competent for him to say that, under the facts embraced in the hypothetical case, a prudent man would have discontinued its use, and it was error in the trial judge to permit him to make this statement. *Bruce v. Beall* (1897, Tenn.) 41 S. W. 445.

The question whether the appearance of machinery would suggest to a prudent man the necessity of an examination is not one for an expert witness, but is for the jury to determine. *Goodsell v. Taylor* (1889) 41 Minn. 207, 4 L. R. A. 673.

Opinions as to the existence of a defect, and the negligence of the master in failing to discover it, are of no weight, where it is apparent that they are based on an examination after the accident and the defect is of such a nature that none of the usual tests would have revealed it. *Indianapolis, B. & W. R. Co. v. Toy* (1879) 91 Ill. 474, 33 Am. Rep. 57.

XVIII. Instructions.

A few rulings as to the correctness of instructions considered merely from the standpoint of procedure are here collected. So far as that correctness may depend upon the soundness of the general principles enunciated in them, the subject is obviously coextensive with the topics discussed in the preceding subdivisions of this note, and does not call for any further elaboration.

Where the plaintiff's case is based partly on the theory that the defendant was negligent in retaining an engineer, and partly on the theory that a defective locomotive was used, an instruction to the effect that there was a failure of proof to show that the engineer was unskilful, incompetent, and negligent, and that the appellant had knowledge of his unfitness a sufficient length of time prior to the accident 41 L. R. A.

to have provided against it, and that therefore the jury should find for the appellant, is properly refused, for the plaintiff may still recover by reason of the defects in the engine. *Wabash & W. R. Co. v. Morgan* (1892) 132 Ind. 430.

A charge upon the effect of the master's knowledge of a defect is erroneous, where there is no evidence that he had any knowledge of the unsafe character of the appliance. *H. S. Hopkins Bridge Co. v. Burnett* (1892) 85 Tex. 16.

Instructions as to negligence should be confined to the negligence charged in the declaration. Hence, where the only negligence charged is a failure to fasten a brakewheel upon the staff, whereby a brakeman was killed, an instruction that, if the brakeman received the injury because of the negligence of the company's inspectors in not noticing and reporting the defects, the company would be liable, etc., is not proper. *Chicago & E. I. R. Co. v. Kneirim* (1894) 152 Ill. 458.

A charge as to the doctrine of assumption of risks cannot be objected to on the ground that it submits to the jury a theory not raised by the testimony, where the plaintiff himself has testified that he very much doubted whether a defect in an apparatus required to bear a tensional strain could have been discovered on inspection, that it was impossible to know how great the strain would actually be in any given case, and that the best of such machinery frequently gave way. *Throckmorton v. Missouri, K. & T. R. Co.* (1896, Tex. Civ. App.) 39 S. W. 174.

In an action for injuries received by a brakeman, while coupling cars owing to a sinking of the drawhead alleged to be the result of a defect in the carrier iron, it is error to refuse to impart greater explicitness to an instruction which merely tells the jury in general terms that the employer is bound to use ordinary care in furnishing reasonably safe appliances by the addition of a charge to the effect that in determining whether the defendant company is liable or not, they "may consider whether or not it was a usual thing for the defendant to have on its line cars with different heights of drawbars, and whether or not those engaged in the transportation and inspection of cars, in the exercise of reasonable care on their part, would consider such defects as may be shown by the evidence to be such as would be likely to occur in the business of railroading, which may be reasonably anticipated by those engaged in the business of handling the cars. *Texas & P. R. Co. v. Rhodes* (1895) 30 U. S. App. 561, 71 Fed. Rep. 145, 18 C. C. A. 9.

In *Durgin v. Munson* (1864) 9 Allen, 396, the following charge was objected to: "But beyond this, the plaintiff must prove that it was gross negligence in the defendant to employ such an engine. If not, no action lies. If the employer is careful and does his duty, if he employs skilful men to buy and run his machinery, if he is not negligent in learning whether that machinery is safe or not, if in all things he does his duty, then he is not liable for the consequences if unsafe machinery is employed without his fault." The court, however, said: "We do not think that there was any such error or insufficiency in the charge of the judge as would give a reason for setting aside the verdict; although one important consideration that, to entitle the plaintiff to recover, he was bound to show that the engine was defective, and that the defendant knew, or in the exercise of ordinary care would have known, that it was defective, might perhaps have been more distinctly presented to the jury."

C. B. L.

ALABAMA SUPREME COURT.

Louisa V. KIDD *et al.*, Appts.,

v.

Louis A. BATES,

(.....Ala.....)

A person is not disqualified as an executor, so that the probate court can refuse to grant him letters of administration, because of large indebtedness to the estate, which he denies, making his interest antagonistic and hostile to that of the estate and beneficiaries of the will, where the statutes (Code 1896, §§ 45-48) provide, not only that letters shall be issued to persons named as executors in the will, "if they are fit persons," but also specify as grounds of unfitness minority, conviction of an infamous crime, or incompetence by reason of intemperance, improvidence, or want of understanding, adding that in case of unfitness for the causes enumerated letters of administration may be granted.

(June 23, 1896.)

A PPEAL by contestants from a decree of the Probate Court for Elmore County granting letters testamentary to Louis A. Bates as executor of the last will of Horatio B. Tulane, deceased. *'Affirmed.*

The facts are stated in the opinion.

Messrs. Gunter & Gunter, for appellants:

The statute says, not that the court must issue letters, but that it may issue them "to the persons named as executors in such will, if they are fit persons to serve as such." Who is an unfit person to serve as trustee of a fund? Manifestly one who, from his character, or hostile personal interest, or any other sufficient cause, cannot, or is not likely to, discharge properly the duties of trustee.

No one would pretend that a person who claims adversely the whole or any substantial part of the estate, under questionable conduct demanding judicial investigation, would be fit to serve as the administrator of such estate and to prosecute the claim against himself, and in doing so to preserve and bring forward evidence to ruin his character and standing as a man, as well as to deprive him of his fortune.

Drake v. Green, 10 Allen, 124; *Thayer v. Homer*, 11 Met. 104; *Hussey v. Coffin*, 1 Allen, 354; *Putney v. Fletcher*, 148 Mass. 247; *Re Gleason*, 17 Misc. 510; *Carrey v. Reed*, 82 Md. 833; *Re Mills*, 22 Or. 210; *Simpson v. Jones*, 82 N. C. 323; *Kellberg's Appeal*, 86 Pa. 129; *Rereiber*, 11 Pa. 157; *Noble v. Moses*, 81 Ala. 530, 60 Am. Rep. 175.

Section 46 of the Code disqualifies any person "who, from intemperance, improvidence, or want of understanding, is incompetent to discharge the duties of the trust." Improvidence refers "to such habits of mind and conduct of a man as to render him generally unfit for the trust in question."

McMahon v. Harrison, 6 N. Y. 443; *Freeman v. Kellogg*, 4 Redf. 218; *Emerson v. Bowers*, 14 N. Y. 449; *Coope v. Lloverre*, 1 Barb. Ch. 45.

NOTE.—As to the requisite moral qualifications of executors, see *Smith's Appeal* (Conn.) 16 L. R. A. 538, and *note*

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Messrs. Tompkins & Troy, for appellee:

There were very few persons disqualified at common law from acting as executors. No persons were disqualified except those who, by reason of their being idiots and lunatics, were deemed incapable of becoming such, because they were not capable of accepting the trust.

Schouler, Extra. §§ 83, 84.

Section 46 of the Code prescribes who shall be deemed fit persons to serve.

A statute in derogation of the common law must be strictly construed.

The grounds set up in the objections would not have rendered appellee an unfit person to act as executor at common law, and, construing this statute even liberally, the objections do not show that he is unfit on any of the grounds recognized by the statute.

Unless a person is deemed unfit for one of the reasons stated in § 46, then the judge of probate must issue to him or her letters testamentary.

7 Am. & Eng. Enc. Law, pp. 171-176, and notes; *Berry v. Hamilton*, 13 B. Mon. 191, 54 Am. Dec. 515, note 518; *Emerson v. Bowers*, 14 N. Y. 454; *Coope v. Lloverre*, 1 Barb. Ch. 45; *Coggshall v. Green*, 9 Hun, 471; *Re Manley*, 12 Misc. 472.

Brickell, Ch. J., delivered the opinion of the court:

Horatio B. Tulane died in October, 1897, leaving a last will and testament, in which Louis A. Bates and Louisa V. Kidd were named as executor and executrix. After the probate of the will Louis A. Bates made application for letters testamentary, which application was contested by appellants, Louisa V. Kidd and Louis S. Kidd, heirs at law of testator and legatees under the will, who filed objections to the issue of letters testamentary to said Bates, and asked that said application be refused. The substance of these objections is that while the testator was in a very weak condition of body and mind, caused by age and disease, and was in the care and under the control and dominion of said Bates, who occupied towards him the relation of confidential agent and companion, transacting much of his business, the latter, by the exercise of fraud and undue influence, induced testator to lend him at various times, without security, large sums of money, aggregating more than \$100,000; and that subsequently the said Bates induced testator to accept, as security for \$64,000 of said indebtedness, a like amount of the bonds of a Tennessee corporation called the Tulane Hotel Company; and thereafter, in September, 1897, while testator was at said hotel, still weak in mind and body, and in the care of and being nursed by the said Bates and others acting for him, who excluded from his presence his friends and acquaintances, he was induced by the exercise of fraud and undue influence to execute an instrument by which said \$64,000 of bonds were donated to said Tulane Hotel Company, of which corporation Bates was president, and the entire capital stock of which he owned. It is further averred that, by reason of the facts above stated, the said Bates is indebted to the estate in a sum ex-

ceeding \$100,000, but that he denies that he is indebted to it in any amount, and claims that all the money alleged to have been loaned to him was, in fact, donated to said Tulane Hotel Company, by reason of which adverse claim the interest of Bates is antagonistic and hostile to that of the estate and the legatees under the will, and litigation between Bates and the estate is necessary to determine the fact and amount of said indebtedness, which litigation would be embarrassed by the issue of letters testamentary to the applicant. To these objections appellee demurred, and the sustaining of the demurrer and issue of letters to him are the only errors assigned.

The first ground of demurrer is too general to be considered, and the others present the single question whether, upon an application for letters testamentary by the person named as executor in the will, the court has authority to refuse to issue the letters to such person for any other causes than those specified in the statute. The statutes affecting the question presented, as found in the Code of 1896, are as follows:

"Sec. 45. Whenever a will has been admitted to probate in this state, the judge of the court in which the will was probated may issue letters testamentary, according to the provisions of this chapter, to the persons named as executors in such will, if they are fit persons to serve as such.

"Sec. 46. No person must be deemed a fit person to serve as executor who is under the age of twenty-one years, or who has been convicted of an infamous crime, or who, from intemperance, improvidence, or want of understanding, is incompetent to discharge the duties of the trust."

"Sec. 48. If the person named in the will as the sole executor is, or if all the persons named therein as executors are, from any of the causes enumerated in the second preceding section, unfit to serve as executor or executors, letters of administration with the will annexed, may be granted on the testator's estate under the provisions of § 53."

Section 47 prescribes the form of letters testamentary, and other sections of the chapter provide for the grant of letters of administration with the will annexed in the event of the death of the sole or surviving executor, or the renunciation of the right to act by the person named in the will.

The theory of counsel for appellants is that the words "if they are fit persons to serve as such," contained in § 45, indicate a legislative intent to give a very broad discretion to the court in determining what are causes of disability, and who are fit persons to serve as executors, and that section 46 was intended not to define all the causes of disability which should authorize the rejection of persons who apply for letters, but only to limit this discretion to the extent of forbidding the issue of letters to one who was under twenty-one years of age, or who had been convicted of an infamous crime, or who, from intemperance, improvidence, or want of understanding, was incompetent to discharge the duties of the trust. If section 45 stood alone, we would be inclined to adopt the construction contended for, and to declare that any cause which rendered the

applicant unfit or unsuitable to serve as executor without detriment to the estate and undue advantage to himself would justify the refusal to issue letters testamentary to him. And upon this construction we would have no difficulty in determining that the facts alleged, if true, render the applicant for letters an unsuitable person to discharge the duties of the trust which require him to collect all the debts and other assets of the estate, and preserve them for distribution according to the provisions of the will, since his interests are clearly adverse to the estate, and antagonistic to the legatees and devisees and others interested therein. The decisions of the courts of all those states the statutes of which vest the court with the power and discretion to determine who are suitable persons to serve as executors so hold, and the correctness of these decisions cannot be doubted. *Winship v. Bass*, 12 Mass. 199; *Drake v. Green*, 10 Allen, 126; *Thayer v. Homer*, 11 Met. 110; *Kimball's Appeal*, 45 Wis. 391; *Re Glendon*, 17 Misc. 510. But the several sections of the Code referred to were adopted at the same time, are *in pari materia*, and must be construed together; and the construction of one, if doubtful, may be aided by a consideration of the words of, and the legislative intent indicated by, the others, and of the evil of the common law intended to be remedied. And a consideration of all the sections and of the common law relating to the subject, which they were intended to modify, leads to a conclusion which is opposed to the construction placed by counsel on § 45. It is a rule of statutory construction that a statute in modification or derogation of the common law will not be presumed to alter it further than is expressly declared. The presumption is that the language and terms of the statute import the alteration or change it was designed to effect, and their operation will not be enlarged by construction or intentment. *Cook v. Meyer*, 73 Ala. 588; *Webb v. Mullins*, 78 Ala. 118. The rule of the common law was that all persons might be appointed executors who were capable of making a will. Neither infancy, nonresidence, coverture, intemperance, improvidence, ignorance, vice, dishonesty, nor any degree of moral guilt or delinquency disqualified one for the office. Idiots and lunatics were practically the only classes disqualified, and the rule now prevails generally that courts have no discretion in respect to the issue of letters to the persons nominated in the will, unless such persons are expressly disqualified, or such discretion is vested by law; and the person appointed by the will cannot be rejected by the court except where the law expressly so provides. 1 Woerner, American Law of Administration, pp. 503 et seq.; Schouler, Exrs. §§ 82, 88; 1 Wms. Exrs. 7th Am. ed. p. 269; Redf. Wills, pt. 3, chap. 2, § 8; *Stewart's Appeal*, 56 Me. 300; *Smith's Appeal*, 61 Conn. 420, 16 L. R. A. 598, and notes. Treating these several sections of the Code as one statute, and construing accordingly, they not only fail to indicate any legislative intent to abrogate this rule of the common law, and vest a broad discretion in the court to determine what are causes of disability, but they show that such effect was not within the contemplation of the legislature, and that the only

discretion intended to be conferred was that to be exercised in the determination of the existence of those particular causes of disability enumerated in § 46. The evil of the common law intended to be remedied by the statute was that persons were permitted to serve as executors who were clearly unfit to serve as such without undue advantage to themselves and consequent detriment to the estate. The purpose of the statute was therefore not to declare, except indirectly, by the process of exclusion, who were fit and competent persons to discharge the duties of the trust, since the common law declared all persons competent except idiots and lunatics, but to enumerate the causes which should render persons incompetent. In so far as it enumerates causes of disability not recognized at the common law, it must be treated as exclusive, containing all the causes which will authorize the rejection of the persons named in the will, and excluding all others, and as leaving the common-law rule as to competency and fitness unchanged except in the particulars specified. That this was the intention of the legislature is, we think, made manifest by the provisions of § 48, quoted above, which authorizes the grant of letters of administration with the will annexed only when the persons named in the will as executors are, "from any of the causes enumerated in the second preceding section [§ 46], unfit to serve." The probate court has therefore no statutory authority to issue letters of administration with the will annexed unless the person named as executor in the will was under twenty-one years of age, or had been convicted of an infamous crime, or was incompetent to discharge the duties of the trust by reason of intemperance, improvidence, or want of understanding, except in the event of the death of the executor or his renunciation of the right to act, as provided in §§ 51 and 54. This failure on the part of the legislature to confer authority to grant letters of administration with the will annexed, except in the cases mentioned, clearly indicates that no causes of disability which could give rise to the necessity for the grant of such letters, other than those enumerated in § 46, were within the contemplation of the legislature when the act was adopted.

The question presented by the demurrer has been touched upon in two cases considered by this court, but cannot be said to have been adjudicated. In *Williams v. McConico*, 27 Ala. 572, appellant applied for letters of administration on the estate of her deceased husband, who had died intestate, and the application was contested on the ground of her unfitness. The evidence showed that she had been living apart from her husband for a long time previously to his death, and had manifested great animosity towards him, and that she "had funds in her hands belonging to her minor children by a former husband, of whom she was sole guardian when she married Williams, which she would not deliver up on settlement, and which she would hold against any other person offering to administer." In the opinion, which does not discuss the question at length, it was said: "It being established that she was the widow, she was the first person entitled to administer; and under

the law every person is a fit person, unless disqualified by some one of the causes specified in § 1658, Code 1852 (Code 1896, § 46). Allowing every legitimate inference in favor of the contestants upon the evidence offered by them, it is clear that it did not establish any ground of unfitness covered by the section of the Code to which we have referred." In *Bingham v. Crenshaw*, 84 Ala. 683, it was held that previous intermeddling with the effects of the estate by the applicant did not *per se* disqualify him; but the court refused to decide "whether there are disqualifications for the office of administrator other than those enumerated in § 1658 of the Code of 1852 (§ 46, Code 1896), and referred to the case of *Williams v. McConico*, 27 Ala. 572. Our statute is a substantial copy of the New York statute, and it is very similar to that of California. In the latter state, § 1349 of the Code of Civil Procedure authorizes the issue of letters testamentary to the persons named in the will as executors "who are competent to discharge the trust;" and § 1350 is the same as our § 46, except that it adds, to the causes of disability therein enumerated, incompetency through want of integrity. In the case of *Re Bauquier*, 88 Cal. 302, the application for letters testamentary was contested on the ground that the applicant had, by the exercise of fraud and undue influence, induced the testator, in his lifetime, to turn over to him more than \$12,000 in money and property, and that he claimed, adversely to the estate, to be the owner of the money and property thus fraudulently obtained. The court held that the statute contained the only causes of disability which could authorize the rejection of the applicant, and that the objections to the granting of the application must be such as to show that the applicant was incompetent upon some one of the grounds specified in the statute. In the case of *Re Gleason*, 17 Misc. 510, a petition was filed for the removal of an executor, on the ground that he claimed the benefit of a contract between himself and the testator, as to which there was strong evidence that testator was of unsound mind at the time of its execution, and by which the executor secured great pecuniary advantage, to the detriment of the estate. The court, held that such conduct on the part of the executor did not render him incompetent or disqualified, within the meaning of subdivision 1 of § 2085 of the Code of Civil Procedure, which specifies the causes of disability, but that his continuing to claim the benefit of the contract was ground of removal, under subdivision 2 of said section, which enumerates, among other causes of removal, unfitness for the due execution of the office by reason of his "having wasted or improperly applied the money or other assets in his hands, or invested money in securities unauthorized by law, . . . or by reason of other misconduct in the execution of his office, or dishonesty." Other decisions of the New York court indicate that the courts, in determining what are grounds for the refusal to grant letters testamentary or of administration, must be governed by the statute. *Emerson v. Bowers*, 14 N. Y. 449; *Coope v. Louerrie*, 1 Barb. Ch. 45; *Cogshall v. Green*, 9 Hun. 471; *Re Manley*, 12 Misc. 472. See also *Barry v. Hamilton*, 12 B. Mon. 191, 54 Am. Dec. 515;

Smith's Appeal, 61 Conn. 420, 16 L. R. A. 538. The statutes of these states being so similar to ours, the construction placed upon them is entitled to consideration and weight in construing our own; and, as it coincides with the result of our independent investigation of the question, we adopt it as the proper construction of §§ 45 and 46 of the Code of 1896. It results that the facts alleged do not show any legal cause of disability, nor any ground for the refusal to issue letters to appellee, and the demurrer was therefore properly sustained. Whether the

question of appellee's liability to the estate by reason of the facts alleged can be adjudicated notwithstanding the issue of letters constituting him executor, and, if so, in what manner and by whom his liability can be enforced, we need not and do not now decide, but refer to the following authorities bearing on the question: *McGregor v. McGregor*, 35 N. Y. 220; *Smith v. Lawrence*, 11 Paige, 206; *Re Gleason*, 17 Misc. 510.

Let the decree of the probate court be affirmed.

CALIFORNIA SUPREME COURT.

PEOPLE of the State of California, *Resp't.*,
v.

Louis James SEARCEY, *App't.*

(.....Cal.....)

1. The fact that some names on the jury panel were not on the last assessment roll of the county, as the law provides they should be, does not, of itself, sustain a challenge to the panel.
2. The omission of a township in selecting the jury list from the wards and townships of the county, which by Code Civ. Proc. § 206, is to be in proportion to their inhabitants, is not shown by the fact that the list does not include the names of any persons in a town which is within the township, but constitutes only a part of it.
3. Excusing for cause some of those on the venire does not constitute available error to one who is tried by twelve qualified, competent jurors.
4. A box of sand containing impressions of shoe tracks which a witness testifies that he made with the shoes of the accused person, and that they are identical with those he found in the sand upon a desert, is admissible in evidence for the purpose of accurately describing the appearance of the tracks on the desert which are claimed to have been made by the accused.
5. An objection that footprints made in a box of sand were not made under conditions similar to those made in a desert is not raised by a general objection to the proof of the footprints in the box, without any specific objection to the dissimilarity of the conditions.

(May 28, 1898.)

APPEAL by defendant from a judgment of the Superior Court for San Bernardino County convicting him of murder. *Affirmed.* The facts are stated in the opinion.

Messrs. Benjamin F. Bledsoe, Gordon & Hall, and H. M. Willis for appellant.
Mr. W. F. Fitzgerald, Attorney General, for the People.

Garoutte, J., delivered the opinion of the court:

The defendant has been convicted of the

NOTE.—As to experiments for the purpose of evidence, see *Leonard v. Southern P. Co.* (Or.) 15 L. R. A. 221, and note; *Chicago, St. L. & P. R. Co. v. Champion* (Ind.) 23 L. R. A. 361.

—41 L. R. A.

crime of murder, and by the judgment of the court the extreme penalty of the law has been ordered. Many assignments of error are relied upon by this appeal, and they are all of a somewhat technical character. We will specially notice the more important ones.

It is claimed that a challenge to the panel of jurors should have been allowed. The evidence taken upon the hearing of the challenge discloses a very lax performance of duty upon the part of the board of supervisors in selecting the list of trial jurors for the year. The sections of the Code declaring what that duty is evidently either have not been closely studied by the board, or no real effort has been made to follow the law there laid down. It appears that the names of persons were placed upon the list which do not appear upon the last assessment roll. That all names upon the list should appear upon the assessment roll of the preceding year is an important requirement in the eyes of the law. But the mere fact that some names of persons appeared upon the list that did not appear upon the last assessment roll of the county, of itself, is not a sufficient departure from the demands of the law to authorize the trial court in sustaining a challenge to the panel. It further appears that not a single name is found upon the list from Colton, a town possessing 1500 inhabitants. The law says (Code Civ. Proc. § 206) that this list should be composed of names of persons selected from the wards and townships of the county in proportion to the inhabitants thereof, as near as may be estimated by the board of supervisors. It would seem that by compliance with this provision of the law the names of some persons from Colton would be likely to appear upon this list. But, however this may be, the evidence discloses that the township in which the town of Colton is situated embraces additional territory; and it is not plain from the evidence but that some names upon the list were those of persons living outside of Colton, and yet within the township. If appellant's contention upon this point be good in law, it was his duty to have shown by some pertinent evidence that the township of Colton was not represented upon the jury list. When he established the fact that Colton was not so represented, such evidence was not sufficient to prove the material issue. The further fact that the judge excused certain of the venire for cause is not a matter for complaint upon the part of the defendant. As to

such matters the court's discretion is of the broadest. Defendant in this regard must be satisfied if he is tried by twelve qualified, competent jurors.

In this case a man was murdered upon the railroad track upon the Mojave desert, while traveling westward. The district attorney in his opening statement to the jury, prior to the introduction of any evidence, stated that he proposed to prove that the defendant was likewise traveling westward upon this track at about the same time and place; and also at that time officers of Arizona, with his knowledge, were looking for him, with a view to arrest him upon a charge of burglary committed in that territory. The case is one of purely circumstantial evidence. As suggested, the defendant was near the scene of the murder, traveling westward. Twenty-four hours later he was arrested 80 miles east of that point, traveling eastward. The district attorney by his opening statement proposed to prove these facts for the purpose of showing the improbability of defendant's conduct in traveling towards the arresting officers, unless great reason existed for such action upon his part, and this reason, it was claimed, was found in the fact of the murder. Evidence to this effect was offered before the jury, and under objection was denied admission by the court. Notwithstanding this ruling, it is still insisted by appellant that the statement of the district attorney, as bearing upon the defendant's commission of another offense, constituted prejudicial error.

There is no question but that under certain conditions the prosecution are entitled in law to prove against a defendant an offense other than the one upon which he is being tried. Our state Reports contain many such cases. But whether or not this case is such a one is not a question necessary for decision, for, as already suggested, the court rejected all evidence looking in that direction. Again, we have been cited to no case where a new trial has been ordered by reason of the character of the opening statement of the prosecuting officer. But, though precedent is lacking to the point, we are prepared to say that such misconduct on the part of the prosecuting officer might be found in the character of his opening statement to the jury as to recommend, or even absolutely demand, in the interests of justice, a second trial of the defendant. The principle justifying such a course is well outlined in *People v. Wells*, 100 Cal. 459. There a new trial was ordered by reason of the action of the district attorney merely asking certain questions of various witnesses, the answers to such questions not being admitted by the court. The conclusion of the court was there declared because it was evident from the record that the attorney in asking those questions was acting in bad faith, and attempting by this course to improperly influence the jury to the defendant's damage. That case is an exceptional one in its facts, but not in its law, and the decision is eminently sound. If such misconduct existed here the same results would follow; but it is not at all apparent that the district attorney was acting in bad faith in making the statements to which objection is made. It is not even clearly apparent that his

position as to the admissibility of such evidence was wrong in law. As a circumstance tending to show the guilt of the defendant upon the charge of murder, the facts evidencing his conduct in this regard bear with some force. There is certainly no such palpable wrong in his conduct as to justify the conclusion that he was actuated by bad faith in making the statements here under consideration.

Witness Arbois testified that a few days subsequent to the homicide he visited the scene of the crime, and found tracks of a person leading therefrom. He followed these tracks in the sand a distance of 15 miles. At that time he had a pair of shoes in his possession taken from the feet of defendant after his arrest. He compared the tracks in the sand, which were in some respects peculiar, with tracks made by these shoes, and found them the same. He also minutely detailed before the jury the appearance of these tracks in the sand. Thereafter he brought before the jury a box of sand which contained impressions of shoe tracks, and then testified he made these tracks with defendant's shoes, and that the tracks so made were identical with those he found in the sand upon the desert. The introduction in evidence of this box of sand, with the shoe impressions therein, is claimed to constitute error, and many reasons are now urged to support this claim. Counsel cite various cases which refer to the danger in allowing experiments to be made before the jury, and also insist that the conditions which surrounded these tracks when made in the box of sand were not shown to be similar to those upon the desert when the tracks were there made; but we see nothing of material moment in these positions. This evidence hardly partook of the character of an experiment made before the jury. Nothing was done before the eyes of the jury looking towards the making of an experiment. The shape and dimensions of certain tracks were placed before that body, made by the use of a box of sand. Any other impressionable substance as well might have been used. These tracks in the box were declared by the witness to be identical with those found upon the desert. Under such circumstances, this evidence served the purpose of accurately describing to the jury the appearance of the tracks upon the desert. It was an indirect, but entirely satisfactory, and legal way of proving that very material link in the chain of circumstances connecting the defendant with the murder.

It being clear that the evidence was admissible for the purpose of showing by comparison the character of the foot tracks upon the desert, no violation of law occurred upon the ruling of the court. Indeed, we find in the record no objection made by counsel to the admission of the evidence, other than the very general one that "we object to the witness testifying that he made footprints representing the form and shape of those." Was this evidence competent as directly tending to prove that defendant's shoes made the tracks in the desert sand? If defendant's shoes made the tracks in the sand in the box, and those tracks were identical with the tracks found in the sand in the desert, then the evidence would seem important upon that issue. There is but one possible objection that could be made to its admission for the pur-

pose of establishing that fact. That objection would be a specific one, based upon a dissimilarity of conditions under which the tracks in the box and those upon the desert were made. To have any weight looking towards the establishment of this important fact, the tracks in both cases must have been made under substantially the same conditions, and, as already suggested, we find no objection in the record sufficiently specific to raise that question upon this appeal. Yet aside from that consideration, upon a careful examination of the testimony, we conclude the conditions were so substantially alike in the two cases as to justify the admission of the evidence. No testimony was offered bearing upon these conditions other than that of the witness Arbois, and he declares that the

sand in the two cases was of the same quality and of the same character of hardness and compactness.

We have examined the remaining assignments of error, and find no substantial merit in them. While the evidence of defendant's guilt is found in a chain of circumstances alone, still, upon a perusal of that evidence as set out in full by the record, we are satisfied the jury was entirely justified in declaring the verdict rendered in the case.

For the foregoing reasons *the judgment and order are affirmed.*

We concur: Van Fleet, J.; Harrison, J.

CONNECTICUT SUPREME COURT OF ERRORS.

Leroy Z. CUTLER *et al.*

v.

ROYAL INSURANCE COMPANY.

(70 Conn. 506.)

A "standard guaranty to maintain 80 per cent insurance," stamped on the face of a policy of fire insurance, does not supersede a provision that the policy shall be void in case of other insurance,—at least when that policy itself is for more than 80 per cent of the value of the property.

(June 1, 1898.)

RESERVATION by the Superior Court for Hartford County for the opinion of the Supreme Court of Errors of an action brought to recover the amount alleged to be due on a policy of fire insurance which defendants claim was void because of the taking of additional insurance contrary to the terms of the policy. *Judgment for defendant advised.*

Statement by Hamersley, J.:

The policy sued upon was the standard form prescribed by Pub. Acts 1893, chap. 226, and contained the following provisions: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof." "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." There was also stamped upon the face of the policy the following: "Standard guaranty to maintain 80 per cent insurance. It is a part of the consideration of this policy, and the basis upon which the rate of premium is fixed, that the assured shall maintain insurance on the property described by this policy to the extent of at least eighty

(80) per cent of the actual cash value thereof; and that, failing so to do, the assured shall be an insurer to the extent of such deficit, and to that extent shall bear his, her, or their proportion of any loss that may happen to said property; provided, however, that in the adjustment of any loss or damage by fire on stock or merchandise, no inventory for the purpose of ascertaining the application of the foregoing clause shall be required unless the amount of damage is at least five (5) per cent of the amount of insurance on such stock or merchandise. It is expressly understood and agreed that, in case there shall be more than one item or division in the form of this policy, this clause shall apply to each and every item or division separately." "Note. The coinsurance clause is not mandatory. The assured has the option of declining by paying a different rate. The coinsurance clause does not apply to dwellings and contents, unless specifically rated. Care should be exercised by the assured to see that at all times the amount of insurance on each item insured by this policy shall not be less than 80 per cent of its value; otherwise its operation in case of partial loss might work to the disadvantage of the insured by decreasing the amount of his indemnity." The policy was issued to Matthew Ferguson and Albert Beyer, and subsequent to the loss was by them assigned to the plaintiffs. The defendant claimed that the policy was void, because the insured had fraudulently concealed material facts concerning the insurance, and because the insured had, after the policy was issued, without the knowledge of the defendant, and without permission in any form, procured additional insurance on the property covered by the policy. By stipulation of the parties the facts were found by the court, and the case reserved for the advice of the supreme court of errors. The findings, after stating the proof of the formal allegations, of the fire, the damage, and proofs of loss, are as follows: "(6) The court further finds, that at the time the defendant issued said policy of insurance to said Ferguson and Beyer, the assured, said parties told the defendant that the value of the property insured under the first item was \$1,200, and under the second item \$500, which I find to be the value of

NOTE.—As to the effect of riders or slips attached to insurance policies, see also *Jackson v. British America Assur. Co.* (Mich.) 80 L. R. A. 636, and *note.*

said property at the time of the insurance; and the assured also informed the defendant company that they intended to increase their stock of goods. (7) Ten days previous to the time of the taking out by the assured of the defendant's policy of insurance, to wit, September 4, 1896, the assured had made an application to the local agent of the Aetna Insurance Company at said Manchester for a policy of insurance for the sum of \$1,000 upon a portion of the same property insured in the defendant's policy, to wit, the stock of boots and shoes, the first item therein. Said policy in the Aetna Company was not delivered to the assured, nor was any communication received by said insured explaining its delay until after they had received the policy in the defendant company. Because said Aetna policy had not been delivered to them pursuant to said application, and no communication had been received, explaining its delay, the assured made application for a policy in defendant company, believing that the Aetna policy was not forthcoming. The assured did not communicate to the defendant the fact that said application for said Aetna policy had been made, nor had the defendant any knowledge or notice thereof at the time of issuing its policy. After receipt of the defendant's policy in suit, and before the fire, the Aetna policy was received by said assured, and was retained by them. Said policy in the Aetna Insurance Company was a valid policy of insurance, dated September 4, 1896, for the sum of \$1,000. The delay in delivery of the Aetna policy was in fact caused by the serious illness of the child of said insurance agent, which for a time suspended his business, but the fact was not known to the assured. (8) The form of defendant's policy of insurance issued to said Ferguson and Beyer is the standard form prescribed by the statute law of this state. The defendant refuses to pay the amount of insurance provided for in said policy of insurance upon the ground of the concealment by the assured of said other insurance for \$1,000 existing upon said property at the time this insurance sued for was taken out, and the subsequent acceptance of the Aetna Insurance Company's policy, without permission of the defendant, and claims that such pre-existing insurance and such subsequent acceptance of the Aetna's policy is in violation of the conditions of this policy, which prohibits other insurance without written permission of the defendant company. At the time of the fire the value of the stock of goods on hand and insured was \$856.87, and no more, upon which the insured had \$1,100 insurance in the defendant company and \$1,000 insurance in the Aetna Insurance Company of Hartford, making in all \$2,100 insurance upon \$856.87 worth of stock. The value of the tools and machinery which the assured had on hand at the time of the fire was \$86.95, upon which assured had \$400 insurance in the defendant company alone under their policy of insurance aforesaid,—making in all \$2,500 insurance upon property valued at \$928.82. I find that at the time the defendant issued its policy to the plaintiff's assignors it had no knowledge of such prior insurance, or the subsequent acceptance of the Aetna Insurance Company's

policy, and that it had not consented to or waived the provisions of the policy against other insurance, unless the consent or waiver appears upon the face of said policy, or upon the slips or riders attached thereto, by construction of law. Defendant claims a violation of the policy in the concealment of the \$1,000 preexisting insurance and subsequent acceptance of the Aetna policy, and fraud claimed as apparent of record. Defendant also claims that if the language of the riders or slips upon said policy can be construed as a permit for 80 per cent insurance, or any other insurance, said permit was exhausted immediately upon the issuance of the defendant's policy to the plaintiff's assignors, which in fact, was for an amount greatly in excess of 80 per cent of the plaintiff's said property at the moment of its issuance and delivery. The question of what judgment should be rendered upon the foregoing facts is reserved for the advice of the supreme court of errors."

Messrs. Olin R. Wood and Hiram R. Mills, for plaintiff:

The defendant cannot escape liability because of the so-called concealment, unless the matter withheld in some way increased or affected the risk to be insured.

11 Am. & Eng. Enc. Law, p. 298; *Davis v. Aetna Mut. F. Ins. Co.* (N. H.) 89 Atl. 902.

The adoption of the provision to maintain 80 per cent coinsurance involved a tacit consent on the part of the insurer to insurance in such an amount as would suffice to free the insured from the risk of contribution in the event of loss.

Pool v. Milwaukee Mechanics' Ins. Co. 91 Wis. 580; *Catoosa Springs Co. v. Lynch*, 18 Misc. 209.

The Aetna policy was honestly retained. Its effect was beneficial to this defendant. It operated to reduce by one half the liability which this defendant would have been under if the Aetna policy had been returned instead of retained.

Mr. George A. Fay, for defendant:

All of the provisions of a contract shall receive full recognition, and be honored in the interpretation of such a contract when possible. One part of a contract will never be allowed to override and nullify another part of the same contract when such a construction can be placed upon the instrument that both may stand.

Clement's Ins. Dig. p. 98; *Merchants Ins. Co. v. Edmond*, 17 Gratt. 188; *Cobb v. Insurance Co. of N. A.* 17 Kan. 492; *Ward v. Whitney*, 8 N. Y. 446.

A waiver is the intentional relinquishment of a known right.

Findeisen v. Metropolitan F. Ins. Co. 57 Vt. 520; *Devons v. Mechanics & T. Ins. Co.* 88 N. Y. 168; *Hoxie v. Home Ins. Co.* 32 Conn. 40, 85 Am. Dec. 240.

Contracts of insurance are to be construed as other contracts. All parts of the contract are to be taken together, and such meaning shall be given to them as will carry out and effectuate to the fullest extent the intention of the parties, and no portion of it will receive such a construction as will tend to defeat the

obvious general purpose of the parties entering into the contract.

Crane v. City Ins. Co. 3 Fed. Rep. 560; *Foot v. Aetna L. Ins. Co.* 61 N. Y. 571.

Paragraphs and clauses of a policy should not be construed so as to make them conflict with each other if such construction can be avoided. They should be construed so as to make them harmonize if such construction is possible.

Clement's Digest, p. 99 (14); *Cobb v. Insurance Co. of N. A.* 17 Kan. 492.

Where a contract contains two repugnant provisions, one printed and the other written, the latter must control. Unless the conflict is irreconcilable, however, this rule does not apply, but the principle prevails that contracts should be so construed as to give effect to every word and expression contained therein.

11 Am. & Eng. Enc. Law, p. 516; *Barhydt v. Ellis*, 45 N. Y. 110; *Kratzenstein v. Western Assur. Co.* 116 N. Y. 57, 5 L. R. A. 799; *Miller v. Hannibal & St. J. R. Co.* 90 N. Y. 430, 43 Am. Rep. 179.

There is no distinction to be made between such agreements of insurance and other agreements. Every provision in the absence of fraud will be presumed to be material.

Allen v. German-American Ins. Co. 123 N. Y. 12.

The procurement of other insurance in violation of conditions against it avoids the policy, and so is the statute law of our own state.

Allen v. German-American Ins. Co. 123 N. Y. 6; Conn. Pub. Acts 1894, chap. 236, pp. 372, 373.

Every year vast amounts of property, not insured, go to destruction in consequence of over insurance of property in its neighborhood. The welfare of the state, which has an interest in all the property of the state, requires that this should not be done.

Couch v. City F. Ins. Co. 88 Conn. 185.

In interpreting a contract, the intention of the parties should be determined by the condition of things at the time of the making of the contract.

11 Am. & Eng. Enc. Law, p. 512.

Hamersley, J., delivered the opinion of the court:

If, as appears from the finding, the insured, at the time of their application to the defendant, believed that their prior application to the Aetna Insurance Company for a policy of insurance for \$1,000 upon property they were asking the defendant to insure could not result in a contract of insurance, they were

not bound, by the terms of their policy, to then inform the defendant of that application. But in subsequently accepting the Aetna policy issued in pursuance of their application they violated the provision against further insurance contained in the policy issued by the defendant, and for this reason the plaintiffs cannot recover. "Precisely that had occurred which both parties had stipulated should make void the contract of insurance." *Bishop v. Clay F. & M. Ins. Co.* 45 Conn. 430, 453. The "standard guaranty to maintain 80 per cent insurance," stamped on the face of the policy, did not supersede the provision against further insurance. The two provisions can stand together, and effect can be given to both. This "guaranty" clause in a fire insurance policy is of recent use, and is a very peculiar one. We consider it only so far as necessary to the decision of this case. If, as the plaintiffs claim, the adoption of the clause imposes on the insured an obligation to procure such additional insurance as may be necessary to keep the total amount of insurance equal to 80 per cent of the changing actual value of the property covered by the policy, and therefore impliedly gives permission to procure, or waives the provision against such insurance, it must follow that such permission or waiver is limited by the necessity from which it is implied. It may be that if, in fulfilling the obligation assumed, the 80 per cent limit is unintentionally exceeded, the policy would not for that reason become void. But a question of this kind does not arise in the present case. The insured obtained insurance for \$1,500 on a stock of goods and fixtures valued at \$1,700; the insurance being more than 80 per cent of the value of the property insured. Immediately afterwards they procured additional insurance on the principal item of this property for \$1,000. Within twelve days the property is destroyed by fire, and its actual value at that time is less than \$1,000. There is here no room for any claim that the additional insurance was intended merely to fulfil the obligation of the guaranty clause. The insured in fact and intent violated the provision against overinsurance. They certainly stand in no better position than if, having obtained permission for an additional insurance of \$100, they then procured insurance for ten times that amount.

The Superior Court is advised to render judgment for the defendant.

The other Judges concur.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

PILLSBURY-WASHBURN FLOUR MILLS COMPANY, Limited, et al., Appts.,

v.

H. R. EAGLE.

(26 Fed. Rep. 608.)

- 1. Owners of flouring mills in Minneapolis, Minnesota,** having established a high reputation for flour bearing the names Minneapolis and Minnesota by using a superior quality of hard spring wheat, and all of them using the same process and the same kind of machinery, and subjecting their product to the same kind of inspection, may have an injunction against the use of such names on flour of lower grades which is made in Milwaukee from wheat of different grade.
- 2. An exclusive or proprietary right in words or labels used is not necessary** in order to obtain an injunction against unfair competition in trade by the deceptive use of such words or labels.
- 3. The fact that one of the mills of complainants who seek an injunction** against the deceptive use of the name of a city on a product made elsewhere is situated outside the city limits will not preclude relief, when that mill is for all practical purposes a part of the complainants' plant within the city.
- 4. Corporations doing business in the same city, and having a common interest,** may unite in a suit in equity to prevent the deceptive use of the name of the city on products made elsewhere to the damage of their business.

(April 5, 1898.)

A PPEAL by plaintiffs from an order of the Circuit Court of the United States for the Northern District of Illinois in favor of defendant in a suit brought to enjoin defendant from the alleged wrongful use of a tradename. *Reversed.*

The facts are stated in the opinion.

Before *Woods* and *Jenkins*, Circuit Judges, and *Bunn*, District Judge.

Mr. Frank F. Reed for appellants.

Mr. Edward O. Brown for appellee.

Bunn, District Judge, delivered the opinion of the court:

This suit is brought by the complainants, who, for many years, have been engaged in the manufacture of flour on a large scale at the city of Minneapolis, Minnesota, against the defendants, who are engaged as wholesale and retail grocers in the sale of flour at Chicago, Illinois, to enjoin the defendants from using as a part of their brand placed upon their barrels and sacks containing flour the words "Minnesota Patent," or "Minneapolis, Minnesota," or "Minneapolis, Minn." The allegations of the complainants' bill, which are fully sustained by the evidence, are substantially these: The complainants are corporations, all, except one,

organized under the laws of Minnesota. The Pillsbury-Washburn Flour Mills Company, Limited, is a corporation organized under the laws of Great Britain. These seven corporations separately own and operate, and have for many years, flouring mills situated in Minneapolis, numbering in all at the present time some twenty-two or twenty-three mills. The first mill was built in 1859, when the city had a population of less than 6,000 inhabitants. Since then the growth of the milling interest has kept pace with that of the city, so that, while the population of the city in 1896 was about 200,000, the product of the mills was 80,000 barrels per day, or some 13,000,000 barrels per year. The Pillsbury-Washburn Company alone own and operate five mills, with a daily capacity of 25,000 barrels ground, packed, and put up ready for shipment, and with an annual output of about 4,000,000 barrels of flour. These mills all use in their manufacture only the highest grade of hard spring wheat grown in Minnesota and the Dakotas, and for the purpose of storing and handling the wheat own and operate many hundreds of elevators in Minneapolis and other parts of Minnesota and the Dakotas. They early adopted and employed the process of high grinding, and subsequently the roller grinding or Hungarian patent process, which is especially adapted to hard wheat. By this roller-patent process, which is a development and extension of the high grinding process with improved machinery, the wheat is subjected to the operation of successive graduated rollers whereby the external portion, the wheat kernels are disintegrated, removed, and successively carried away, so as to leave the interior or core of the wheat containing the nutritive gluten for disintegration separately and last, the process being first to remove by the action of the rollers the outside hull of the wheat, and then the starchy portions, thus preserving as nearly as possible the gluten for separate grinding, in this way obtaining a wheat flour which is from 40 to 50 per cent of gluten and the balance starch, and which is known as "Patent" or "Patent Process" flour, and is highly nutritious, and makes a fine white quality of bread, the flour commanding the highest price in the market. That the different operators and owners have used upon the sacks and barrels containing the flour manufactured at their respective mills various trademarks and brands of two distinct kinds known as "mill brands" and "customers' brands," the latter being subdivided into foreign and domestic. Mill brands consist of names, marks, and symbols peculiarly arranged, indicating by assertion or association the mill, establishment, or combination of mills producing the flour contained in the receptacle exhibiting and employing such brands. Customers' brands consist of names, marks, and symbols peculiarly arranged, and put on the flour receptacles, indicating sometimes by statement and implication and some-

NOTE.—For trademark in geographical name, see *E. D. Pa.*) 10 L. R. A. 833; *Levy v. Waitt* (C. C. App. 1st C.) 25 L. R. A. 190; *Hoyt v. J. T. Lovett Co.* (C. C. App. 3d C.) 81 L. R. A. 44; also some cases in *note* to *Alf v. Radam* (Tex.) 9 L. R. A. 145.

times by association the flour jobber, wholesale or retail merchant, selecting and standing sponsor for the flour in the exhibiting sack or barrel, and frequently simply the place of manufacture, as being Minneapolis, Minn." Nothing resulting from use, exploitation, association, or otherwise was, as a rule, used to identify the flour sold under these customers' brands as the product of any particular mill or mills; but the place of manufacture of the flour was usually indicated. The flour jobber or wholesale or retail merchant who exploits, introduces, and owns the brand, may, with perfect propriety, and frequently does, secure the flour for his particular brand from different mills operated by different persons. As a matter of fact, however, almost all the brands of flour, both mill and customers', used and employed at any time upon flour made at any of complainants' mills, have contained and distinctly and prominently exhibited thereon the words "Minneapolis," "Minneapolis, Minn.," or "Minneapolis, Minnesota." Many of said brands have also contained the words "Minnesota" or "Minnesota Patent" in addition to the word "Minneapolis," and a few brands have omitted the word "Minneapolis," and employed the words "Minnesota" or "Minnesota Patent" instead. The use of these last named words, "Minnesota" or "Minnesota Patent," means, and is understood by the trade, buyers, and consumers to mean, that the flour in the receptacle exhibiting them is made under the patent process as above described somewhere in the state of Minnesota. The words "Minneapolis," "Minneapolis, Minn.," or "Minneapolis, Minnesota," in flour brands signify universally to jobbers, wholesale, and retail merchants, flour traders and dealers, buyers and consumers that the flour in the receptacle imprinted therewith was made at a Minneapolis flouring mill, and, because of the location, methods, and reputation of Minneapolis, that the flour is "Minnesota Patent" flour made at "Minneapolis, Minnesota." That the location of the said city of Minneapolis upon the Mississippi river is highly advantageous and desirable for flour milling. The states of Minnesota and North and South Dakota produce the highest grades and best qualities of hard spring wheat in enormous quantities, and the immense acreage therein devoted to this product is strong assurance that there will at all times be an ample wheat crop for supplying the Minneapolis mills, while the capital invested and population interested and employed in this hard spring wheat growing industry, and the adaptation of soil and climate to the production of such wheat, insure competition, and the progressive development of the industry increase in production and improvement in quality. Minneapolis is situated at the extreme southeast of this hard-wheat region, and is a natural outlet of the wheat grown therein for shipment, either as grain or flour, throughout the United States, and especially to the manufacturing populations in the Central and Eastern states, where the consumption of hard spring wheat flour is extensive, and to the seaport cities for export. Principally because of the grain and flour trade, Minneapolis has become both a terminal point for many important railroads which concentrate there from points

throughout the hard-wheat growing district, and the initial point of many trunk lines terminating at points along the Great Lakes and in the Central, Southern, and Eastern states and seaports. The locality and the fine water power induced the establishment of mills at Minneapolis early in the development of the country northwest thereof, and from 1859 until the present the growth of the flour industry there has been constant and rapid. This industry has always been the leading one of Minneapolis, and through it the place has in thirty-seven years increased in population from less than 6,000 to about 200,000 inhabitants. Over 5,000 men find work in and about the flour mills and business, and as many more in connection with buying, selling, storing, and handling grain. Minneapolis has long been styled throughout the United States and also abroad the "Flour City." From the inception of the flour-milling business there in 1859, there has been among and between all the mills located there the keenest competition as to quality and quantity of flour made and sold, and early in the history of the milling industry at Minneapolis there was adopted the custom between millers of frequently examining and comparing the methods and machinery employed in the various mills, and of frequently examining and comparing the flour produced. All wheat used at the Minneapolis mills has for years been systematically inspected and graded by competent and disinterested persons appointed for that purpose by the state of Minnesota. The machinery in the mills is made almost entirely by two establishments. This comparison of mill products by the mill owners and operators has been made daily for over twelve years. Each day each mill submits to an expert 2 pounds of its high-grade flour, who examines, tests, and bakes it, and reports the result. These methods, and the close proximity of the mills, produce the greatest uniformity and identity in the flour made at the mills. Practically these mills have always been run on the same systems and methods, and with exactly similar machinery and appliances, employing the same grades of hard spring wheat grown in the same territory, and subjecting it to the same kind of inspection, and, as the necessary consequence, the flour ground at all the mills has been practically of the same classes, kinds, qualities, and reputations. As a result of this method and the continued and extended use of the words "Minneapolis," "Minneapolis, Minn.," and "Minneapolis, Minnesota," in and upon the brands, both mill and customers', and in advertisements, circulars, and announcements relating to the flour and brands, there has grown up, and for a long time has existed, and now exists, throughout the United States and in many foreign countries, a great reputation and demand for flour made in Minneapolis, Minn., and the flour made at the mills of complainants is known generally as "Minnesota Patent" flour, and also especially as "Minneapolis Flour," and is classified and listed upon markets, and is in both the trade among flour dealers, wholesale and retail, and wholesale and retail grocers, and by purchasers and consumers, asked for, identified, bought, and sold by the style of "Minneapolis Flour" as a

particular and superior kind or grade of "Minnesota" or "Minnesota Patent" flour, and thus the words "Minneapolis," "Minneapolis, Minn.," or "Minneapolis, Minnesota," upon or in connection with flour, signify to and are understood by traders, purchasers, consumers, and the public generally to mean that the said flour was made and put up at some one of complainants' mills, and have acquired and do possess this secondary meaning and significance in the trade.

The complainants and their predecessors in business in the operation of said mills have sold and do sell in Chicago large quantities of flour bearing said trademarks and names, and there known and dealt in both at wholesale and retail as "Minnesota Patent" flour and "Minneapolis" flour, and by the latter term identified as coming from some one of complainants' mills. The use of the words "Minnesota," "Minnesota Patent," "Minneapolis," "Minneapolis, Minn.," and "Minneapolis, Minnesota," upon, in, and in connection with such flour brands, both mill and customers', employed in connection with flour made at complainants' mills, has caused such brands of flour to become known upon the market, and to be listed, tabulated, and classified as that variety of Minnesota patent flour manufactured at Minneapolis; that is, flour coming from the complainants' mills is styled in common with all other flour made in the state of Minnesota under the roller process, "Minnesota" and "Minnesota Patent" flour, and also more exclusively "Minneapolis" flour. The term "Minneapolis" alone upon flour thus means and is understood by the public to mean "Minnesota Patent" flour manufactured and put up at some one of complainants' mills at Minneapolis, in that state. That the defendants are doing a retail and wholesale grocery business at Nos. 68 and 70 Wabash avenue, Chicago, and as a part of such business deal in and sell flour at wholesale and retail. That prior to 1893 defendants adopted as a trademark for flour put up and packed for and sold by them the brand "H. R. Eagle & Co.'s Best Minnesota Patent, Minneapolis, Minn." That the words "Minnesota Patent, Minneapolis, Minn.," were added because of the reputation of that city and state for superior flour, and that the method employed by defendants at the outset was to procure flour at the mills of complainants to be packed in sacks or barrels, and stenciled or marked with such brand, and then shipped and delivered to defendants at Chicago. That such flour was genuine Minneapolis flour, and properly and truthfully labeled "Minnesota Patent, Minneapolis, Minn." That a high and uniform grade of flour was furnished and put up under said brand and sold by the defendants, and thereby and by reason of the reputation of Minnesota patent flour made at Minneapolis, Minnesota, soon acquired a reputation and demand upon the market. Thereupon, about 1893, defendants, in order to take and continue the advantage of the representation that the flour was Minnesota flour made at Minneapolis, Minnesota, and at the same time to procure inferior flour at a less price, and palm and foist off the same upon the public and purchasers and consumers as genuine "Minnesota patent"

flour made at Minneapolis, Minnesota, ceased to obtain the flour sold under said name and brand at mills in Minneapolis, Minnesota, and have since procured all, or the greater portion, of the flour put up and sold under said brand and name from various flour mills at Milwaukee, Wisconsin, first from the mills known as the "Phoenix Mill," and then since, and at the present time, from the mills in Milwaukee, Wisconsin, operated by J. B. A. Kern & Sons, and known as the "Eagle Mills." This flour is made from wheat of a different grade, and in an entirely different locality, by flour mills conducted and operated in methods variant from the mills in Minneapolis, and often contains a large percentage of winter wheat, and is in quality, reputation, and value inferior to the genuine "Minnesota Patent, Minneapolis, Minn.," flour, and is worth and commands a less price upon the market when truthfully and honestly sold as Milwaukee flour. Nevertheless, the said defendants have made no alteration in the style of their brand used upon Milwaukee flour, but have the same packed at the Eagle Mills in Milwaukee, Wisconsin, and there branded "H. R. Eagle & Co.'s Best Minnesota Patent, Minneapolis, Minn.," and so shipped and delivered to defendants at Chicago, Illinois. Such spurious and falsely branded flour is then, with full knowledge on their part of the fraud, advertised and sold by said defendants as and for genuine "Minnesota Patent, Minneapolis, Minn.," flour in sacks and barrels containing and conspicuously exhibiting the words "Minnesota Patent, Minneapolis, Minn.," and with the positive assurance, both in advertisements, circulars, and oral representations, that the flour is made in Minnesota, and at Minneapolis. The consequence of this false branding, advertisement, and assertion by the defendants is that inferior flour, manufactured at a locality concealed from, and not desired by, the purchaser, is fraudulently and deliberately palmed off upon the deceived public and purchasers for another and higher priced and more reputable flour, and the public is thereby cheated and defrauded, and complainants are injured by being deprived of a regular, established, and valuable trade, and also by having an inferior flour represented and sold as and for flour made by complainants, and originating at the city to which complainants, by their joint efforts and methods, have given a valuable reputation for flour, which inflicts direct and irreparable injury upon the reputation of complainants' flour, and injuriously affects the trade therein and the demand therefor. The defendants' dealings in such inferior, spurious flour so branded as genuine "Minnesota Patent, Minneapolis, Minn.," flour are extensive, and the sales thereof amount to about 4 car loads, or 500 barrels, of flour a week. It is principally by means of a false statement upon the barrels and sacks, "Minnesota Patent, Minneapolis, Minn.," and the reproduction of this statement and fac simile of the brand in advertisements, that the belief is induced on the part of buyers that the flour is "Minnesota Patent, Minneapolis, Minn.," flour. The milling establishment of J. B. A. Kern & Sons carefully conceals the fact that this flour so branded is ground, packed, and shipped by it

under such brand and names, and H. R. Eagle & Co. also carefully hide the truth, and persistently assert to buyers that the flour is made in Minneapolis, Minnesota, and the result is benefit to J. B. A. Kern & Sons and H. R. Eagle & Co., and injury to the public and to complainants.

The defendant H. R. Eagle alone appears, and denies that he has any knowledge of any such person as Wallace R. Eagle, and the principal issue tendered by defendant's answer relates to the signification of the terms "Minnesota Patent," "Minneapolis, Minnesota," or "Minneapolis, Minn.," as used by the complainants and by him upon their flour sacks and barrels, the defendant denying that these words so used have the meaning ascribed to them by the complainants, or that they are understood by traders, purchasers, consumers, and the public generally to mean that the flour is made and put up at the mills of the complainants, or that the words "Minnesota" or "Minnesota Patent," used in connection with flour, are understood by dealers in flour, or purchasers and consumers, or by the public generally, to denote that the flour was ground in the state of Minnesota; and denies that the complainants have any exclusive right to the use of the words "Minneapolis," "Minneapolis, Minn.," or "Minneapolis, Minnesota;" but, on the contrary, alleges that the word "Minneapolis" is and has been generally used and understood to designate flour manufactured by the patent, or roller, or Hungarian process, from the fact that the use of that process in the manufacture of flour first became generally known in the United States in connection with the city of Minneapolis, having been there first introduced. The defendant asks the court to take notice that by the admission of the bill of complaint, one of the complainants, the Pillsbury-Washburn Flour Mills Company, Limited, is now using the word "Minneapolis" in connection with the flour manufactured by it elsewhere than at Minneapolis, the flour being sold under such name with the knowledge of all the other complainants, and without objection on the part of any of them; and is justifying such use by the assertion that the flour is made by the same methods, and with the same precautions, and under the same tests as are used in the mills situated in the said city of Minneapolis.

Upon the one principal issue made by the answer respecting the proper signification and meaning of the words "Minnesota Patent," "Minneapolis, Minnesota," and "Minneapolis, Minn.," as used upon sacks and barrels of flour, either alone or in connection with other flour brands and marks, the testimony is conclusive and overwhelming in favor of the complainants. Numerous affidavits, taken in the principal flour markets of this and other countries, prove beyond any doubt or cavil that these words so used signify to the dealer, the purchaser, and the consumer that the flour is made by the roller or patent process at Minneapolis, in the state of Minnesota, and that it is this fact which has given to the flour so branded its uniform great credit for excellence in the markets of the world, not alone in this country, but in South America, Europe,

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China, Japan, South Africa, and wherever flour is imported from this country.

The defendant admits all the allegations of the bill in regard to first purchasing his flour of complainants and putting it up at Minneapolis, and marking it as "Minnesota Patent, Minneapolis, Minnesota," flour, and afterwards purchasing in Milwaukee, and putting up and selling under the same brands, but denies that the complainants have a right to invoke the interposition of this court to prevent him from the continued use of such brands; and it only remains to be seen whether the complainants have any such right, and whether this court has any power to grant the relief sought. The principal allegations of the bill being either conceded or proved, the injunction ought to go if the complainants make a case, and the bill is not demurrable. The application for an injunction was denied by the court below, but it is difficult to see wherein the facts lack anything of making a good case in equity. Upon the evidence the fraud is open and palpable, as is also the damage to the complainants' business and to the public resulting from it. This being the case, are the hands of a court of equity tied by any controlling circumstance or iron rule which forbids it to grant relief? We think not. Just when it first came into the defendant's mind that the terms "Minnesota Patent" and "Minneapolis, Minnesota," related only to the roller-patent process which might be carried on in any part of the world, and had no reference to the place of manufacture, is not clear from the record; most probably, however, it was after, as he admits, partly by his own business enterprise, and partly by the use of these brands, he had succeeded in building up a prosperous business, and when he had conceived the idea of getting his flour elsewhere, but at the same time continuing the use of the old brands, which had been so successful. But, however this may be, when the defendant failed utterly to make good his defense in regard to the alleged proper meaning of the words used as a part of his brand, there was left small ground for him to stand upon. He was fairly beaten in his defense by the testimony. After that to still say that the court has no jurisdiction or power to grant relief is to fly in the face of the well-grounded principle running through all the cases that fraud accompanied by damages is actionable at law, and that, where one person has so dressed out his goods as to deceive the public into the belief that they are really the goods of another person, and so put them upon the market, to the manifest injury of that person and of the public, an action at law will lie for the deceit, and, to save a multiplicity of suits, and prevent irreparable injury, equity will restrain such unfair and fraudulent competition. This rule is so well established, is so general and elastic in its application, and so consonant to the general principles of equity jurisprudence, that it would be difficult to frame a case coming fairly within its spirit and meaning in which a court of chancery will not find a way to afford the proper relief. This principle is affirmed in many of the leading cases.

In the recent English case, quite analogous to

this, of *Saxlehner v. Apollinaris Co.* 13 Times Law Rep. 258 [[1897] 1 Ch. 893], plaintiff was the owner of a spring in Hungary named "Hunyadi Janos." Defendant, once the exclusive agent in England for the sale of the spring water, on expiration of the contract, began selling water from a spring near Budapest, which was styled "Uj Hunyadi." The injunction went, and Mr. Justice Kekewich said: "The plaintiff's case, as opened, was brought distinctly within the authority of *Reddaway v. Banham* [1896] A. C. 199, which, be it observed, was decided by the house of lords some time before the issue of the writ in this action. It is important to note what that authority really is. There is no novelty in the principle stated, and even the language finds a counterpart in many older cases, as for instance *Seizo v. Provezende*, L. R. 1 Ch. 192. But yet the law is so clearly put on a simple and intelligible basis, that one necessarily makes it the starting point in consideration of questions of this class. I have studied the case with this view, and it seems to me that the entire doctrine is summed up in one sentence in the first paragraph of the lord chancellor's speech moving the judgment of the house: 'Nobody has any right to represent his goods as the goods of somebody else.' Observe that the proposition is perfectly general. There is no limit as regards name, origin, honesty of manufacture or sale, or otherwise; and, although there are elsewhere to be found learned and useful disquisitions on the facts of the particular case, the application of the law to them and criticism of earlier authorities, there is no departure from what the lord chancellor states to be 'the principle of law.' It matters not, therefore, how a plaintiff's goods come to acquire a particular value, or how the defendant's goods have come to adopt that value. If, in fact, the defendant is selling his goods as those of the plaintiff, he is doing what the law will not allow, and the plaintiff is entitled to relief against him."

In *Newman v. Alvord*, 51 N. Y. 189, 10 Am. Rep. 538, also much like to this in principle, the trademark used by the plaintiffs was the word "Akron" in designating a cement made by them near the village of Akron, in Erie county, state of New York. This word had been used by the plaintiffs and their predecessors in business about thirteen years, to designate the origin and quality of their cement. The defendants, who manufactured cement in Onondaga county, near Syracuse, knowing that the plaintiffs had for years used the word "Akron" as a trademark to designate the origin and place of manufacturing their cement, applied the word to designate their cement by calling it "Akron Cement." The plaintiffs' barrels were labeled as follows: "Newman's Akron Cement, manufactured at Akron, N. Y. The hydraulic cement known as the 'Akron Water Lime.'" The defendants labeled their barrels: "Alvord's Onondaga Akron Cement or Water Lime, manufactured at Syracuse, N. Y." They placed the word "Akron" upon their label for precisely the same reason that the defendant in this case placed the words "Minnesota Patent, Minneapolis, Minn.," upon his flour sacks and barrels, to increase their sales, and avail themselves of the reputation

acquired by plaintiff's cement. The label, as said by Earl, J., who delivered the opinion of the court of appeals, was calculated to induce ordinary buyers to believe that they were purchasing either plaintiff's cement, or cement of the same kind and value. The sole question to be determined, as stated by the learned justice, was whether the plaintiffs, who were the only persons engaged in manufacturing and selling the Akron cement which was known and had a reputation in the market as such, could be protected in the use of the word "Akron" against the defendants, who used it to defraud the plaintiffs and deceive the public. And the court thought the plaintiffs were entitled to the injunction. The principle upon which the relief was granted, as stated in the opinion, is that the defendants shall not be permitted, by the adoption of a trademark, which is untrue and deceptive, to sell their own goods as the goods of the plaintiffs, thus injuring the plaintiffs and defrauding the public. The plaintiffs, as the court held, had given a reputation to the Akron cement in market. They had always been its principal manufacturers and sellers, and at the time of the commencement of the suit the sole parties who could be injured by the fraudulent use of the trademark by the defendants; and hence they were clearly entitled to the protection which they sought. This case, which is quite analogous in principle to the case at bar, has been cited and approved by the Supreme Court of the United States in *Delaware & H. Canal Co. v. Clark*, 12 Wall. 311, 20 L. ed. 581, and *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828. In the former of these cases the distinction between a trademark proper as indicating an exclusive right, and the use of a geographical name, as in the case at bar, where no exclusive property can be had, is clearly indicated. In speaking of the case of *Newman v. Alvord*, after stating the facts of the case the court says: "[I]t [the defendants' cement] was not in fact Akron cement (for Akron and Syracuse were a long distance from each other), and the purpose of calling it such was evidently to induce the public to believe that it was the article made by the plaintiffs. The act of the defendants was, therefore, an attempted fraud, and they were restrained from applying the word 'Akron' to their manufacture. But the case does not rule that any other manufacturer at Akron might not have called his product 'Akron Cement' or 'Akron water-lime.' On the contrary, it substantially concedes that the plaintiffs, by their prior appropriation of the name of the town in connection with the words cement and lime acquired no exclusive right to its use, as against anyone who could use it with truth."

. So in the case at bar, the complainants can have no exclusive right to the use of the geographical names of "Minneapolis" or "Minnesota." They are not the subject of a trademark proper. Any one or more of the 200,000 inhabitants of Minneapolis may use that word upon their flour. The defendant or any other person from any state may go there, and establish a mill, and brand his flour "Minnesota Patent" and "Minneapolis, Minnesota." The defendant might have continued to buy Minneapolis flour, and branded it "Minneapolis, Minn.," and

had all the benefit which these marks would give him in the market, because he would be adhering to truth and fair dealing. But when he placed these same brands upon another flour, manufactured in Wisconsin, he departed from the truth, and placed a lying brand upon his goods, which was intended to deceive, and could not but deceive, the public, and result in injury to the complainants' business. If the defendant could do this, all other persons could do the same thing, and so the public would be defrauded, and the goodwill and business of complainants, which has taken thirty-nine years to build up, would be greatly impaired, if not destroyed. If this could be permitted, there would not be much incitement to provide the public with a high grade of flour, such as the complainants have been manufacturing for many years, and which the evidence shows has led the markets of the world, if, by all manufacturers using the same brand, the complainants' flour may be confounded with all lesser grades and kinds made from all sorts and grades of wheat. It must be conceded that, if the private interests involved are great, the public interests are no less so. In the examination of scores of cases referred to in the briefs of counsel, we find very little difference in opinion on this subject. The distinction, both in the English and American cases, is between those where a geographical name has been adopted and claimed as a trademark proper, and those where, as in the case at bar, it has been adopted first as merely indicating the place of manufacture, and afterwards, in course of time, has become a well-known sign and synonym for superior excellence. In the latter class of cases, persons residing at other places will not be permitted to use the geographical name so adopted as a brand or label for similar goods for the mere purpose by fraud and false representation of appropriating the goodwill and business which long continued industry and skill and a generous use of capital has rightfully built up. It will be of no avail in such cases, where the facts are admitted or proved, to allege a want of power in a court of equity to find a remedy. The court has always exercised this jurisdiction, and must continue to do so.

In *Lee v. Haley*, L. R. 5 Ch. 155, the plaintiffs had for a series of years carried on business as coal dealers in Pall Mall, London, under the name of "The Guinea Coal Company," and they were frequently called the "Pall Mall Guinea Coal Company." The defendant, who had been their manager, finally set up a business in the same street under the same style of the "Pall Mall Guinea Coal Company;" and, while it appeared that there were other Guinea coal companies in London, so that the plaintiffs did not have the exclusive right to use the trademark "Guinea Coal Company," yet the court held that they were entitled, as against the defendant, to be protected in the use of the name. Lord Justice Gifford, delivering the opinion of the court, says: "I quite agree that they [the plaintiffs] have no property in the name, but the principle upon which the cases on this subject proceed is, not that there is property in the word, but that it is a fraud on a person who has established a trade, and carries it on under a given name, that some

other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name."

Of course, this case goes further than it is necessary to carry the rule in the case at bar, because the words "Pall Mall Guinea Coal Company" could be truthfully used by both parties. They both sold coal in Pall Mall at a guinea a ton. But here the defendant could not truthfully call his flour "Minneapolis, Minn.," flour, and his using these words was a fraud upon the complainants and upon the public.

In *Southern v. Reynolds*, 12 L. T. N. S. 75, William Southern established a clay-pipe factory at Brosely, Shropshire, and the product obtained a great repute as "Southern's Brosely Pipes." He died, and two brothers—William and Edward—carried on the business at separate establishments, both using the name "Southern Brosely," distinguishing their different factories by prefixing their initials. The pipes were made from a peculiar vein of clay used by both brothers, and the products of both of their factories were known indifferently as "Southern Brosely Pipes." Defendant, who had no establishment at Brosely, began to make "Reynolds' Purified Clay Pipes, made by Southern from Brosely." It appeared that he had employed a former workman in one of the factories at Brosely whose name was Southern. One of the brothers only brought suit for an injunction to restrain the use of the names "Southern Brosely." The court held that a clear case of fraud and misrepresentation was made, and granted an injunction.

In *El Modelo Cigar Mfg. Co. v. Gato*, 25 Fla. 886, 6 L. R. A. 823, the court, in stating the case, said: "The complainant engaged in and commenced the manufacture and selling cigars at Key West, Florida, in 1875; used exclusively Havana tobacco at his factory, and that he established among purchasers, dealers, etc., a high reputation for his cigars, and that his cigars still maintain said high reputation; that the climate of Key West is more favorable to the manufacture of Havana cigars than points north of that place; . . . caused to be stamped or branded on his cigar boxes the words 'Key West,' and the words 'Key West,' . . . 'E. H. Gato,' or 'Eduardo H. Gato,' . . . made use of the distinctive words 'Bouquet,' 'La Estrella,' and the words 'Key West' and 'E. H. Gato' and 'Eduardo H. Gato,' upon the boxes of his cigars and labels, etc., as trademarks, and to distinguish his cigars in the market, etc., from cigars made and put upon the market by other manufacturers, long before the defendants made use of the said distinctive words upon boxes of cigars, labeled and printed thereon as hereinafter stated and complained of. That the defendants, or one or more of them, about the year 1882, commenced to manufacture cigars at Jacksonville, Florida, under the name and style of firm of 'El Modelo Cigar Manufacturing Co.' or 'Company,' . . . That defendants use seed tobacco, . . . a much inferior quality of tobacco to the 'Havana tobacco,' in the estimation of dealers, etc., and is in point of fact a greatly inferior

tobacco to the 'Havana tobacco,' and well known to all manufacturers, etc. The defendants, well knowing the superior qualities of complainant's cigars, . . . brand and stamp upon the boxes containing their cigars manufactured at Jacksonville, and print upon the labels, pictures, and paper upon said boxes, the words 'Key West' and 'G. H. Gato,' in conspicuous places upon said boxes, and in form and size of letters identical with or similar to the form and size of letters employed and used by complainant upon his boxes of cigars and labels and pictures thereon."

It was held that, "when a man manufactures his goods at a particular place, and uses the name of that place in combination with other words as a trademark to distinguish the origin or ownership of his goods, no other person will be permitted to use the name of the same place, upon goods manufactured by him at another and different place,"—citing *Delaware & H. Canal Co. v. Clark*, 18 Wall. 325, 20 L. ed. 584; *Congress & E. Spring Co. v. High Rock Congress Spring Co.* 45 N. Y. 291, 6 Am. Rep. 82; *Newman v. Alcord*, 51 N. Y. 189, 10 Am. Rep. 588; *Glen & H. Mfg. Co. v. Hall*, 61 N. Y. 226, 19 Am. Rep. 278; *Sawyer v. Horn*, 1 Fed. Rep. 24; *Gilman v. Hunnewell*, 122 Mass. 189; *Robertson v. Berry*, 50 Md. 591, 38 Am. Rep. 387, note 1. And that, after the complainant, whose factory was located at Key West, had adopted his own name in combination with the words "Key West," "La Estrella," and "Bouquet," and certain brands, labels, and pictures, as his trademarks, the defendants did not afterwards have the right to adopt the name G. H. Gato in combination with the words "Estrella," "Bouquet," and "Key West," and certain brands, labels, and pictures, in combination with the name G. H. Gato, as their trademarks, where the words so adopted by them so clearly resembled the trademarks so adopted by the complainant as to enable them to palm off upon and induce an ordinary purchaser to buy their cigars for those of the complainant, whereby the defendants might be profited, and the complainant might be injured.

In *Carlsbad v. Kutnow*, 68 Fed. Rep. 794, the city of Carlsbad, as proprietor of the Carlsbad springs, had for years evaporated the waters into salts, which were sold as "Carlsbad Sprudel Salz." Defendants, who were New York druggists, made a similar salt, without the use of the genuine Carlsbad water, and sold it under the name "Improved Effervescent Carlsbad Powder." Judge Wheeler, in granting the injunction, said:

"If any artificial salts have come to be known by the name of 'Carlsbad Salts,' from similarity or otherwise, of course the defendants have the same right to sell such salts by that name that they have to sell anything by the name by which it is known. But there is no real evidence to that effect. And if the defendants procured genuine Carlsbad waters or salts, and put them up in different forms, or with other ingredients, to improve their taste or vary their effects, these words would be truthful, and they would seem to have a clear right to use them in such preparations; but the plaintiff's proof tends to show that the defendants' salts are not, in substance, genuine Carls-

bad salts, in any form, and the leading defendant has been a witness, and has not assumed to state—and, although the proof must be within their reach, none has been produced to show—that their salts come direct in any form, from the Carlsbad springs. The impression left by the evidence is that they do not, but are artificial. No proof has been brought showing that the plaintiffs have used the name of 'Carlsbad' upon any but genuine Carlsbad sprudel salts. As the case stands here, the defendants appear to be using the name 'Carlsbad' upon artificial salts having no connection with that name, and to be using it only because of its connection with the genuine Carlsbad sprudel salts. Carlsbad with its springs is far away. This use of the name in connection with a preparation so similar to this well-known product of them is some representation that it is a genuine product of them. Calling the powder 'Improved Carlsbad' is a direct representation that genuine 'Carlsbad' powder has been taken to be improved upon; and calling it also 'effervescent' is a representation that the improvement is in the effervescence. This is putting the plaintiff's mark, to some extent, upon the defendant's salts, and is calculated to lead customers to think they are the salts of the plaintiffs. Such deception would be actionable at law, and is preventable in equity. *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828; *Menendez v. Holt*, 129 U. S. 514, 32 L. ed. 526; *Improved Fig Syrup Co. v. California Fig Syrup Co.* 7 U. S. App. 588, 54 Fed. Rep. 175, 4 C. C. A. 264; *Von Mumm v. Frisch*, 56 Fed. Rep. 880. Allusion has been made to this word being the name of the city, to which ordinarily an exclusive right cannot be acquired; but it is also the name of these peculiar springs and gives the name to their products."

And on appeal (35 U. S. App. 750, and 71 Fed. Rep. 167, and 18 C. C. A. 24), the court, in affirming the order by Judge Lacombe, said: "The Carlsbad sprudel salts in either form, therefore, is a natural product, and well known as such, and there is no proof in the case that the complainants have used the name 'Carlsbad' upon anything but genuine Carlsbad Sprudel Salts. And we concur with the circuit judge in the finding that there is no evidence in the record that any artificial salts have, from similarity or otherwise, come to be known by the name of 'Carlsbad,' as is the case with the Epsom salts, a term now generally applied to sulphate of magnesia whether such sulphate of magnesia comes from Epsom or not. Under these circumstances the complainant, the city of Carlsbad, has the right to indicate the origin of these natural salts by its own name, and would be entitled to the aid of a court of equity to prevent anyone from using that name to induce the public to accept as genuine artificial salts not the product of the Carlsbad spring."

In *Kinney v. Basch* (N. Y.) 16 Am. L. Reg. N. S. 586, plaintiffs manufactured cigarettes, and used a label with a field of divergent rays, and the words "St. James" and the symbol "1/2." The cigarettes were distinguished on the market as "St. James." Defendants employed a label of the same size, differing slightly in color, containing the words "St.

James Perique Cigarettes," with the symbol "1/2." It was shown there was a St. James parish in Louisiana, and St. James perique tobacco was a common article. The symbol "1/2" meant mixed goods, and was so used by the trade. In regard to the right of the plaintiff to the use of the word "St. James" and the figures "1/2," the court said: "It has been urged upon the part of the defendants that geographical names cannot be the subject of a trademark; neither can numerals, which only serve to indicate the nature, kind, or quality of an article. It is true that the cases cited by the defendants sustain these propositions; but the later cases have proceeded upon different and more equitable principles in defining the grounds upon which courts of equity interfere in cases of this description. This interference, instead of being founded upon the theory of protection to the owners of trademarks, is now supported mainly to prevent frauds upon the public. If the use of any words, numerals, or symbols is adopted for the purpose of defrauding the public, the courts will interfere to protect the public from such fraudulent intent even though the person asking the intervention of the court may not have the exclusive right to the use of these words, numerals, or symbols. This doctrine is fully supported by the latest English cases of *Lee v. Haley*, L. R. 5 Ch. 155; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; and also in the case of *Newman v. Alford*, 51 N. Y. 189, 10 Am. Rep. 588."

In *Anheuser-Busch Brewing Assn. v. Fiza*, 24 Fed. Rep. 149, complainant, doing business at St. Louis, Missouri, had been accustomed to export beer in bottles with a label bearing the words "St. Louis Lager Beer." It had an established market for this product in South America and Panama. Defendant nor any other person in the export trade had been accustomed to use the words "St. Louis Lager Beer." Defendant shipped beer from New York in competition with complainant. It was shown that at Panama and in South America "St. Louis Lager Beer" was in demand. Defendant's beer was made in New York, and his bottles were so labeled as to represent that the beer was made at St. Louis, and that his firm were the sole agents for the St. Louis lager beer. Defendants insisted that buyers did not discriminate between complainant's article and other beer in the United States, but bought it simply because they supposed St. Louis beer was produced in the United States, as distinguished from German and English beer; but the court said: "This may be true; but, if it is, it does not seem to be conclusive against the right of the complainant to the injunction which he seeks. As the goods of the parties go to the same markets, it can hardly fail to happen that the complainant will lose sales, and the defendant will get customers, in consequence of defendant's acts. Although the complainant cannot have an exclusive property in the words 'St. Louis' as a trademark, or an exclusive right to designate its beer by the name 'St. Louis Lager Beer,' yet, as its beer has always been made at that city, its use of the designation upon its labels is entirely legitimate; and if the defendant is diverting complainant's trade by any practices designed to mislead its customers, whether these acts con-

sist in simulating its labels, or representing in any other way his products as those of complainant, the latter is entitled to protection. It is no answer for the defendant, when the complainant asks for protection, to say that it has no exclusive right to designate its product in the manner it has, although this might very properly be asserted by a competitor selling beer made at St. Louis, or who, by reason of any circumstances, might be entitled to represent his product as originating there. *Dela-ware & H. Canal Co. v. Clark*, 13 Wall. 322, 20 L. ed. 583. . . . It is unnecessary, for present purposes, to consider whether the complainant has a valid trademark, or can have a technical trademark, in the name 'St. Louis.' It is sufficient that it was lawful for the complainant to use that name to designate its property, that by doing so it has acquired a trade which is valuable to it; and that the defendant's acts are fraudulent, and create a dishonest competition, detrimental to the complainant."

In *Southern White Lead Co. v. Cary*, 25 Fed. Rep. 125, complainant, a manufacturer of White Lead in St. Louis, stamped upon the upper end or head of its kegs the words "Southern Company, St. Louis." These words encircle the head of the keg, "St. Louis" forming the lower half of the circle, and "Southern Company" the upper half, inclosing the words "Warranted Strictly Pure White Lead in Pure Linseed Oil." St. Louis had an established reputation for the manufacture and sale of pure white lead, and complainant had maintained for years a large trade at that place as a manufacturer. Defendants manufactured their lead at Chicago, branding it "Southwestern St. Louis," surrounding the words "Strictly Pure White Lead;" the words "Southwestern St. Louis" appearing in the same form as the words "Southern Company, St. Louis." Defendants also pasted a label on their kegs, stating it was strictly pure. Analysis showed complainant's lead to be pure, and defendants' to be adulterated. Gresham, Ch. J., said: "I shall not stop to inquire whether the complainant's claim to trademark is or is not well founded, as I think it is entitled to an injunction upon another ground. The defendants so brand the heads of their kegs as to naturally mislead and induce persons purchasing for consumption to suppose they are purchasing the complainant's lead, when they are getting an inferior article. The brand used by the defendants is so like the complainant's as to induce the public to mistake the one for the other. The defendants sell their goods to retail dealers, and it may be that such dealers are not deceived, but they sell to consumers who are or may be deceived. The complainant is entitled to relief if the brand used by the defendants sufficiently resembles the complainant's brand to be mistaken for it, and the defendants adopted their brand for the purpose of selling their kegs as the kegs of complainant or for the purpose of enabling retail dealers to do so, and the complainant has been injured by this fraud, or is likely to be injured by it. The complainant manufactures its genuine white lead at St. Louis, and its reputation is already established as a manufacturer and dealer of this character. The defendants manufacture their adulterated and greatly in-

ferior lead at Chicago, and stamp upon their kegs a false brand in imitation of the complainant's brand. Why is this done unless it be in the hope of deceiving the public and injuring the complainant? Realizing that they could not engage in open, manly competition with the complainant, the defendants resort to a palpable trick. If this resulted in no injury to the complainant, or was likely to result in no injury to it, the bill would have to be dismissed. But the affidavits show that the defendants' kegs can and have been sold as the complainant's."

Judge Blodgett in *Southern White Lead Co. v. Coit*, 39 Fed. Rep. 492, made the same ruling upon the same facts.

In *A. F. Pike Mfg. Co. v. Cleveland Stone Co.* 35 Fed. Rep. 896, it was sought to protect the names "Green Mountain," "Willoughby Lake," "Lamoille," and others as designating scythe stone, which had been used by complainant and its predecessors for a number of years. Defendants acquired a quarry adjacent to complainant's, and branded theirs in the same way. It was urged, first, that the brands employed by defendants did not infringe. Defendants used the exact words "Lamoille," "Green Mountain" and others, but in place of "Willoughby Lake" employed the title "Willoughby Ridge." It was ruled that the titles employed were infringements. It was next urged that the brands as applied to scythe stones indicated the quality or grit of the stones. The court said that they did not designate alone quality, but also indicated selection and care in the manufacture, and finally: "It is urged that 'Lamoille' and 'Willoughby Lake' are geographical terms. The defendants' quarry stones 200 miles from Lamoille county and Willoughby lake, and apply the names 'Lamoille' and 'Willoughby Ridge.' Assuming that complainant cannot have a valid trademark in these names, which I do not decide, it seems to be well settled that a manufacturer will be protected in the use of a geographical name as against one who does not carry on business in the district so designated. *Bluckwell v. Dibrell*, 8 Hughes, 160; *Newman v. Alvord*, 49 Barb. 588, 51 N. Y. 189, 10 Am. Rep. 588."

The same doctrine was upheld in *Northcutt v. Turney*, 19 Ky. L. Rep. 483. The complainants were the owners of what are called and known as the Upper and Lower Blue Lick springs in Nicholas county, Kentucky, and brought suit to enjoin Northcutt from using the words "Blue Lick" in connection with his advertisement and sale of water from an artesian well in Campbell county. The court, in affirming the right to an injunction, said: "It is substantially alleged and admitted that water from the two springs of appellees have been for a century known, sold, and used throughout the United States and many foreign countries as medicinal water, and also that they and those under whom they claim have, by long use and legal adoption, acquired exclusive right to the use of the words 'Blue Lick' as their trademark. Though Upper and Lower Blue Lick springs are some distance apart, and belong to two distinct firms, the water from them seems to be composed of the same ingredients, and to possess the same kind

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and combination of medicinal qualities. And, as the trademark 'Blue Lick Water' has been heretofore appropriately and legally adopted and used by each respective owner without objection of either, they have a common interest in preventing a third party illegally appropriating and using it, and, consequently, have a right to jointly maintain this action. Appellant states in his answer that he and those who preceded him have been selling and shipping water from said artesian well for a period of at least sixteen years; that for about one year of that time the trademark or brand used in the sale of said water was 'The Campbell County Blue Lick Water,' and for about fifteen years last past the trademark or brand used by him and the former owners and proprietors in sale of said waters has been 'Kentucky Blue Lick Water.' And the two defenses based upon this alleged statement of fact are: First, that appellees, having knowledge thereof, and acquiescing in such use of the words 'Blue Lick Water' by appellant and his predecessors, is now estopped to deny their right or interfere with the exercise of it by them; second, that the action is barred by the statute of limitation. That appellees acquired exclusive right to use as their trademark the words 'Blue Lick Water' is not only apparent from the facts stated in their petition, and conceded in the answer of appellant to be true, but has been definitely decided by this court in the case of *Parkland Hills Blue Lick Water Co. v. Hawkins*, 95 Ky. 503. Such being the case, the use and attempted appropriation of the same words by the predecessor of appellant, in advertising and selling water from the artesian well, was manifestly illegal and fraudulent."

Since the case of *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. ed. 1144, was decided, holding that the word "Columbia" placed upon flour sacks could not constitute a proper trademark word so as to give the person using it an exclusive right, no one would be so hardy as to claim that an exclusive right to the use of a geographical name could be acquired as a trademark proper. Indeed, the doctrine of that case was not new in 1893, but has been the leading doctrine on the subject both in this country and England for many years, as is clearly shown by the cases already cited. There is no inconsistency between that case and the previous decisions of the state and Federal courts in this country, including the decisions of the United States Supreme Court before cited, to the effect that "wrongs of this description, whereby, through an artifice of any sort, the goods of one manufacturer become confused in the public mind with goods of some other manufacturer, may be redressed by a court of equity." *Merriam v. Famous Shoes & C. Co.* 47 Fed. Rep. 411.

In the case of *Pillsbury v. Pillsbury Washburn Flour Mills Co.* 24 U. S. App. 395, 64 Fed. Rep. 841, 12 C. C. A. 432, which, like this, was a case of unfair and fraudulent competition, Jenkins, Circuit Judge, speaking for the court, says: "In the consideration of this question we have not overlooked the case of *Columbia Mill Co. v. Alcorn*. That was the case of a trademark pure and simple, in which it was held that one cannot acquire the right to the exclusive use of the word 'Columbia.' . .

There the proof failed to establish that the brand was calculated to mislead or deceive; here the proof is overwhelming to the effect that the brand used was designed to mislead, and actually did deceive and mislead."

Since the case of *Columbia Mill Co. v. Alcorn* was decided, a question arose in the United States circuit court for the district of New Jersey in *Morgan Envelope Co. v. Walton*, decided in 1897, and reported in 82 Fed. Rep. 469, in reference to the use of the same word "Columbia" in connection with certain symbolical representations of Columbia by different dealers who had placed it upon their packages of tissue paper. The complainants brought their bill to restrain the use of the word "Columbia" and the allegorical representation, alleging that they had used it for more than ten years continuously to distinguish their manufacture of a superior quality of tissue paper, and charging the defendants with the use of the same words and representations upon a tissue paper manufactured by them, and in such a manner as to constitute unfair and fraudulent competition. The defendants were allowed, besides answering, to file a cross bill, by which they set up that they had employed the word "Columbia" and a symbolical or allegorical representation of "Columbia" upon their packages for a period of seventeen years and longer before the complainants had employed them. The court, in deciding the case in favor of the defendants, granting the injunction asked for in the cross bill, says: "There cannot be any question that under these circumstances there is grave danger that the goods may be mistaken the one for the other. If the question presented were the only one raised by the complainants' bill, I should not hesitate to grant them the relief asked for; but the prior application by the defendants of the word 'Columbia' to the same product changes the situation of the parties. It cannot be said that Walton & Co. acquired a technical trademark in the word 'Columbia,' in view of the decision of *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. ed. 1144; but that they were the first persons, so far as the records show, to apply the word to this article of production, cannot be disputed. By such application and continued use their paper became known to the trade and the public generally. It acquired a reputation for quality, and the name was a distinctive mark of excellence. The figure of 'Columbia' afterwards added by the defendants cannot be regarded as more than a mere amplification of the word 'Columbia' previously appropriated. It conveys no further or other idea than the word, and can be regarded only as a different way of expressing it. It is apparent that, inasmuch as none of the wrappers in controversy bear the names of the makers, the packages must be known and designated and called for by the users as 'Columbia paper,' whether the word 'Columbia' be expressed in letters alone, or in a figure typifying 'Columbia.' So it would happen that, whether a purchaser wanted the package of the complainants or the defendants, he must ask for 'Columbia paper.' It would be impossible for the seller to know which of the manufactured articles was desired, and the public would be rendered liable to have imposed upon

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it goods which they did not want. Such a condition must inevitably lead to confusion in the trade, disappointment to the general public, deception of ultimate purchasers, and be productive of unfair competition in trade. *Orr Ewing v. Johnson*, L. R. 18 Ch. Div. 484; *Sawyer v. Horn*, 4 Hughes, 289, 1 Fed. Rep. 24. One cannot be permitted to practice deception in the sale of his goods as those of another, 'nor to use the means which contribute to that end.' *Perry v. Truefitt*, 6 Beav. 68. Irrespective of the question of trademark, inasmuch as Walton & Co. appear to have been the first to put up their paper with the distinguishing mark 'Columbia,' and as their goods were the first to become known to purchasers as 'Columbia paper,' no other person should be permitted to use that name as the sole distinguishing mark of a like article, whether expressed in letters or by figure, and in that manner mislead the general public into buying his goods as those of his competitor. If the word could not be used as a trademark, it is to be treated as a descriptive term, to the benefit of which they are entitled. *Wilson v. T. H. Garrett & Co.* 47 U. S. App. 250, 78 Fed. Rep. 472, and 24 C. C. A. 173."

The following are some other of the leading cases which we have examined, and which affirm the same general principle: *Reddaway v. Bentham Hemp-Spinning Co.* [1892] 2 Q. B. 639, 9 Rep. Pat. Cas. 503; *Powell v. Birmingham Vinegar Brewery Co.* 11 Rep. Pat. Cas. 563, 13 Rep. Pat. Cas. 235 [[1896] 2 Ch. 54]; *Paine v. Daniell*, 10 Rep. Pat. Cas. 217 [[1893] 2 Ch. 567]; *Hine v. Last*, 7 L. T. 41; *Braham v. Beachin*, L. R. 7 Ch. Div. 848; *Knott v. Morgan*, 2 Keen, 214; *Magnolia Metal Co. v. Atlas Metal Co.* 14 Rep. Pat. Cas. 389; *Society of Accountants v. Corporation of Accountants*, 20 Scot. Sess. Cas. 4th Series, 750; *Dunnachie v. Young*, 10 Scot. Sess. Cas. 4th Series, 874. In this last case the following remarks of Lord Craighill seem peculiarly applicable to the case at bar: "'Glenboig,' as used by the respondents, and without any explanation of the sense in which the word was used, could not but be a description almost certainly leading to a deception. The lord ordinary appears to me to have been insensible to this consideration. He thinks that because Dunnachie made 'Glenboig' a part of his trademark, the word must be held to be *publici juris*,—misreading the *Case of Seizo*, as I think. But Dunnachie was on Glenboig; the clay he used was raised and manufactured there; and in putting the name of the place into his trademark he was only following the course ordinarily pursued. The respondents, however, are not on Glenboig. In taking that word they took it only because it denoted goods known in the market to be of high quality; and, if they are to find virtue in it, this will only be because those who at first or second hand are the purchasers of their goods read the word as indicating that the goods are the product of a manufactory other than Heathfield. The respondents try to justify their assumption of Glenboig, first, on the ground that their clay is of the same seam; and, second, that the word 'Glenboig,' as used by them, is qualified by the word 'Young's' and so misapprehension, not to say deception, is prevented. The fact assumed in the former

of these grounds has, I think, been established, but it is insufficient as a justification. The least that can be said on the subject is that the word, as used, is ambiguous. That, in my opinion, would be enough. Why should the respondents use a word that may mislead,—that may lead people to buy their goods as the goods of the complainants? If all the respondents desired to suggest is that their bricks are made of the clay of the Glenboig seam raised on Heathfield, a word or words could be introduced by which this could be communicated."

Every case, as has often been adjudged, must rest upon its own circumstances; but this case and many others already quoted seem quite undistinguishable on principle from the case in hand. The result of all the cases is that the question must come down to one of fair or fraudulent competition. *Clark Thread Co. v. Armitage*, 67 Fed. Rep. 897, Affirmed 45 U. S. App. 62, 74 Fed. Rep. 936, 21 C. C. A. 178; *Merriam v. Texas Siftings Pub. Co.* 49 Fed. Rep. 944; *Seizo v. Proceende*, L. R. 1 Ch. 192; *Brooklyn White Lead Co. v. Masury*, 25 Barb. 417; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Myers v. Kalamazoo Buggy Co.* 54 Mich. 215; *Keller v. B. F. Goodrich Co.* 117 Ind. 556; *Companie General v. Rehder*, 5 Rep. Pat. Cas. 61; *Free Fishers & Dredgers v. Elliott*, 4 Law T. 273; *Thompson v. Montgomery*, L. R. 41 Ch. Div. 35. This last case is very analogous to the case at bar. The plaintiff had established a brewery at a place called "Stone," where he had long carried on business, and whence his ale, under the denomination "Stone Ale," had acquired a reputation. Lord Lindley, in reversing the order denying an injunction, said: "The plaintiff's rights are to prevent anybody from passing off his goods as the goods of the plaintiff which is indeed the very substance and kernel of the cases on this subject." *California Fig Syrup Co. v. Taylor Drug Co.* 14 Rep. Pat. Cas. 841.

In *McAndrew v. Bassett*, 4 De G. J. & S. 880, the plaintiffs were large manufacturers of licorice. They styled this licorice "Anatolia." Anatolia was the name applied to a whole tract of country wherein licorice root is largely grown. At the time plaintiffs began to use the word there was no other manufacturer of licorice stamping it with this word. Subsequently, in response to an order for Anatolia licorice, defendants caused a stamp to be prepared containing the word "Anatolia," and put it on the goods, and afterwards continued to use it. The court below granted a perpetual injunction restraining the use of the word "Anatolia" by the defendants on licorice. In response to the argument that the word "Anatolia" was common to all, the court said: "That argument is merely a repetition of the fallacy which I have frequently had occasion to expose. The property in the word for all purposes cannot exist, but property in that word, as applied by way of stamp upon a particular vendible article as a stick of licorice, does exist the moment the article goes into the market so stamped, and there obtained acceptance and reputation, whereby the stamp gets currency as an indication of superior quality, or of some other circumstance, which renders the article so stamped acceptable to the public."

In *Amos H. Van Horn v. Coogan*, 52 N. J. 41 L. R. A.

Eq. 380, plaintiff and its predecessors had, at Newark, N. J., for a great many years, manufactured and sold stoves and ranges under the style of "Portland Stoves and Ranges." Defendants carried on business very close to plaintiff, and began to make, advertise, and sell "Famous Portland Ranges." It was insisted there could be no trademark in the word "Portland" because it was a geographical name, and on this point the court said: "But it is contended that a geographical name, like Portland, cannot be a trademark, nor be so used as to give the dealer, who first adopts it an exclusive property in it. This, I think, may be conceded, without impairing in the slightest degree the complainant's right to the protection it asks. For, as was said, in substance, by Lord Langdale, in the case just cited, the question, in cases like this, is not whether the complainant has a property in the name by which his goods are distinguished in the market, but, on the contrary, the pertinent inquiry is, Has the defendant a right to use the name by which the complainant's goods are known, for the purposes of deception, and in order to attract to himself that custom which, without the improper use of such name, would have flowed to the complainant? And the answer to the inquiry is that the defendant has no such right. The Supreme Court of the United States in *Coats v. Merriok Thread Co.* 149 U. S. 562, 566, 37 L. ed. 847, 850, recently said, speaking by Mr. Justice Brown, that there can be no question as to the soundness of the proposition that, irrespective of the technical question of trademark, one trader has no right to dress up his goods in such manner as to deceive an intending purchaser, and induce him to believe he is buying the goods of a rival trader. 'Rival manufacturers may lawfully compete for the patronage of the public in the price and quality of their goods, in the beauty and tastefulness of their inclosing packages, in the extent of their advertising, and in the employment of agents; but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals.'"

The same rule prevails in the French and German law, and is comprehensively thus laid down in Kohler, Trademarks: "Much more important is a second kind of fraudulent competition,—so important that many legislatures especially single it out, and have passed particularly severe rules regulating it. It is one of the most common practices to designate the products of a place, if these products be of a particularly celebrated character, by the name of their place of origin. For commerce in cultivated plants this form of designation is a vital question, and in the same way for mineral products, for mineral waters, and so forth; and also for industrial and manufactured goods this designation has an eminent meaning, since the products of certain countries have their peculiar advantages and peculiarities, which come either from the peculiar quality of the raw material of a country, from the customary skill of the workmen, or perhaps from a special method of production long in vogue. The great popularity of such goods in demand, the ready sale which they find, and the profits

which their production brings, are temptation enough for many traders to mark their goods also with the name of this locality, entirely foreign to them, in order to realize the advantages which this demand produces. Such practices often inflict the most deplorable damage upon the genuine and reputable products of those places, not only in that they rob them of a good part of the revenue directly, but the greatest damage consists in the depreciation which the indifferent wares, entirely foreign to the nature of the place from which they are said to come, inflict upon the entire locality, which they bring into bad repute. Before the public notices the deception, it has become disgusted with the inferior goods, and a flourishing branch of industry is ruined at a blow. In glowing colors, and without exaggeration, the terrible effect which such practices have upon industry has been depicted in the report of Lemoine des Mares in the French law of 1824. It states there particularly that several branches of industry 'owe to them the loss of their relations with foreign countries which closed their markets to them from the moment that they saw the most common product arrive under a name which heretofore they had been in the habit of respecting and honoring.' Pouillet, p. 707. It is just the trade with foreign countries that is most injured by these practices, because there the deception is far more difficult to detect, and the foreigner is easiest deceived in his perception of the true nature of the goods."

The cases in which a person has been enjoined from using his own name in connection with other labels or brands upon his goods proceed upon the same general ground of deceit and unfair competition in trade. If a person may be restrained from the use of his own name upon his own goods because such use, in the circumstances, will deceive the public into purchasing his goods believing them to be the goods of another, to the injury of the public and the goodwill and business of such other person, so, also, on the like principle, may he be restrained from using any other proper or geographical name when such use will produce like results. *Wilson v. T. H. Garrett & Co.* 47 U. S. App. 250, 78 Fed. Rep. 478, 24 C. C. A. 178; *William Rogers Mfg. Co. v. Rogers & S. Mfg. Co.* 11 Fed. Rep. 495; *R. W. Rogers Co. v. William Rogers Mfg. Co.* 35 U. S. App. 848, 70 Fed. Rep. 1017, 17 C. C. A. 576; *Landreth v. Landreth*, 22 Fed. Rep. 41; *Pillsbury v. Pillsbury-Washburn Flour Mills Co.* 24 U. S. App. 395, 64 Fed. Rep. 841, and 12 C. C. A. 482; *Tarrant v. Johann Hoff*, 45 U. S. App. 143, 76 Fed. Rep. 959, 22 C. C. A. 644; *Meyer v. Dr. B. L. Bull Vegetable Medicine Co.* 18 U. S. App. 372, 53 Fed. Rep. 884, and 7 C. C. A. 558; *Walter Baker & Co. v. Baker*, 77 Fed. Rep. 181; *Brinsmead v. Brinsmead*, 101 Law Times, 606; *Melachrinio v. Melachrinio Egyptian Cigarette Co.* 4 Rep. Pat. Cas. 215; *Barlow v. Johnson*, 7 Rep. Pat. Cas. 395; *Huntley v. Biscuit Co.* 10 Rep. Pat. Cas. 277.

It is hardly necessary to cite authority for the doctrine that in cases where the question is simply one of unfair competition in trade it is not essential there should be any exclusive or proprietary right in the words or labels used, in order to maintain the action. This has been

decided by the United States Supreme Court both before and since the decision of *Columbia Mill Co. v. Alcorn*. See *Coats v. Merrick Thread Co.* 149 U. S. 562, 37 L. ed. 847; *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118. In the former of these cases the doctrine is distinctly and broadly announced that, "irrespective of any question of trademarks, rival manufacturers have no right, by imitative devices, to beguile the public into buying their wares under the impression that they are buying those of their rivals."

In the defendant's brief and argument much reliance is placed upon the fact that one of the mills belonging to the Pillsbury-Washburn Co. is situate outside the city limits of Minneapolis. But, upon examination, this defense, much like the other defenses in the case, vanishes into "unsubstantial air" when viewed in the light of the evidence. The objection, if good at all, would go to show a misjoinder of parties; that is to say, that the Pillsbury Flour Mills Company should not have been joined with the six other corporations, all of whose mills are situate at the Falls of St. Anthony, within the city limits of Minneapolis. It would furnish no good reason for not granting the relief asked for as to the other complainants. The objection, if of any value, should, no doubt, have been taken by plea in abatement for the misjoinder of parties. A plea to the merits is held to be an admission not only of the competency of the plaintiffs to sue, but to sue in the particular action which they bring. *Society for Prop. of Gospel v. Pawlet*, 4 Pet. 480, 7 L. ed. 927. But upon the merits there is but little substance to this objection. The evidence shows that this Anoka mill has always been an integral part of the great Minneapolis milling plant belonging to the Pillsbury Flour Mills Company; that it has the same machinery, is run by the same proprietors, in the same manner, grinds the same grade of wheat, is subject to the like interchange of flour and tests; that the business of the mill has always been conducted in Minneapolis by the same parties in connection with that of their other mills, and has always been considered and treated as one of the Minneapolis mills. It is situated on a tributary of the Mississippi river, about 10 miles outside the city limits, in a small suburb of the city, only because there happened to be a water power at that place. For these reasons, the public has not been deceived, because this, which is one of the smallest mills, has been practically for all purposes a Minneapolis mill, and part and parcel of the Pillsbury flouring plant in that city. There is nothing unusual, and it does not seem to be a material circumstance, that large manufacturing concerns carrying on business in a city should have some portion of their works outside the corporate limits; and it hardly requires the citation of authorities to the point that, where this is done, such business will be considered entitled to the same measure of protection as if carried on wholly within the corporate limits. See *Kohler, Trademarks*, 291; *New York & R. Cement Co. v. Coplay Cement Co.* 45 Fed. Rep. 212, where it is said that all cement manufacturers in Rosendale and vicinity may rightfully call their manufactured article "Rosendale Ce-

ment;" *Cleveland Stone Co. v. Wallace*, 52 Fed. Rep. 431.

As we read the opinion of the court below (see 82 Fed. Rep. 816), the injunction was refused, not only because the several complainants could have no exclusive interest in the words, the use of which by defendant is complained of, as a trademark, but on the further ground that the misuse of these words by the defendant cannot injuriously affect any one particular complainant, because they do not imply that any one in particular of the complainants manufactured the flour sold by the defendant. We think this ground not tenable. If the complainants were consolidated into one great business concern, this objection would be obviated, because then one corporation would manufacture all the flour made at Minneapolis, as now the several corporations complainant do. But, if such a corporation would be entitled to relief, we take it that any one or more of the complainant corporations having a common interest in preventing the fraud will also be entitled to maintain the action. In the judgment of the court it is the common every-day case of several persons having a common interest in the prevention of an irreparable injury joining together to obtain the desired relief. Though their interests are different in degree, they are of the same quality and kind. Any number of landowners may join together to enjoin the assessment and collection of an illegal tax upon real estate, or one or more may sue on their own behalf, and for the benefit of all others similarly situated. One landowner may own 1,000 acres, and another but 1. That makes no difference, so long as their grievance is of the same character, though differing in degree, as affecting different persons. So, if a person attempts to erect a nuisance of any kind upon a block of land in a city where the lots to be affected are owned by different owners, anyone may sue, or one or more may join together in asking for relief by injunction. The same principle is illustrated in the cases of common of pasturage or common of fishery, and the same rule prevails. The test is whether the parties have an interest in common in the subject-matter of the suit as well as in the question involved; whether, to use the language of Mr. Justice Nelson in *Cutting v. Gilbert*, 5 Blatchf. 259, 261, approved by the Supreme Court in *Scott v. Donald*, 165 U. S. 107, 116, 41 L. ed. 648, 654, "there is a community of interest growing out of the nature and condition of the right in dispute; for, although there may not be any privacy between the numerous parties, there is a common title out of which the question arises, and which lies at the foundation of the proceeding." In all of these cases, and many more of like kind, anyone may separately, but

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not jointly with another, maintain an action at law, or anyone or any number together, to save multiplicity of suits, and prevent irreparable injury, may maintain a bill in equity to enjoin. The doctrine is too common to require the citation of authorities.

In the examination of the cases upon the subject of fraudulent competition in trade we have found many like this, where both individuals and corporations having a common interest have united together to maintain the action in equity, only one or two of which we will refer to. In the case of *Society of Accountants v. Corporation of Accountants*, 20 Scot. Sess. Cas. 4th Series, 750, the Society of Accountants in Edinburgh, the Institute of Accountants and Actuaries in Glasgow, and Society of Accountants in Aberdeen, three several and distinct societies, all incorporated by royal charter, as well as the individual members of each, joined in a suit to prevent the Corporation of Accountants, Limited, and certain of its members, from using the letters "C. A." (chartered accountants). From the date of the incorporation of complainants these letters had been used to designate their members, and were so understood by the public. Each of the complainant societies consisted of a body of professional men who had associated themselves for the purpose, *inter alia*, of keeping up a high standard of professional education and efficiency. The court, in granting the interdict, said: "Here each of the corporations is not only incorporated, but each has a distinct patrimonial interest in enforcing its conditions of membership,—an interest attaching both to the corporations as such, but also to its individual members. But, if this be so,—if a wrong is done,—and a title to sue exists where there is only one corporation, does it make any difference that there are here three corporations, and that the injury consists in conduct which involves a false representation of membership of one or other of the three? I do not, I confess, see that this makes a difference in principle—at least assuming that, as here, the three corporations jointly complain. There may be a difference in degree,—that is to say, there may be a difference in the degree of the injury to each body individually,—but I think that that is all, and I am not able to hold that that is enough. Each corporation suffers a legal wrong, greater or less, and, that being conceded, the question becomes one merely of title to sue."

The case upon appeal was unanimously affirmed. The same rule was recognized and adopted in *Northcutt v. Turney*, 19 Ky. L. Rep. 483.

The order of the court below is reversed, and the case remanded, with instructions to grant the injunction as prayed.

KANSAS SUPREME COURT.

COMMERCIAL BANK *et al.*, *Plffs in Err.*,
v.
CHESHIRE PROVIDENT INSTITUTION.

(.....Kan.....)

* An unrestricted guaranty of payment indorsed on a negotiable instrument is negotiable, and passes with the title to the instrument.

(May 7, 1896.)

ERROR to the District Court for Montgomery County to review a judgment in favor of plaintiff in an action to enforce liability on a guaranty of a promissory note. *Affirmed.*

The facts are stated in the opinion.

Mr. James McKinstry, with *Mr. J. D. McCue*, for plaintiff in error:

The guaranty on which judgment was rendered was not a negotiable guaranty, under the law merchant, because payable generally and not "to order or bearer."

2 Dan. Neg. Inst. § 1774; 2 Parsons, Notes & Bills, pp. 133, 134; *True v. Fuller*, 21 Pick. 140; *Briggs v. Latham*, 36 Kan. 205, 59 Am. Rep. 546; 2 Randolph, Com. Paper, § 861; *Tiedeman*, Com. Paper, § 419.

It was not negotiable under the statute. The statute expressly declares that the words "to order or bearer," are essential words in a negotiable instrument. It also prohibits the courts from, by construction, making an instrument negotiable which does not contain these words.

Gen. Stat. 1889, chap. 14, § 1; *Briggs v. Latham*, 36 Kan. 205, 59 Am. Rep. 546.

The note was indorsed to plaintiff below. This is not an assignment of the guaranty. Indorsement and assignment are not equivalent terms.

Bank of Marietta v. Pindall, 2 Rand. (Va.) 475.

The guaranty is absolutely void. The bank, as a bank, had no power to sell or lend its credit. The guaranty was a loan of its credit, in violation of its corporate powers, and outside the usual and ordinary course of banking.

Morse, Banks & Banking, § 65; *Farmers' & M. Bank v. Butcher's & D. Bank*, 16 N. Y. 125, 69 Am. Dec. 678; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 313; *National Bank of Commerce v. Atkinson*, 55 Fed. Rep. 471; *Hall v. Auburn Turnp. Co.* 27 Cal. 255, 87 Am. Dec. 75; *Ang. & A. Corp.* 257, 258; *Knickerbocker v. Wilcox*, 83 Mich. 200.

All parties dealing with this contract are presumed to have knowledge of the bank's power, and that it had no power to guarantee the paper of another, which it did not own.

Davis v. Old Colony R. Co. 131 Mass. 258, 41 Am. Rep. 221; *Hendrie v. Berkowitz*, 37 Cal. 113, 99 Am. Dec. 251.

* Headnote by ALLEN, J.

NOTE.—As to the effect of payments indorsed on a note upon its negotiability, see *note to Farmers' Bank v. Shippey* (Pa.) 38 L. R. A. 823.
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The fact that the guaranty recites a consideration does not change the rule as to persons having notice of the bank's want of power.

National Park Bank v. German-American Mut. Warehousing & S. Co. 116 N. Y. 281, 5 L. R. A. 673; *Monument Nat. Bank v. Globe Works*, 101 Mass. 58, 3 Am. Rep. 322.

Messrs. Gleed, Ware, & Gleed for defendant in error.

Allen, J., delivered the opinion of the court:

The defendant in error obtained judgment against the Commercial Bank for \$2,685 on a guaranty indorsed on a negotiable promissory note executed by Daniel Dart, in the following form:

For value received, the Commercial Bank hereby guarantees prompt payment of the interest on the within obligation, and the payment of the principal at maturity.

Witness our hands this 12th day of May, 1886.

Geo. T. Gunersey, Cashier.

L. U. Humphrey, President.

The note was made payable to the order of the Topeka Investment & Loan Company, and by it indorsed before maturity to the Cheshire Provident Institution. The petition alleges that, at the time the note and mortgage securing the same were executed, the Commercial Bank, in writing and for a valuable consideration, executed the guaranty above copied. The answer of the Commercial Bank alleges that it, as a corporation, never had any interest in the note, and never received any value for the execution of the guaranty, that the officers of the bank had no authority to execute the guaranty, and that these facts were known to the payee of the note at the time of its delivery. To this answer the plaintiff replied with a general denial. The case was tried to the court, and a general finding was made in favor of the plaintiff on which judgment was entered for the amount of the note and interest. Counsel for plaintiff in error claim: First, that the guaranty on which judgment was rendered was not a negotiable guaranty, because payable generally, and not to order or bearer; second, that the indorsement of the note did not assign the guaranty; third, that, if it be conceded that the indorsement of the note operated as an assignment of it, all defenses against the first holder are available against the assignee; fourth, that the guaranty is void, because the bank had no power to lend its credit in that manner.

The first point presents the most important question in the case, and one on which the authorities are conflicting. It will be noticed that the guaranty under consideration in this case contains no words of negotiability, but is indorsed on a negotiable instrument. In *Daniel on Negotiable Instruments* the conflicting views of the courts and text writers are summarized, and in § 1777 [Vol. 2] the author says: "On the other hand, there are cases which maintain that, although the guar-

anty on the paper, written at the time of delivery, specifies no person to whom the guarantor undertakes to be liable, and has no negotiable words, it runs with the instrument to which it refers, partakes of its quality of negotiability, and any person having the legal interest in the instrument takes in like manner the guaranty, as an incident, and may sue thereon. And it has been said, in such a case, 'this view is consistent with the nature of the transaction, the evident intention of the parties, and the objects and uses of commercial paper.' This seems to us the better doctrine. By writing the guaranty on the paper the guarantor evidences his intention to guarantee the contract of the maker. That contract, being negotiable, is made with any and every person who may be the holder, and the guarantor is thus brought in privity with any and every person who becomes the holder." This view of the law seems to us supported by reason and the weight of authority. A guaranty indorsed on a negotiable instrument is to be construed with the language of the instrument. The one under consideration in terms, names no guaranty. The evident intent was to guarantee the payment to the legal holder of the note. We are unable to perceive any good ground for the position taken by some of the authorities, that the guaranty inures to the benefit of the first holder of the paper only. The transfer of the note by indorsement must certainly operate at least as an assignment of the guaranty. We think it does more, and that the guaranty passes by the indorsement as fully as the note itself. The Commercial Bank by its guaranty became a party to a negotiable instrument. It employed no words limiting its liability, and it must make good the terms of its promise to the legal holder of the paper. This view of the law is sustained by the following authorities: *Story, Bills*, § 453; *Webster v. Cobb*, 17 Ill. 459; *Phelps v. Sargent* (Minn.) 71 N. W. 927; *McLaren v. Watson*, 28 Wend. 425, 37 Am. Dec. 260; *Partridge v. Davis*, 20 Vt. 499; *Jones v. Berryhill*, 25 Iowa, 289; *Brandt, Suretyship and Guaranty*, § 47.

The view, opposed to the negotiability of a guaranty, unless made so by express terms, is taken by Mr. Randolph in his work on Commercial Paper (§ 261), and the authorities sustaining that view are cited in the notes. Much

stress and reliance are placed on the case of *Briggs v. Latham*, 86 Kan. 205, 59 Am. Rep. 546. In that case a recovery was sought on a guaranty written on a mortgage securing the note. It was a guaranty of the payment of the mortgage. The mortgage itself was not a negotiable instrument, and there were no words of negotiability in the guaranty. We are entirely satisfied with the decision of that case. The *dictum* contained in the opinion, seemingly opposed to the conclusion reached in this case, being entirely outside of the question before the court is not of binding authority. That the guaranty is assignable, and passes with the assignment of the debt guaranteed, does not admit of doubt. *Reed v. Garvin*, 13 Serg. & R. 100; *Claflin v. Ostrom*, 54 N. Y. 581; *Harbord v. Cooper*, 48 Minn. 466; *Stillman v. Northrup*, 109 N. Y. 473. The record before us does not contain any of the evidence offered at the trial. The general finding resolves all doubts as to the facts against the plaintiffs in error. We must therefore presume that the guaranty was executed for a valuable consideration by the duly authorized officers of the bank, and in due course of business. The claim that a banking institution dealing in commercial paper is without authority to bind itself by a guaranty thereof has nothing to commend it to especial favor. It is true that in this case the paper itself does not indicate that the Commercial Bank ever owned it. Nevertheless it may have received the proceeds, and the guaranty may have been made strictly in the interest of the bank. Attempts of corporations, organized solely for profit, to avoid their obligations on the ground that they are *ultra vires*, have never been received with marked favor by this court. *Kansas Nat. Bank v. Quinton*, 57 Kan. 750; *Arkansas Valley Town & L. Co. v. Lincoln*, 56 Kan. 145; *Alexandria, A. & Ft. S. R. Co. v. Johnson*, 58 Kan. 175. The general finding in favor of the plaintiff is a complete answer to all questions urged on our consideration, except that as to the negotiability of the guaranty, and the effect of the indorsement of the paper as an assignment of it.

The judgment is affirmed.

All the Justices concur.

NEW HAMPSHIRE SUPREME COURT.

STATE of New Hampshire

v.

Willard H. GRIFFIN.

(.....N. H.....)

1. Injury to the interests of a person, resulting from an exercise of the police power, do not entitle him to compensation under the law of eminent domain, if no part of his lands or property is taken therefor.
2. A police regulation prohibiting acts which are in some circumstances harmless is not unconstitutional as an exercise of judicial power.
3. A statute prohibiting the depositing of sawdust in the waters of a lake or any tributary thereto is a proper exercise of the police power.
4. A general law making a police regulation applicable to part of the state only is not void for lack of equality and uniformity.

(March 12, 1897.)

CASE RESERVED by the Supreme Court for Rockingham County for the opinion of the full bench upon an appeal from a judg-

NOTE.—Statutory protection of water used for supplying municipalities.

The cases in which the power of the legislature to prohibit the fouling of water from which a municipal supply is obtained, is considered, are not numerous. The power seems to have been upheld whenever it has been called in question, and in several cases statutes enacted for that purpose have been enforced without any question being raised as to their constitutionality.

In *State v. Wheeler*, 44 N. J. L. 88, it was held that a statute prohibiting the casting into any stream from which a water supply is taken, of any matter calculated to render the water impure, does not violate the constitutional provision against appropriation of private property without compensation, nor is it an act of eminent domain for which compensation must be made.

The California Penal Code makes it a misdemeanor to keep any sheep or other live stock penned, corralled, or housed on, over, or on the banks of a stream, the waters of which are thereby polluted and are drawn for the supply of the inhabitants of any city or town in the state. And it was held a violation of this statute to herd sheep upon the banks of the stream for a large part of each day. *People v. Borda*, 106 Cal. 638.

In *People, Ricks Water Co., v. Elk River Mill & L. Co.* 107 Cal. 221, the judge says: "I do not doubt the power of the legislature to make criminal the acts therein specified [in the statute], when the direct effect of such acts is to pollute . . . waters" used for supplying a municipal corporation.

The New York statute of 1898, chap. 189, gives the commissioner of public works of the city of New York the right to take such measures as he may deem necessary to preserve from pollution and defilement all the sources of the water supply of the city. *Tilford v. New York*, 1 App. Div. 199.

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ment of a justice of the peace convicting defendant of depositing sawdust in a stream contrary to the terms of a statute. *Appeal dismissed.*

For the purpose of increasing the facilities for its water supply, the city of Manchester, in 1881, acquired the farm of defendant's father situated on Sucker brook, a tributary of Lake Massabesic, which lake is the source of the water supply of the city. It leased the property back to the grantor for a period of twenty years with right of renewal. There was a sawmill on the property, and other sawmills along the stream. In 1881, a state statute was passed prohibiting the deposit of sawdust in the tributaries of said lake. It appeared in evidence that the effect of sawdust in the water is to discolor it and impart to it a woody taste. Near the mills the effect of decay is to render the water unwholesome. But at the point where the city's water supply was taken from the lake the effect of the sawdust on the water could not be detected except by chemical analysis. The lease having become vested in the defendant, proceedings were taken against him for violation of the statute, which resulted in his conviction.

Further facts appear in the opinion.

And that act gives the right to condemn lands contiguous to the source of supply for the purpose of removing possible sources of contamination from them. *Daly v. Smith*, 18 App. Div. 194.

In *Kelley v. New York*, 6 Misc. 518, that act was held constitutional, but it provided for the acquisition by the city of lands containing the source of pollution, and did not, as some other of the statutes have, contain a direct prohibition against throwing polluting matter into the stream.

Chapter 661 of the Laws of 1893 requires a municipal corporation benefited to pay the expense of changes ordered by the state board of health to protect a water supply from contamination. *Merritt v. New York*, 21 App. Div. 165.

The Massachusetts statute forbids the discharge into any stream used as a water supply within 20 miles above the point where the supply is taken, of any sewage, drainage, refuse, or polluting matter of such quality or amount as to be deleterious to health. *Brookline v. Mackintosh*, 133 Mass. 215.

The Utah statute of 1892 prohibits the establishment of any corral, camp, or bedding place for the purpose of herding, holding, or keeping any cattle, horses, or sheep within 7 miles of any city, town, or village, where the refuse or filth from such place will naturally find its way into any stream or water used by the inhabitants of the city, town, or village for domestic purposes. *People v. McCune*, 14 Utah, 152, 85 L. R. A. 396.

The Pennsylvania legislature passed an act to prevent pollution of the water supplying cities of the commonwealth, and making it unlawful to locate any cemetery within 1 mile of any city of first class, the drainage from which passed into a stream from which a water supply was obtained; but the court held that it was a local law and violated the provisions of the Constitution. *Philadelphia v. Westminster Cemetery Co.* 162 Pa. 106, Affirming 3 Pa. Dist. R. 151.

H. P. F.

Mr. Oliver E. Branch, for appellant:

Griffin's mill privilege on the brook was a species of property. He used the stream for manufacturing purposes. That use constituted a property or right, for, in its final analysis, it is the use only of what one possesses that constitutes his property in it.

Eaton v. Boston, C. & M. R. Co. 51 N. H. 511, 12 Am. Rep. 147.

If the use of the stream for transporting sawdust ever was unlawful, or was a private trespass, it became lawful, and the trespass ripened into a substantial right after an uninterrupted and open use and enjoyment of it by him and his predecessors for more than one hundred years.

Griffin's contract with the city gave him the right to use the brook in the same way that it had theretofore been used, which included the right to throw sawdust into it.

This act, although it is printed among the laws of the state passed in January session, 1891, is nevertheless a private act. The legislature cannot transmute the real into the unreal, nor transform fictions into facts. If it attempts to do so, its action may be investigated by the courts. Thus, if it should declare that to be a public use which in its nature was private, its declaration on that point may be set aside by the court.

Concord R. Co. v. Greely, 17 N. H. 57.

If the legislature should declare that a stream shall be considered a public highway, yet, if in fact it is not one, the legislative declaration that it is so cannot make it so, since, if it is private property, the legislature cannot appropriate it to a public use without providing for compensation.

Cooley, Const. Lim. p. 591; *Coe v. Schulte*, 47 Barb. 64; *Re Cheesebrough*, 78 N. Y. 232.

This statute cannot be sustained unless it was passed by the legislature in the exercise of its police power. But the police powers of the legislature are not without limitations, and in the exercise of them the legislature must move within constitutional limitations.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394.

This law is unconstitutional in that it is not an equal and uniform law of the state. It does not apply to all its citizens similarly situated.

State v. Pennoyer, 65 N. H. 114, 5 L. R. A. 709; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869; *People v. Markx*, 99 N. Y. 377, 52 Am. Rep. 34.

The effect of this statute is to take from Griffin the consideration for which his farm was sold to the city. This amounts to depriving him of his farm without consideration. To deprive one of the ordinary beneficial use and enjoyment of his property is, in law, equivalent to the taking of it, and is as much a taking as though the property itself were actually taken.

Lewis, Em. Dom. § 56; *Tiedeman*, Pol. Powers, § 397; *Cooley*, Const. Lim. p. 670; *Eaton v. Boston C. & M. R. Co.* 51 N. H. 504, 12 Am. Rep. 147; *Vanderlip v. Grand Rapids*, 78 Mich. 522, 3 L. R. A. 247; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393.
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If the taking of property becomes necessary, compensation must be awarded, and if the use of it constitutes in fact a nuisance, that fact must be found as any other fact is found, which affects a man's liberty or property. It cannot be established by a mere legislative fiat.

Gray v. Burlington & M. R. Co. 37 Iowa, 119.

An abutter's private right of use and occupation, being a part of his estate, cannot be taken from him for private use without his consent, or for public use without compensation.

Concord Mfg. Co. v. Robertson, 66 N. H. 20, 18 L. R. A. 679.

The use of the brook and of the lake itself for the purpose of sawing lumber and disposing of the sawdust were property rights which Griffin had, subject only to the restriction of reasonable use. What is reasonable is a question of fact, whether the water is private or public, and is one of fact for the jury.

Hayes v. Waldron, 44 N. H. 580, 84 Am. Dec. 105; *Green v. Gilbert*, 60 N. H. 144.

The chief end sought by the Constitution was to secure to all as perfect equality of privilege and of burden as human wisdom permits, and to this all other purposes were incidental and subordinate.

State v. Pennoyer, 65 N. H. 114, 5 L. R. A. 709; *Merrill v. Sherburne*, 1 N. H. 199, 8 Am. Dec. 52; *Barbier v. Connolly*, 113 U. S. 31, 28 L. ed. 924; *People v. Gillsen*, 109 N. Y. 399.

The police power has been defined to be "the right of a state, or of a state functionary, to prescribe regulations for the good order, peace, protection, comfort, and convenience of the community, which do not encroach on the like power vested in Congress by the Federal Constitution."

New Orleans Gaslight Co. v. Hart, 40 La. Ann. 474; 4 Bl. Com. p. 162; *Hannibal & St. J. R. Co. v. Huen*, 95 U. S. 465, 24 L. ed. 527; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 192, 22 Am. Rep. 71; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079.

While it is said that its exercise is within the discretion of the legislature, this statement must be taken with the qualification that the discretion of the legislature must be exercised within constitutional limitations.

A law is local if it touches a part of the state, or a part of its people. If it touches either it is local.

People, Lee, v. Chautauque County Supers. 48 N. Y. 10; *Re DeVaucene*, 81 How. Pr. 289; *Davis v. Clark*, 106 Pa. 377; *State, Harris, v. Herrmann*, 75 Mo. 240.

Messrs Drury & Peaslee, for the State: The motives influencing a legislative body to take any action cannot be inquired into (except, possibly, in a direct proceeding for that purpose) for the purpose of having the act declared void by the courts.

Fletcher v. Peck, 6 Cranch, 87, 130, 131, 3 L. ed. 162, 176; *Juilliard v. Greenman (Legal Tender Case)*, 110 U. S. 421, 28 L. ed. 204.

The act in question was an exercise of the police power, and it is the rule of law that no state or municipality can make a binding contract not to exercise this power.

Brick Presby. Church v. New York, 5 Cow.

538; *Coates v. New York*, 7 Cow. 585; *Gosler v. Georgetown*, 6 Wheat. 593, 597, 598, 5 L. ed. 389, 340; 1 Dill. Mun. Corp. § 97; *State v. Hayes*, 61 N. H. 264; *State v. Wheeler*, 44 N. J. L. 88; *Kincaid's Appeal*, 66 Pa. 411, 5 Am. Rep. 377; Co. Litt. 206, a; *Baylies v. Fellyplace*, 7 Mass. 325.

Police power includes health laws of every description. And these are or may be sometimes carried to the extent of ordering the destruction of private property when infected with disease or otherwise dangerous.

Cooley, Const. Lim. p. 722; *State v. White*, 64 N. H. 48; *Brick Presby. Church v. New York*, 5 Cow. 528; *Coates v. New York*, 7 Cow. 585; *Kincaid's Appeal*, 66 Pa. 411, 5 Am. Rep. 377; *Craig v. First P. & Y. Church*, 88 Pa. 42, 32 Am. Rep. 417; *Solier v. Trinity Church*, 109 Mass. 1.

A statute prohibiting the putting of anything injurious to health into any stream tributary to any reservoir, the source of any public water supply, was held to be constitutional.

State v. Wheeler, 44 N. J. L. 88.

The question of whether or not acts injurious to the public health shall be prohibited is wholly one for the legislature.

Tiedeman, Pol. Power, § 426; *State v. Campbell*, 64 N. H. 402; *State v. Marshall*, 64 N. H. 549, 1 L. R. A. 51; *Solier v. Trinity Church*, 109 Mass. 1; *State v. Wheeler*, 44 N. J. L. 88.

The only question for the court is, Were the prohibited acts of such a nature that they might injure the public health? If they were, then the statute was within the scope of the legislative power.

Tiedeman, Pol. Power, §§ 426, 427; *Fletcher v. Peck*, 6 Cranch. 87, 3 L. ed. 162; *State v. Marshall*, 64 N. H. 549, 1 L. R. A. 51.

Lake Massabesic being one of the great ponds of the state, and never having been granted away by the legislature, is still the property of the state, held in trust for the benefit of the public.

Concord Mfg. Co. v. Robertson, 86 N. H. 1, 18 L. R. A. 679.

In such waters no prescriptive rights can be gained by individuals.

State v. Franklin Falls Co. 49 N. H. 240, 6 Am. Rep. 513; *Collins v. Howard*, 65 N. H. 190; *Concord Mfg. Co. v. Robertson*, 86 N. H. 1, 18 L. R. A. 679.

The duty of protecting its citizens is one of which the state cannot divest itself.

State v. Forcier, 65 N. H. 42; *Stone v. Mississippi*, 101 U. S. 816, 25 L. ed. 1079, 1080; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Stuyvesant v. New York*, 7 Cow. 588; *People, New York Electric Lines Co., v. Squire*, 107 N. Y. 593.

It is often the effect of the exercise of the police power that it practically destroys the value of property by restricting its use.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205.

Such limitation of use is not a taking.

Com. v. Alger, 7 Cush. 53; *State v. Wheeler*, 44 N. J. L. 88.

The police power extends, not only to the abatement of that which has already become a nuisance, but also to the prohibition of acts which may become such.

Watertown v. Mayo, 109 Mass. 315, 12 Am. 41 L. R. A.

Rep. 694; *State v. Wheeler*, 44 N. J. L. 88; *State v. Cate*, 53 N. H. 240.

The authority that legislates for the state at large must determine whether particular rules shall extend to the whole state and all its citizens, or, on the other hand, to a subdivision of the state, or a single class of its citizens only.

Cooley, Const. Lim. 5th ed. pp. 482, 483; *Bailey v. Philadelphia, W. & B. R. Co.* 4 Harr. (Del.) 389, 44 Am. Dec. 593; *Pierce v. Kimball*, 9 Me. 54, 23 Am. Dec. 537.

The legislature may constitutionally pass a general law in relation to a particular place.

Scott v. Wilson, 3 N. H. 321; *State v. Noyes*, 30 N. H. 279; *Charter of Manchester*, 47 N. H. 277; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385; *Walston v. Nevins*, 128 U. S. 578, 32 L. ed. 544; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107; *Murshant v. Pennsylvania R. Co.* 153 U. S. 330, 38 L. ed. 751, 756; *People, New York Electric Lines Co., v. Squire*, 107 N. Y. 593; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694.

Mr. Edwin F. Jones, also for the State:

Laws passed in the exercise of this power are not obnoxious to constitutional provisions merely because they do not furnish compensation to the individual who is inconvenienced by them.

Bancroft v. Cambridge, 126 Mass. 441.

The law is not unconstitutional in that it is not an equal and uniform law of the state, for it applies to all citizens alike who act in the same way. Mr. Griffin has acted in throwing sawdust into the waters of the brook or lake.

Scott v. Wilson, 3 N. H. 321.

Police regulations need not be applicable to all parts of the state.

Watertown v. Mayo, 109 Mass. 319, 12 Am. Rep. 694; *State v. Noyes*, 30 N. H. 279.

Carpenter, Ch. J., delivered the opinion of the court:

If any person shall throw, place, leave, or cause to be thrown, placed, or left, any sawdust in Lake Massabesic, situated in Auburn and Manchester, or in any stream tributary thereto, he shall be punished for the first offense by a fine not exceeding \$20, or by imprisonment not exceeding thirty days, or both; and for any subsequent offense by a fine of not exceeding \$100, or by imprisonment not exceeding six months, or both." Laws 1891, chap. 26, § 1. The complaint is founded upon this statute. The circumstance that the defendant holds the mill under a lease from the city of Manchester and the stipulations of the lease are immaterial. The city cannot exempt the defendant from the operation of the statute. The only defense is that the act is unconstitutional. The defendant claims that it is in conflict with the Constitution for three distinct reasons, namely: Because (1) it deprives him of his property without compensation; (2) it is an exercise, not of legislative, but of judicial power; and (3) it is not an equal and uniform law, applicable equally to all persons similarly situated, but operates only against those engaged in a particular business in a particular part of the state.

"It is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and un-

qualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth . . . is derived directly or indirectly, from the government, and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. This is very different from the right of eminent domain,—the right of a government to take and appropriate private property to public use, whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power,—the power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise. There are many cases in which such a power is exercised by all well ordered governments, and where its fitness is so obvious that all well-regulated minds will regard it as reasonable. Such are the laws to prohibit the use of warehouses for the storage of gunpowder near habitations or highways; to restrain the height to which wooden buildings may be erected in populous neighborhoods, and require them to be covered with slate and other incombustible material; to prohibit buildings from being used for hospitals for contagious diseases, or for carrying on of noxious or offensive trades; to prohibit the raising of a dam, and causing stagnant water to spread over meadows near inhabited villages, thereby raising noxious exhalations, injurious to health and dangerous to life. Nor does the prohibition of the noxious use of property,—a prohibition imposed because such use would be injurious to the public,—although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. If the owner of a vacant lot in the midst of a city could erect thereon a great wooden building, and cover it with shingles, he might obtain a larger profit of his land than if obliged to build of stone or brick with a slated roof. If the owner of a warehouse, in a cluster of other buildings, could store quantities of gunpowder in it for himself and others, he might be saved the great expense of transportation. If a landlord could let his building for a smallpox hospital or a slaughterhouse, he might obtain an increased rent. But he is restrained; not because the public may have occasion to make

the like use, or to make any use of the property, or to take any benefit or profit to themselves from it; but because it would be a noxious use, contrary to the maxim, *sic utere tuo ut alienum non ladas*. It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is, therefore, not within the principle of property taken under the right of eminent domain." *Com. v. Alger*, 7 Cush. 53, 84-86. The universal doctrine on the subject is nowhere more clearly stated than in the foregoing language of Chief Justice Shaw. It has been often applied and never questioned in this state.

In *State v. Clark*, 28 N. H. 176, 61 Am. Dec. 611 (decided in 1854, when the keeping for sale of intoxicating liquors was not unlawful), it was held that a city ordinance adopted under legislative authority, prohibiting the keeping of liquors in "any refreshment room or restaurant for any purpose whatever," was constitutional. In *State v. Noyes*, 80 N. H. 279, it was held that the statute declaring a "bowling alley situate within 25 rods of any dwelling house, store, shop, schoolhouse, or place of public worship" to be a public nuisance (Laws 1845, chap. 245), was constitutional, although it deprived the defendant of the use of a bowling alley lawfully built, if not put in operation, before the statute took effect. It was not suggested by the defendant's counsel that the act was invalid for the reason that the defendant was deprived of that use of his property without compensation. In *State v. Freeman*, 88 N. H. 426 a city ordinance prohibiting restaurants to be kept open after 10 o'clock at night was held valid. Bell, J. says (p. 438): "It is an unavoidable consequence of city ordinances that they, in some degree, interfere with the unlimited exercise of private rights which were previously enjoyed. It is one thing to deprive a party of his rights, and quite another to regulate and restrain their exercise in such a manner as the common convenience and safety may require. If it is permissible to interfere in any way with the private right to carry on and manage his lawful business at such time and place and in such manner as suits himself, we are unable to see anything unreasonable in requiring places of public entertainment to be closed at seasonable hours. The guaranty of the Constitution is just as effective to secure the citizen against the interference of the legislature as of the city council, and it has never been questioned that the legislature may constitutionally pass laws materially interfering with the business of individuals." In *Morey v. Brown*, 42 N. H. 873, an act providing that no one should be liable for killing a dog found without a collar, etc., was held constitutional. Bartlett, J., says (p. 875): "The plaintiff claims that the act is in conflict with our Constitution, but we do not think so. It is not, as he argues, an act to take private property for public uses, or to deprive parties of their property in dogs, but merely to regulate the use and keeping of such property in a manner that seemed to the legislature reasonable and expedient. It is a mere police regulation, such as we think the legislature might constitutionally establish." A statute prohibiting the sale of goods by any

person outside his usual place of business within 2 miles of a public assembly convened for religious worship (Gen. Stat. chap. 255, § 9) is constitutional. *State v. Cate*, 58 N. H. 240. "Vice, pauperism, and crime may be suppressed and prevented by a variety of measures. In behalf of property, health, life, and morals the social contract may be performed by destroying buildings, burglars' tools, gambling, and counterfeiting implements, and intoxicating liquors. The spread of fire and physical, mental, and moral disease may be stopped by vigorous action. Destruction may be protection. . . . For the common security, by the judgment of his peers and the law of the land, an offender may be deprived of his estate, liberty, and life. Wrong may be obstructed and repressed by methods less severe than capital punishment. The protective power may seek by mild courses to lessen an evil, or check its increase. Instead of destroying the life, liberty, or property of wrongdoers, it may discourage their noxious business, and restrain it within certain bounds." *State v. United States & C. Exp. Co.* 60 N. H. 219, 257. "The police power of the state extends to the protection of the lives, health, comfort, and quiet of all persons and the protection of all property, within the state; and persons and property are subjected to such restraints and burdens as are reasonably necessary to secure the general comfort, health, and prosperity. . . . The state has authority to make regulations as to the time, mode, and circumstances under which parties shall assert, enjoy, or exercise their rights without coming in conflict with any of those constitutional principles which are established for the protection of private rights and private property." *State v. White*, 64 N. H. 48, 50. In *State v. Campbell*, 64 N. H. 402, a statute prohibiting the sale of milk containing less than a specified per cent of milk solids, though perfectly pure and wholesome, was held valid. The court says (p. 403, 64 N. H.): "Under what is generally called the police power of the state, . . . the sale of bread, the inspection of flour, beef, pork, and other provisions, the practice of medicine, surgery, and dentistry, the licensing of druggists, and the sales of drugs and medicines, are regulated, and the sale of spirituous or intoxicating liquor prohibited by statute. . . . Such legislation is not open to the objection that it transcends the limits of legislative authority, the purpose and object of such legislation being the protection of the lives, health, comfort, and safety to all persons; and for securing this purpose persons and property are subjected to many restraints and burdens. They are presumed to be rewarded by the common benefits secured." *Bancroft v. Cambridge*, 126 Mass. 438, 441. In *Mugler v. Kansas*, 123 U. S. 628, 664, 670, 31 L. ed. 205, 211, 218, it was held that the owners of breweries that were made worthless by a statute forbidding the manufacture of malt liquors were entitled to no compensation for the practical destruction of their property. Any conceivable statute enacted under the police power, and regulating the use of property, must necessarily affect injuriously individual rights, but in no instance, so far as known, has it been de-

clared by a court of last resort that persons whose interests are so affected are entitled to compensation. Under the law of eminent domain no one is entitled to compensation for injuries, however serious they may be, caused by public improvements, if no part of his lands or property is taken therefor. *Kennett's Petition*, 24 N. H. 139, 143; *Mount Washington Road Co.'s Petition*, 35 N. H. 184, 146, 147.

The objection that the act is judicial in its character—that in enacting it the legislature exercised its judicial power—has no better foundation. *Merrill v. Sherburne*, 1 N. H. 199, 203, 204, 8 Am. Dec. 52. The precise question was considered and decided in *State v. Noyes*, 30 N. H. 279, where it was held that the statute declaring bowling alleys situated within 25 rods of a dwelling are public nuisances, was not, for this reason, unconstitutional. Bell, J., says (pp. 294, 295): "It is objected to this law that, if otherwise constitutional, it is forbidden by the Constitution, because it undertakes to determine questions of fact and law, and is judicial in its character. What is or is not a nuisance, is a judicial question, it is said, to be determined by courts; and this is clearly so. Nothing is a nuisance unless it is made such by the law, and to determine what is by the law a nuisance is an exercise of judicial power. But the legislature do not exceed their legitimate authority when they make a change of the law, and constitute that an offense which was not such before, nor when they make certain acts an offense of a particular kind within which they were not previously included. There may be an apparent unfitness sometimes in such legislation, but its validity has never been questioned. . . . It may be said that a bowling alley is not of itself a nuisance, since it may either remain unused, or it may be used only as a place of innocent amusement; that its injurious character depends upon the improper use alone. But the legislature may well determine that an instrument which tends to facilitate vicious practices is of itself an evil which ought to be prohibited. There seems to us, then to be no sound foundation for this exception." *Farnum's Petition*, 51 N. H. 376, 380, 381.

The instances are numerous in which acts and things not nuisances at common law, and in themselves harmless and inoffensive, or even beneficial, and only liable to become offensive to the public health or comfort by improper use, have been by statute declared nuisances. Such legislation, whenever brought in question, has been sustained by the courts. Pub. Stat. chap. 108, §§ 8, 10, 12, 15; *State v. Wilton*, 43 N. H. 415, 420, 89 Am. Dec. 163. The following are a few out of the many early examples of such legislation, viz.: The act of April 6, 1781, against permitting swine to go at large in Portsmouth (Laws, ed. 1789, p. 174); of February 28, 1786, forbidding gunpowder in excess of 10 pounds to be kept in private houses in Portsmouth (Laws, p. 184); of January 3, 1792, forbidding the erection or occupation of slaughter houses or a house for currying leather or trying tallow in the compact part of any town (Laws, ed. 1797, p. 194); of January 14, 1795, against permitting horses, etc., to go at large without fetters (Laws, p. 340); of February 18, 1794, forbidding gun-

powder in excess of 10 pounds to be kept in private houses or in vessels at the wharves in Portsmouth (Laws, pp. 359, 860); of June 16, 1791, against permitting swine to go at large in any town without being yoked and ringed, or at all in Portsmouth (Laws, p. 870); of June 16, 1792, prohibiting the casting of gravel, stones, ashes, etc., into Portsmouth Harbor (Laws, p. 891); of June 22, 1788, prohibiting the setting of gill nets in Ammonoosuc river (Laws, p. 402); of January 9, 1795, prohibiting seines, nets, and pots in Connecticut river (Laws, p. 404). The act of October 19, 1887, declaring any building used for the illegal sale of spirituous or malt liquors, wine, or cider to be a common nuisance, has been sustained by many decisions. Whether a statute restricting individual rights, that is enacted for the purpose of protecting the public health, may be declared unconstitutional and void, because, in the opinion of the court, it has no such effect, is a question not raised. It is found that the tendency of sawdust in the water is to render it unwholesome. It is needless to pursue the subject. It is enough to say that this objection cannot be sustained without overruling *State v. Noyes*.

The principal ground relied upon is that the act is local in its operation. It is not, it is said, equal and uniform, and does not apply to all persons similarly situated. It operates, it is urged, against a class only and those engaged in a particular occupation in a part only of the state. It is said that, "if the water supply of Manchester needs a sawdust law, the water supplies of other towns in the same situation need the same law. If an infusion of sawdust is unwholesome for the people of Manchester it is unwholesome for other people."

If Massabesic can be selected by a state law for protection unknown elsewhere, the well of a Massabesic farmer can be protected by a penal enactment applicable to no other well.

All wells, springs, and brooks from which the owners and their families take their supply of water for domestic purposes are equally entitled to protection. A statute making it a felony or misdemeanor to put sawdust or other substance in the well of A. B. in Haverhill, and leaving all other wells in the state protected by the common law alone, would be valid if the act of 1891 is valid in giving Manchester a protection against sawdust that is not given to anybody else in the same situation. Under a state law equality is a right, or the construction repeatedly put upon the Constitution from 1827 to the present time is a false pretense." In other words, it is claimed that a general law applicable to a particular place, or not applicable throughout the entire state, is unconstitutional. The legislature cannot make an act a penal offense in one locality,—as a city, town, or other place,—where, for the public welfare, the legislation is necessary, without also making it penal in all other parts of the state, though in none of them is the protection necessary or desirable. It cannot forbid the killing of the few deer found in the small and scattered forests of Cheshire county, without also forbidding it in the vast wilderness of Coos, though there they become so numerous as to be a pest. It cannot protect the wells of Haverhill, where the state of so-

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ciety makes protection necessary, without extending it to all other wells, though they need no protection. It cannot confer an authority upon one town which it does not give to all. Legislation required for the public good in Strafford county must be made applicable to Grafton, though there it is injurious. The acts for the protection of the Duston monument (Laws 1874, chap. 44) and of Corbin Park (Laws 1895, chap. 258) are unconstitutional and void. If, however, the words, "or any other like monument in the state," "or any other like park in the state," were added, though no other such monument or park exists, the statutes would be valid: that is to say, the constitutionality of a statute may depend upon the presence or absence of words that in practical effect are immaterial. If this is sound constitutional law, more than a thousand invalid statutes have been enacted since the adoption of the Constitution. In numerous instances rights under them have been enforced, and punishment for their violation has been inflicted by judicial action. Not one in a hundred of such cases appears in the reports, and in two only of the reported cases (*Scott v. Willson*, 3 N. H. 821, and *Charter of Manchester*, 47 N. H. 277), was this objection taken, in both of which it was overruled. In all this class of cases for more than a hundred years our courts have administered to the people gross injustice, instead of constitutional justice. No clause in the Constitution condemning such legislation is pointed out. No judgment of the court declaring it invalid is cited. No such decision can be found. The sole argument of the defendant in support of his position is that the act is inconsistent with "the equality of right which the Constitution secures to all; that it discriminates in favor of some citizens to the detriment of others." The argument is without foundation in fact. The statute makes no discrimination. It does not permit some persons and forbid others to put sawdust in the lake. Everybody is prohibited. "Any person," says the statute, who puts sawdust in the lake, shall be punished. True it is that the prohibition affects the owners of sawmills on the lake shore more seriously than the farmers, and it affects the farmers there dwelling more seriously than the farmers of Coos. Such is necessarily the effect of all restrictive laws. They affect some persons more than others. A similar objection might be made against the larceny law. It has no effect upon the great body of the people, but upon a small class only, namely, the thieves. In the sense of the defendant's argument, it is as unequal as the sawdust law.

The act confers upon Manchester or its citizens no individual or exclusive right or benefit, within the meaning of the Constitution. Every inhabitant of the state is entitled to enjoy the benefits conferred by the statute on complying with the necessary conditions, as he may, if he choose, enjoy the benefit of the aqueduct itself or of any other property taken for the public use. If this act violates the law of equality prescribed by the Constitution because only the 50,000 inhabitants of Manchester are directly benefited by it, because to reap its benefit a person must go to Manchester, all acts authorizing the condemnation of private

property for aqueducts, cemeteries, or other public uses, which, from their nature, can be enjoyed only in the towns and cities where they are located, are equally invalid. It is impossible to hold that the legislation in the latter case is for the public good, and that it is not in the former. The equality of the Constitution is the equality of persons, and not of places; the equality of right, and not of enjoyment. A law that confers equal rights on all citizens of the state, or subjects them to equal burdens, and inflicts equal penalties on every person who violates it, is an equal law, though no one can enjoy the right, be subjected to the burden, or infringe its provisions, without going to or being in a particular part of the state. It does not discriminate in favor of some at the expense of others. There are places regarding which any protective legislation must necessarily be special; as, for example, Corbin Park and the state-house yard. Laws 1883, chap. 12; Pub. Stat. chap. 7, § 5. If general in form, it would be special in substance. There are few, if any, towns, cities, or other subdivisions of the state, whose situation and circumstances are so nearly alike that legislation may not be required for one that is not necessary or desirable for any other. Many may be so differently situated that legislation essential for one would be injurious to the others. No two cities in the state are governed by exactly the same ordinances. Acts made penal offenses in some cities are innocent in others. No two charters are alike. Some cities have over them a police commission, while others select and control their police officers. Their authority and their ordinances differ in many particulars. So it is, in perhaps a less degree, with towns. Many have been given authority which others do not possess. Their by-laws (Pub. Stat. chap. 40, §§ 7, 8) are not uniform. Acts forbidden in some towns are permitted in others. It is said that this lack of uniformity results "from the exercise of limited powers of local government granted to towns and cities," and therefore has no bearing on the present question. In the first place, it is not, as a matter of fact, altogether a result of local ordinances or by-laws. Much of it is created by the direct action of the legislature; as, for example, in the creation of police commissioners, and in conferring special powers upon particular towns. In the next place, acts under a delegated power are the acts of the principal. The principal cannot confer upon his agent a power which he does not himself possess. Whatever by laws and ordinances the legislature can lawfully authorize towns and cities to adopt, it has the constitutional power to enact directly. *Wooster v. Plymouth*, 62 N. H. 193, 208-210; *State v. Noyes*, 30 N. H. 279, 298. The legislature may at any time resume the delegated powers. *Rumney & W. Union School Dist. v. Smart*, 18 N. H. 268, 273; *Liabon v. Clark*, 18 N. H. 234; *Stevens v. Dimond*, 6 N. H. 330, 331; *State v. Hayes*, 61 N. H. 335; *Berlin v. Gorham*, 34 N. H. 266, 275. If the legislature is by the Constitution forbidden to enact such laws, it cannot authorize towns and cities to enact them. It cannot confer a power it does not itself possess. It is not for the court to inquire into the wisdom or unwisdom of such legislation.

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Whether the act "be wise, reasonable, or expedient is a legislative, and not a judicial, question. The legislature is as capable of determining the question of the wisdom, reasonableness, and expediency of a statute, and of the necessity for its enactment, as the courts. The only inquiry is whether the statute conflicts with the Constitution." *State v. Marshall*, 64 N. H. 549, 550, 1 L. R. A. 51; *Par-num's Petition*, 51 N. H. 376, 378. The question is one of constitutional power.

It is not easy to see how a requirement that all general statutes shall be made applicable equally to all similarly situated portions of the state could be given practical effect unless the legislature were made the final and exclusive judge of what places, towns, or cities are so situated. Cooley, Const. Lim. 4th ed. 156, note. It is a question of fact. Is it to be determined by a jury, and the validity or invalidity of the statute made to depend upon their verdict? *State v. Campbell*, 64 N. H. 403, 404. The question is concluded by our decisions. In *Scott v. Willson*, 3 N. H. 321, decided in 1825, it was held that an act regulating the mode of putting pine timber into Connecticut river was not repugnant to the Constitution, for the reason that it "does not embrace all rivers, but is confined to Connecticut river." Richardson, Ch. J., says (p. 328): "It has been decided in Massachusetts that an act attempting to suspend the operation of a general law in relation to a particular person was unconstitutional. *Holden v. James*, 11 Mass. 396, 6 Am. Dec. 174. But that decision has no bearing upon the question to be decided in this case. Here the objection is not that the law does not extend to all persons, but that it does not extend to all places. The objection in truth is that the statute is a general law in relation to a particular place. But we have been referred to no clause in our Constitution which restrains the legislature from passing such a law; nor have our researches enabled us to find any such clause." Richardson, Ch. J., and his associates thought the proposition so obviously sound as to require no elaboration. It is needless to say that nothing is to be found in *Opinion of the Justices* (the same judges) 4 N. H. 572, inconsistent with this doctrine. In *Charter of Manchester*, 47 N. H. 277, decided in 1867, it was held that an act requiring the check list in the city of Manchester to be regulated in a different manner from that prescribed by the general law in all other places, towns, or cities was not, for that reason, unconstitutional. Sargent, J., says (p. 279): "But it may be said that the rule should be uniform, and administered alike in all places. There might be more weight in this objection if all the other attendant circumstances were the same. We by no means intimate an opinion that the legislature might not constitutionally impose these duties relative to the check list, upon one set of officers in some towns and counties, and upon a different board in other towns and counties. The legislature may constitutionally pass a general law in relation to a particular place. *Scott v. Willson*, 3 N. H. 321, 328; *State v. Noyes*, 30 N. H. 279. So, general statutes have been passed in regard to schools in Portsmouth and in Somersworth,

differing widely from the general law relating to schools in other parts of the state. Comp. Laws, chaps. 80, 81. But when we consider the difference between the wards of a city and towns not connected with any city, we see at once that there is such a difference in circumstances as may well justify a difference in the board selected to perform these duties if such a justification were necessary." The question was directly involved in *State v. Franklin Falls Co.* (1870) 49 N. H. 240, 6 Am. Rep. 518. It was there held that the statute (Gen. Stat. chap. 251, § 20), prohibiting the maintenance of dams on the Winnipisogee river (and five others) was constitutional. The objection that the statute was local in its application was not alluded to either by counsel or the court, and for the reason, undoubtedly, that they understood that it was not tenable; that the question was not an open one. The same is true of *State v. Roberts* (1879) 59 N. H. 256, 484, 47 Am. Rep. 199, where the defendant was indicted, convicted, and presumably punished for taking trout from his own pond, under a statute prohibiting the taking of trout in certain months from any waters of the state except certain lakes and a certain pond. So, also, of *Purinton v. Ladd*, 58 N. H. 596, which was debt for the penalty under the same statute. Laws 1872, chap. 55.

The latest judicial declaration bearing upon the question is found in *Opinion of the Justices*, 66 N. H. 629, 665, where it is said that "a special act is not to be declared void because it is opposed to a spirit supposed to pervade the Constitution, but not made an operative part of it by express words, or necessary implication, that is, by fair construction." Until 1864, deposits in savings banks were taxed to the depositors like other property. Rev. Stat. chap. 89, § 3; Comp. Stat. chap. 41, § 4; Laws 1864, chap. 4028. By the act of 1864 the banks were required to pay a tax of $\frac{1}{2}$ of 1 per cent on the deposits, to be in full of all taxes on the depositors on account of the deposits. In 1869 the tax was increased to 1 per cent (Laws 1869, chap. 4, § 3), and so it remained until 1895, when it was reduced to $\frac{1}{4}$ of 1 per cent. (Laws 1895, chap. 108.) This was a heavy discrimination in favor of the depositors. *First Nat. Bank v. Concord*, 59 N. H. 75, 78. They were required to pay in many towns less than one half the tax assessed on other property. Yet, notwithstanding the express provisions of the Constitution that the general court may "impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of and residents within the said state, and upon all estates within the same" (article 5), and "in order that such assessments may be made with equality" require that a valuation of the estates be taken anew once in every five years (article 6), and declare that "every member of the community . . . is bound to contribute his share" of the public expense (Bill of Rights, art. 12, and the numerous judicial decisions thereon, — *State v. Pennoyer*, 65 N. H. 113, 114, 5 L. R. A. 709), this court in 1888 (less than twenty years after the enactment creating the discrimination), declared that "the savings bank tax . . . is an anomaly resting on peculiar grounds of public policy, and is uni-

versally understood to have acquired the position of an exception to the constitutional rule of equality." *Boston, C. & M. R. Co. v. State*, 62 N. H. 648, 649. How did it become an exception? Solely by virtue of the statute creating it and less than twenty years' of public acquiescence. In *Morrison v. Manchester*, 58 N. H. 588, 551, 552 (decided in 1879), the court said: "In this state the taxability of money at interest is not an open judicial question. Whether the assessment of money at interest is a process of ascertaining the lender's or the borrower's just share of the public expense, or an exceptional, double, or otherwise wrongful taxation of the borrower, . . . permitted, not required, by an erroneous constitutional construction established by legislative usage and judicial recognition, we need not inquire. If the assessment of a creditor for his interest bearing loan of money is in effect, either a double taxation of his debtor, or a taxation of the debtor for property which, by conveyance or destruction, has ceased to be his, . . . such taxation is sustained by the authority of precedent. . . . The precedent is too firmly established to be overthrown by any other authority than that of making laws." In other words, a legislative usage for something less than 100 years, accompanied by judicial recognition, is sufficient to establish a rule of taxation forbidden by the Constitution. "Local self-government, . . . in uninterrupted operation for more than 240 years, has been constitutionally established by recognition and usage." Doe, Ch. J., *State v. Pearson v. Hayes*, 61 N. H. 264, 322. "When a question arises as to the contemporaneous meaning of the terms used in an ancient instrument, early and long continued usage has a controlling weight." The *Dublin Case*, 38 N. H. 459, 512; *Pierce v. State*, 13 N. H. 586, 573; *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444, 459; *Copp v. Henniker*, 55 N. H. 179, 209, 20 Am. Rep. 194; *King v. Hopkins*, 57 N. H. 334, 356; *Keniston v. State*, 63 N. H. 37, 38, 56 Am. Rep. 496.

Immediately upon the adoption of the Constitution in 1784, the legislature (many members of which, and of succeeding legislatures, were members of the convention, and participated in framing the Constitution) began to enact general laws applicable to particular places. They have continued to do so from that time to this,—more than 100 years. There have been few, if any, legislative sessions during which one or more statutes of this character have not been enacted. Their number is very great. They have been sanctioned by judicial decisions. Not a *dictum* or intimation against their validity is to be found in our reports, nor, it is believed, in those of any other state, in the absence of express constitutional prohibition. They have been acquiesced in by the public. Under them rights have accrued and have been enforced. Many persons have been punished for violating them. It is not claimed that such legislation is expressly forbidden. Conceding (for sake of the argument) that it is unwise, and opposed to the general spirit of the Constitution, this long continued usage, recognition, and acquiescence must, (even if there were no judicial decision on the subject), under our established doctrine

of constitutional construction, be held decisive upon the question of legislative power. "Laws, public in their objects may, unless express constitutional provision forbids, be either general or local in their application; they may embrace many subjects or one; and they may extend to all citizens or be confined to particular classes, as minors, or married women, bankers, or traders, and the like. The authority that legislates for the state at large must determine whether particular rules shall extend to the whole state and all its citizens, or, on the other hand, to a subdivision of the state, or a single class of its citizens only. The circumstances of a particular locality or the prevailing public sentiment in that section of the state, may require or make acceptable different police regulations from those demanded in another, or call for different taxation, and a different application of the public moneys. The legislature may therefore prescribe or authorize different laws of police, allow the right of eminent domain to be exercised in different cases, and through different agencies, and prescribe pe-

culiar restrictions upon taxation in each distinct municipality, provided the state Constitution does not forbid. These discriminations are made constantly; and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle. . . . The business of common carriers for instance, or of bankers, may require special statutory regulations for the general benefit and it may be matter of public policy to give laborers in one business a specific lien for their wages, when it would be impracticable or impolitic to do the same for persons engaged in some other employments. If the laws be otherwise unobjectionable, all that can be required in these cases is, that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge." Cooley, Const. Lim. 4th ed. pp. 488, 489.

Appeal dismissed.

All concur.

OHIO SUPREME COURT.

LUFKIN RULE COMPANY, *Ptff. in Err.*,

v.
Xavier FRINGELI *et al.*

(57 Ohio St. 596.)

*1. All agreements in general restraint of trade are against public policy and void; but agreements having such partial effect only, made in connection with the purchase of a business and its goodwill, shown to be reasonably necessary to the enjoyment of the goodwill of the business purchased, and not oppressive, may be enforced.

2. Where one engaged in the same business as another purchases that of the latter, with its goodwill, and takes from the latter a stipulation that he will not directly nor indirectly engage in the same business in the state, nor in the United States, for the period of twenty-five years, such agreement necessarily tends to create a monopoly; and, whether necessary or not to the reasonable enjoyment of the goodwill so purchased, the interest of the public in the nonenforcement of such an agreement outweighs the interest of the purchaser in its enforcement, and it is void.

3. Such an agreement is not divisible, for the reason that, if restrained to the limits of the state, still such restraint would be general in its nature, and obnoxious to all the objections that exist against a general restraint of trade.

(February 1, 1898.)

ERROR to the Circuit Court for Cuyahoga County to review a judgment affirming a judgment of the Court of Common Pleas in favor of defendant in an action brought to

*Headnotes by the COURT.

NOTE.—As to the validity of contracts of sale in restraint of trade without limitation of place, see note to Gamewell Fire Alarm Teleg. Co. v. Crane (Mass.) 22 L. R. A. 673.
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enforce a contract to refrain from engaging in business in competition with plaintiff. *Affirmed.*

Statement by Minshall, J.:

The suit below was brought to enforce an agreement claimed by the defendant on demurrer to be in general restraint of trade, and therefore void. The petition is as follows: "The plaintiff says it is a corporation under the laws of Ohio; that the defendants Xavier and Lucas Fringeli are partners under the firm name of the Fringeli Rule Company. The plaintiff further says that on January 28, 1893, and prior thereto, the said Xavier Fringeli and Lucas Fringeli, partners as the Fringeli Rule Company, and the said Frank and Charles Fringeli, were all engaged in the city of Cleveland, Ohio, in the business of manufacturing and dealing in wood, iron, steel, and copper rules, pencil holders, calipers, and gauges for measuring timber, logs, lumber, and other things, and said defendants then had a factory, located at No. 7 Bergen street, equipped with machinery, tools, implements, furniture, patterns, dies, molds, engine, boiler, shafting, belting, and other property and appurtenances used in the manufacture of said rules, etc., and in handling the materials therefor, and then had on hand large quantities of manufactured rules, and materials of various kinds in process of being made into rules and other things, and also had accounts receivable, and other choses in action and resources connected with said business, including a leasehold interest in certain real estate, and had an established business, trade, and goodwill, all of which property, interest, business, and goodwill the said defendants then

In connection with the present case, see the more liberal rule of the Massachusetts decision in Anchor Electric Co. v. Hawks, post, 189.

sold, assigned, and transferred to the plaintiff by an agreement in writing dated January 28, 1893; and the said defendants further stipulated in said agreement that the demand for the kind of goods which they were then producing, owing to the nature of the goods, was limited in quantity, and restricted chiefly to the sections of the United States where lumber is manufactured and handled; and said defendants also agreed that the plaintiff, who was then engaged in the same business extensively, had ample facilities to supply the demands for said goods throughout the United States promptly and at reasonable prices. Said defendants jointly and severally bound themselves not to engage in, or be in any way, directly or indirectly, connected with, the manufacturing, dealing in, or handling of board or log rules, lumber gauges, log calipers, pencil holders, or any of the other goods which the defendants were then making or dealing in, within the state of Ohio, or elsewhere in the United States, at any time during the next ensuing twenty-five years; and the said Frank and Charles Fringeli specially agreed that they would not directly or indirectly engage in the manufacturing or production of any of said articles within the United States during the said period of twenty-five years; and said defendants further agreed to promote the interest and aid the business of said plaintiff, and agreed that the said plaintiff should receive all orders, letters, documents, papers, and correspondence then in the possession of the defendants, and all such letters and orders as they might thereafter receive; and said defendants then agreed and authorized the plaintiff to use the name of the Fringeli Rule Company for any purpose connected with the business, or which the plaintiff might deem essential to promote its business; and the said defendants also agreed not to use said name, or any of their names, in connection with the rule business, throughout the United States, during the said period of twenty-five years. As consideration for the transfer of said property and the agreement above specified, the plaintiff agreed to pay to said defendants the sum of \$1,277.45, in certain instalments, ending March 1, 1894, all of which instalments have been paid according to said agreement by the plaintiff. It is further stipulated in said agreement that if said defendants Xavier and Lucas Fringeli, or either of them, shall in any respect violate the provisions thereof as to engaging in the manufacturing or handling said rules and other articles, then and in that case they shall become liable to the plaintiff, as for so much liquidated damages, in the sum of \$5,000; and said Frank and Charles Fringeli also separately agreed in said contract not to engage, directly or indirectly, in the manufacturing, dealing in, or handling any of the goods in the foregoing agreement mentioned, and if they, or either of them do so, they shall become liable and indebted to the party of the second part in the sum of \$5,000, liquidated damages. The plaintiff further says that the said defendants Xavier, Lucas, Frank, and Charles Fringeli have violated said agreement, and are infringing the same, in the manner following, to wit: They have established a factory at 272 Wellington avenue, in Cleveland, Ohio, and

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have equipped it with machinery, and are now therein engaged in manufacturing board and log rules, lumber gauges, log calipers, and other articles which they agreed not to manufacture, in said contract; and they are also selling the same, and sending out circulars to dealers in said articles all over the United States, offering to fill orders for all of said materials, and soliciting orders and correspondence, all in violation of said agreement, and without any right or authority from the plaintiff. The plaintiff further says that said conduct of said defendants causes a constant and increasing damage to its business, by interrupting and interfering therewith, and such damage is irreparable, owing to its peculiar nature, and because each and all of the defendants are insolvent, and have no property or resources to pay damages, and the plaintiff has no adequate remedy at law. The plaintiff further says that the said defendants are carrying on said business at No. 272 Wellington street aforesaid in the name of the Cleveland Rule Company, which all of the defendants claim is a partnership composed of the defendants Andrew Fringeli and George Junglas, but the plaintiff says that neither said Andrew Fringeli nor George Junglas has contributed any money or capital to said business, nor have they done, nor do they intend to do, anything in connection therewith; that they are not acquainted with the business, are not mechanics, have no money or resources, and are unable to take any part in the business which the other defendants are carrying on; that the names Andrew Fringeli and George Junglas are used by the other defendants collusively, for the purpose of cheating and defrauding the plaintiff, and concealing their real purpose and actions, and evading liability under said contract. The plaintiff says that all of the business carried on at said place under the name of the Cleveland Rule Company is directed and carried on in all respects by the defendants, Xavier, Lucas, Frank, and Charles Fringeli. The plaintiff says that it will sustain great and irreparable damages unless the further conduct and management of said business by said defendants is restrained by order of this court. The plaintiff further says that a copy of said contract, dated January 28, 1893, is hereto attached, and filed herewith. Wherefore the plaintiff prays that the defendants may be restrained by order of this court, and enjoined from manufacturing, handling, dealing in, or offering for sale any of said rules, calipers, or other things which they agreed not to manufacture as aforesaid; that on the final hearing hereof the plaintiff may have a judgment against said Xavier Fringeli and Lucas Fringeli for \$5,000, and against said Frank Fringeli and Charles Fringeli for \$5,000, and that all of said defendants be perpetually restrained from doing said acts, and from in any way interfering in the plaintiff's business in violation of said contract; and that the plaintiff may have such other and further relief in the premises as it may be entitled to have in equity."

Messrs. Dickey, Brewer, & McGowan,
for plaintiff in error:

It is lawful for manufacturers and dealers.

for a fair consideration and in good faith, to sell their goodwill in a business, trade, or occupation, and to agree not to pursue the same for a limited time in a prescribed territory.

The agreement as to time, territory, and kind of business, may have such scope as is necessary to protect the purchaser in the goodwill which he acquires.

Morgan v. Perhamus, 36 Ohio St. 517, 38 Am. Rep. 607; *Paragon Oil Co. v. Hall*, 7 Ohio C. C. 240.

Where the contract is an incident to a bona fide purchase of business and goodwill, and the restraint is such only as affords a fair protection to the interests of the vendee, it will be upheld without regard to time or extent of the restraint.

The true test is reasonableness, rather than the extent of time or space.

Gibbs v. Consolidated Gas Co. 130 U. S. 396, 32 L. ed. 979; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464; *Nordenfellt v. Maxim Nordenfellt Guns & A. Co.* [1894] A. C. 585; *Ellerman v. Chicago Junction R. & U. Stockyards Co.* 49 N. J. Eq. 217; *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 23 L. R. A. 639; *Tode v. Gross*, 127 N. Y. 480, 13 L. R. A. 652; *Collins v. Locke*, L. R. 4 App. Cas. 674; *Herrshoff v. Boutineau*, 17 R. I. 3, 8 L. R. A. 469; *Central Shade Roller Co. v. Oushman*, 143 Mass. 353; *Gamevell Fire Alarm Teleg. Co. v. Orane*, 160 Mass. 50, 22 L. R. A. 678.

Mr. Allan T. Brinsmade, for defendants in error:

All contracts in general restraint of trade are opposed to public policy and void; and those in partial restraint are also illegal, except when founded upon a valuable consideration, and when good reasons appear for entering into the contract.

Lange v. Werk, 2 Ohio St. 520; *Thomas v. Miles*, 3 Ohio St. 275; *Grasselli v. Lowden*, 11 Ohio St. 349.

To prevent competition in the business of rule making was the controlling idea of this corporation, the Lufkin Rule Company, and though it had "ample facilities to supply the demand promptly and at reasonable prices," the usual plea of such corporations and of trusts and combinations,—yet it is for the court to look further and contemplate what such corporations might do.

State, Atty. Gen., v. Standard Oil Co. 49 Ohio St. 137, 15 L. R. A. 145.

In *Richards v. American Desk & Seating Co.* 87 Wis. 603, the court held that the pleading was demurrable in not affirmatively showing that the restraint was reasonably necessary to protect defendant's interest under the contract.

Minshall, J., delivered the opinion of the court:

The question in this case arises on a demurrer to the petition, which was sustained in the common pleas, and the judgment was affirmed in the circuit court. From the petition and the agreement annexed to it, it appears that Xavier and Lucas Fringell, as partners under the name of the Fringell Rule Company, were carrying on the business at Cleveland, Ohio, of manufacturing and selling rules and other instruments used principally in measuring lumber, and that the plaintiff, the Lufkin Rule

Company, an Ohio corporation, with its principal office at Saginaw, Michigan, engaged in the same business on January 28, 1893, purchased the business and assets of the Fringellis, together with the goodwill of the firm; they agreeing not to engage in the same business, directly or indirectly, in the state of Ohio or in the United States, for a period of twenty-five years. The Fringellis also assented to the statement, contained in the agreement between the parties, "that the demand for the different kinds of rules which they produce is limited as to quantity, and restricted to the section of the United States where lumber is manufactured and handled; and the parties of the second part [Lufkin Rule Company] have ample facilities to supply the demand in all sections of the United States, promptly, at reasonable figures." Afterwards, the agreement having been performed on the part of the plaintiff, the defendants violated it, and continue to violate it, by carrying on the same business, with others, at Cleveland, Ohio, in the name of the Cleveland Rule Company. It asks for liquidated damages, as fixed by the agreement, and for an injunction restraining the defendants from further prosecuting the business.

It is the settled rule in this state that all agreements in general restraint of trade are against public policy and void; but it is held that agreements that only impose a partial restraint, made in connection with the purchase of a business, that are reasonably necessary to make available the goodwill purchased with the business, and are reasonable, and not oppressive, may be enforced. The case of *Lange v. Werk*, 2 Ohio St. 519, is the leading one on the subject. The authorities there, both in England and this country, at that time were so fully and intelligently considered as to dispense with their examination here. In that case the party, by his covenant, was restrained from engaging in the business of manufacturing stearin or star candles in Hamilton county, state of Ohio, or at any other place whatsoever in the United States. The covenant was regarded as divisible, and that that part of it which bound Lange not to pursue the business or give his assistance at any place in the United States was void, being in general restraint of trade; but as to Hamilton county, it was held that, if it were attended with certain other necessary requisites, it might be good. These requisites were stated to be: (1) That the restraint is partial; (2) that it is founded on a valuable consideration; and (3) that the contract is reasonable, and not oppressive,—the presumption being always, in the first instance, that it is illegal, and must be overcome by the party seeking to enforce it, before relief can be had. The presumption of illegality arises from the fact that any restraint of the kind tends to oppression, by depriving the individual of the right to engage in a pursuit or trade with which he is generally most familiar, and consequently the community of the services of a skillful laborer; and the general effect must be, more or less, to encourage idleness, and affect the price of such things as has been produced by his labor. These are the general reasons against any restraint of trade, and, being founded in the nature of things, cannot be materially varied by any change in the times and circumstances

of the people. The judge, however, in delivering the opinion in the above case, says that "no case is to be found where such a contract has been upheld, which covered the whole of England or a state of this Union." Such restraints are regarded as general. And it will be observed that in the case before us the restraint at the least, is to the state of Ohio, and hence the agreement is not capable of such a division as under any circumstances would make it a valid one. It is in general restraint of trade. In *Taylor v. Blanchard*, 18 Allen, 370, 90 Am. Dec. 208, where the restraint extended only to the state of Massachusetts, the court said: "We do not think the extent of the territory embraced in a state affects the principle. Whatever may be the extent of the state, the monopoly restricts the citizen from pursuing his business unless he transfers his residence and his allegiance to some other state or country. Its tendency is to drive business and citizens who are skilled in business from this to other states. If one is not at liberty to carry on his business here, but is at liberty to do so elsewhere, he will be likely to go elsewhere, and employ others to go with him." And see also *Chappel v. Brockway*, 21 Wend. 157; *Dunlop v. Gregory*, 10 N. Y. 241, 244, 61 Am. Dec. 746; *Wright v. Ryder*, 36 Cal. 842, 95 Am. Dec. 186; *Homerv. Ashford*, 8 Bing. 828. The doctrine of *Lange v. Werk* was followed in *Thomas v. Miles*, 3 Ohio St. 274. There the restraint extended to carrying on the business in the city of Cincinnati, or any other point where agencies might be established. It was held that under the facts of that case, while the restraint as to Cincinnati was reasonable, and might be sustained, yet, so far as it attempted to prevent Miles from competing with any branch that Thomas might establish at any and all other places, it was clearly opposed to public policy and void. It was not departed from in *Morgan v. Perkamus*, 36 Ohio St. 517, 88 Am. Rep. 607. There the restraint was partial. Mrs. Morgan carried on the business of a dressmaker in the town of Felicity, Clermont county, Ohio. She sold her business to another, with the goodwill, and bound herself not to carry it on in the same town, or at any place within such distance as would interfere with the business. Mrs. Morgan commenced to carry on the same business in Felicity, and was enjoined. The goodwill being in general nothing more than the probability that the old customers will resort to the old place for the purpose of trade, it is apparent that in this case the restraint imposed was reasonable, being no more than was required to secure the goodwill of the business to the purchaser, and was not oppressive, as she was at liberty to carry on the same business outside of the limits to which the goodwill of her former business, carried on in Felicity, extended. Partial restraints on trade, of this character, have been generally sustained, and they are the only ones that have been, in this state or elsewhere, unless it be in a few modern instances, to which we will hereafter refer.

But there is a particular feature in this contract, reflecting on its purpose and character, that deserves notice, to wit, the statement, to which the Fringells are required to, and do, assent, that the demand for the kind of goods

they were then manufacturing was limited in quantity, and restricted chiefly to particular sections of the country; and that plaintiff, who was then engaged in the same business extensively, had ample facilities to supply the demand "promptly and at reasonable prices." This was likely introduced for the purpose of showing the reasonableness of the contract, but, when analyzed, tends more strongly to show that its principal object was, not simply to acquire the defendant's business and its goodwill as an investment, but to purchase them out of business, that it might have a more complete monopoly of the entire business of making rules, and therefore, on principles of public policy, should not receive any aid from the courts in its enforcement. That the field is a limited one only furnishes the more reason on the part of the public that it should not be engrossed by a single person, and the statement that it has the facilities to supply the public at reasonable prices lacks perception of the real ground of objection. Certainly we are not called on to relearn how little human cupidity can be trusted when it has the opportunity to enrich itself at the expense of others. A disposition to overlook this feature only shows how far, in some of the cases, we are getting away from the salutary principles of the common law, which never permitted a person to occupy a position in which his duties were opposed to his interests. No one could be judge in his own case, nor, in a fiduciary capacity, buy of or sell to himself. The case of *Diamond Match Co. v. Roerber*, 106 N. Y. 478, 60 Am. Rep. 464, is referred to by plaintiff as supporting the validity of the restraint on trade imposed by this contract, and we are not disposed to controvert the claim. The defendant, Roerber, who was engaged in the manufacture and sale throughout the United States of friction matches, sold his business, with its goodwill, to the plaintiff, engaged in the same business, and agreed that he would not at any time within ninety-nine years engage in the same business anywhere in the United States, with the exception of the states of Nevada and Montana. In an action for a violation of the agreement, the restraint was held to be reasonable. In this case, and some others, the decision is acknowledged to be a departure from the well-established rule of the earlier decisions, notably *Mitchel v. Reynolds*, 1 P. Wms. 181, followed and approved by Ranney, J., in *Lange v. Werk*. In this case, and in those similar to it, the question seems to be considered as one wholly between the parties; and if the restraint is no more than the purchaser requires as a protection to the enjoyment of what he purchased, and for which the vendor received a fair consideration, then it is argued that there is no objection to the contract, because the limits of trade and commerce are now so great, under modern conditions, that a general restraint is not more than is reasonable to afford protection to the purchaser in his business. This, as we think, is fallacious, as it ignores the interest of the public in the question which now, more than at any former time, is involved. All monopolies, combinations, and agreements, of whatever nature, formed for the purpose of controlling the production and manufacture of commodities, are generally considered against

public policy, as thereby prices may be unreasonably increased to the consumer, and are almost uniformly entered into for such purpose. Heretofore the right of any trade or business to determine for itself the extent of production and the price that shall prevail, has been stoutly denied by the public. This can only be done by the government, and then only in extreme cases, amounting to a necessity. So general have these agreements become, and their attendant evils, as to have arrested the attention of the legislatures of some of the states; and laws have been passed to correct as far as possible the evils. And in 1890 the Congress of the United States passed an act, known as the "Sherman Law," to protect trade and commerce against unlawful restraints and monopolies. In construing this act the Supreme Court in *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 323, 41 L. ed. 1007, 1023, held that under its provisions any restraint of trade affecting the interstate trade and commerce of the United States is invalid. It had been claimed in argument that it only included such contracts in restraint of trade as were unlawful at common law. These statutes give emphasis to what has been heretofore regarded as a sound public policy by the courts.

But beyond this there is still another consideration connected with such monopolies and combinations that is not to be overlooked, from the standpoint of sound political wisdom and economy. It is to the interest of the republic that there should be, measurably, an equality in the fortunes of its citizens; and one of the best modes of accomplishing this, without the use of arbitrary means, is by encouraging separate and independent employments, and discouraging by law, and its administration in the courts, all tendencies to the concentration of property in the hands of the few,—a condition in which there will be a constant unrest and dissatisfaction among the masses that can bode no good to the nation. It may be safely affirmed that free institutions cannot long be maintained among a people where a few, possessed of great wealth, are the employers, and the many are mere laborers, wholly dependent on wages as

a means of supporting themselves and families. These considerations, and others of a like character, constitute in great measure that sound public policy which looks with distrust upon all agreements in restraint of trade; and particularly such as may be used in the formation of monopolies, and the control by a few of all individual pursuits. Therefore contracts whereby men are purchased out of their business, and restrained from carrying it on anywhere else, should receive no aid from the courts. No more efficient method could be devised for the creation of a monopoly in any business. It simply requires a combination of persons possessed of a large amount of capital, for the purpose of engaging in a particular business, and purchasing that of all others engaged in the same business, and binding them not to engage in the same business anywhere else. Among the various methods adopted for the purpose of engrossing a particular business, this seems to have become quite a favorite one, when the business may be, and generally is, carried on by individuals on a limited capital; for the reason, no doubt, that in such cases it is easier to accomplish the desired result in this way than by the formation of a trust, through which an entire business may be carried on,—each separate owner, as a beneficiary of the trust, receiving its or his proportion of the net earnings. To say in such cases that the vendor should be bound not to carry on his business, because he has received an adequate consideration for his agreement, is no answer to the objection that the agreement tends to foster the formation of a monopoly, and is therefore against public policy. The reasoning of the cases in which a departure from the common law had been adopted fails to persuade us that we should disregard the rule that has been so long settled in this state by the decisions of this court. On the contrary, the changed conditions on which the argument proceeds tend the more strongly to convince us that, in the interest of a wise public policy, it should be more firmly adhered to.

Judgment affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

ANCHOR ELECTRIC COMPANY *et al.*
v.

Horatio C. HAWKS.

(.....Mass.....)

An agreement by officers of corporations not to engage in business for five years in any way to interfere with or compete with the business of a new corporation to which each of the old companies sold its business is not against public policy, although the new business is of a nature to extend over the whole country, and is more general than that of either of the old companies, combining the business of install-

NOTE.—See the preceding case and footnote thereto.

41 L. R. A.

ing and constructing electric plants and appliances, which one of them had carried on, with that of manufacturing and dealing in such appliances, which the others had carried on.

(May 19, 1898.)

REPORT by the Supreme Judicial Court for Suffolk County after a decree in favor of plaintiffs in an equity suit to restrain defendant from violating his agreement not to enter into business in competition with the plaintiffs.
Decree for plaintiffs.

The facts are stated in the opinion.

Messrs. Sherman L. Whipple and William R. Sears, for plaintiffs:

There is no decision in Massachusetts that a covenant not to engage in business, given in

aid of the sale of a goodwill, is void when such a covenant was reasonably necessary to perfect the sale.

Pierce v. Fuller, 8 Mass. 223, 5 Am. Dec. 105; *Perkins v. Lyman*, 9 Mass. 522; *Stearns v. Barrett*, 1 Pick. 443, 11 Am. Dec. 223; *Palmer v. Stebbins*, 3 Pick. 188, 15 Am. Dec. 204; *Pierce v. Woodward*, 6 Pick. 206; *Alger v. Thacher*, 19 Pick. 51, 81 Am. Dec. 119; *Gilman v. Dwight*, 18 Gray, 355, 74 Am. Dec. 634; *Taylor v. Blanchard*, 13 Allen, 370, 90 Am. Dec. 203; *Angier v. Webber*, 14 Allen, 211, 92 Am. Dec. 748; *Dean v. Emerson*, 102 Mass. 480; *Morse Twist Drill & Mach. Co. v. Morse*, 103 Mass. 78, 4 Am. Rep. 513; *Dwight v. Hamilton*, 113 Mass. 175; *Boutelle v. Smith*, 116 Mass. 111; *Ropes v. Upton*, 125 Mass. 258; *Bishop v. Palmer*, 146 Mass. 469; *Llandforth v. Jackson*, 150 Mass. 149; *Gamevell Fire Alarm Teleg. Co. v. Crane*, 160 Mass. 50, 22 L. R. A. 673; *Smith v. Brown*, 164 Mass. 584.

Only by allowing the owner of a business of wide area to enter into a covenant of this nature can the owner of such a business upon its sale receive adequate compensation for the goodwill; for obviously that goodwill is practically worthless unless the vendor can covenant that he will not compete against his vendee.

Rannie v. Irvine, 7 Mann. & G. 969.

In England the law now seems to be definitely decided in favor of the plaintiffs' contention.

Marim, Nordenfelt Guns & A. Co. v. Nordenfelt [1893] 1 Ch. 630 [1894] A. C. 585.

In the following cases a restraint limited in time and unlimited in space was held valid:

Whittaker v. Howe, 3 Beav. 383; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351; *Moenich v. Fenestre*, 67 L. T. N. S. 603; *Badische Anilin und Soda Fabrik v. Schott S. & Co.* [1892] 3 Ch. 447; *Dubowski v. Goldstein*, 74 L. T. N. S. 180.

The reasonableness of the restraint is generally regarded as the test in this country.

2 *Parsons*, Contr. 8th ed. p. 875; *Fowle v. Parke*, 131 U. S. 88, 33 L. ed. 67; *Carnig v. Carr*, 167 Mass. 544, 35 L. R. A. 512.

Mr. Freedom Hutchinson, for defendant:

The agreement is in restraint of trade, without limitation of space, and is against public policy, and void.

Bishop v. Palmer, 146 Mass. 469; *Taylor v. Blanchard*, 13 Allen, 370, 90 Am. Dec. 203; *Alger v. Thacher*, 19 Pick. 51, 81 Am. Dec. 119; *Gamevell Fire Alarm Teleg. Co. v. Crane*, 160 Mass. 50, 22 L. R. A. 673; *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 560; *Wiley v. Baumgardner*, 97 Ind. 66, 49 Am. Rep. 427; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315; *Fox, Solid Pressed Steel Co. v. Schoen*, 77 Fed. Rep. 29; *Trenton Potteries Co. v. Oliphant* (N. J. Ch.) 39 Atl. 923.

If the test of reasonableness is to be applied to this restriction, then the restriction should not be more than was reasonably necessary to protect the purchaser in the enjoyment of the property, business, and goodwill which he bought and paid for.

Morse Twist Drill & Mach. Co. v. Morse, 103 Mass. 78, 4 Am. Rep. 513; *Gamevell Fire Alarm Teleg. Co. v. Crane*, 160 Mass. 50, 22 L. R. A.

L. R. A. 673; *More v. Bennett*, 140 Ill. 69, 15 L. R. A. 361; *Althen v. Vreeland* (N. J. Ch.) 36 Atl. 479; *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 23 L. R. A. 639; *Nordenfelt v. Maxim Nordenfelt Guns & A. Co.* [1894] A. C. 585; *Perls v. Saalfeld* [1892] 2 Ch. 149; *Ellerman v. Chicago Junction R. & U. Stockyards Co.* 49 N. J. Eq. 217; *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621; *Thomas v. Miles*, 3 Ohio St. 275; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464.

This question of reasonableness is one of law for the court, to be determined from the contract and material allegations of the bill, all of which are admitted in this case.

Whart. Contr. § 483; *Bishop*, Contr. § 517; *Benjamin, Sales*, § 527; *Wiley v. Baumgardner*, 97 Ind. 66, 49 Am. Rep. 427; *Herreshoff v. Boutineau*, 17 R. I. 3, 8 L. R. A. 469; *Consumers Oil Co. v. Nunnemaker*, 142 Ind. 564; note to *Angier v. Webber* (Mass.) 92 Am. Dec. 758.

The time when the contract is entered into is alone looked to in determining whether a contract is reasonable or not.

Rannie v. Irvine, 7 Mann. & G. 969; *Cook v. Johnson*, 47 Conn. 175, 36 Am. Rep. 64; *Nordenfelt v. Maxim Nordenfelt Guns & A. Co.* [1894] A. C. 585.

This restriction is more than was reasonably necessary to protect the purchaser in the enjoyment of the property which it bought and paid for, and is void because it embraced important branches of business not sold by defendant, viz., the "manufacture and sale of electrical supplies," and it is unreasonable, where the defendant sold only the business of installing electrical plants and appliances, that he should be barred from the business of manufacturing and dealing in electrical supplies. He could reasonably have been barred only from the business which he sold, and the protection of the interest sold required no more.

Nordenfelt v. Maxim Nordenfelt Guns & A. Co. [1894] A. C. 580, [1893] 1 Ch. 630; *Badische Anilin und Soda Fabrik v. Schott S. & Co.* [1892] 3 Ch. 447; *Perls v. Saalfeld* [1892] 2 Ch. 149; *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 23 L. R. A. 639.

If there be simply a stipulation, though in an instrument under seal, that a trade or profession shall not be carried on in a particular place, without any recital in the deed, and without any averment showing circumstances which render such contract reasonable, the instrument is void. But, if there are circumstances recited in the instrument (or probably if they appear by averment), it is for the court to determine whether the contract be a fair and reasonable one, or not.

Benjamin, Sales, § 527; *Lange v. Werk*, 3 Ohio St. 519.

Knowlton, J., delivered the opinion of the court:

The only question which we need to discuss in this case is whether the stipulation on which the bill is founded is void as against public policy. The stipulation is as follows: "It is further agreed by all the persons whose names are set hereunder, officers of the corporations hereinabove described, that they will not hereafter at any time, directly or indirectly,

as partner, agent, officer of a corporation, or in any other wise, enter into or conduct, or assist in conducting, any business that shall in any way interfere with or compete with the proposed business of said Anchor Electric Company for a period of five years, except that any one of said persons sever connection with said Anchor Electric Company as provided by paragraph 6 of said agreement of September 29, 1894." The defendant was the business manager of the Hawks Electric Company, a corporation, and a shareholder therein; Norman Marshall was the business manager of the Iona Manufacturing Company, a corporation, and a shareholder therein; and Phillip M. Reynolds was the business manager of the Brown Electric Company, a corporation, and a shareholder therein. On September 29, 1894, these three persons entered into an agreement in writing to form a new corporation under the laws of Maine, of which Hawks was to be the president, Reynolds the treasurer, and Marshall the vice president and assistant secretary, and of which these three were to be the managing board of directors. Four other persons were to be selected to make up the full board of directors, of whom one was to be chosen from the board of directors of each of the above-mentioned corporations. Each of these corporations was to sell all its assets to the new corporation at their actual cash value, to be determined as provided in the writing, and an agreed price of a substantial amount fixed by the writing was to be allowed by the new corporation for the goodwill of each of the three corporations. Each of these three persons was to subscribe for and take one third of the capital stock of the new corporation, and the assets of each of the three corporations at the value ascertained as provided by the writing were to be received *pro tanto* by the new corporation in payment for this stock, and the balance was to be paid for by the subscribers in cash. The three persons severally agreed that, so long as the agreement should continue, they would "devote themselves unreservedly to the interests and duties of the office which they occupied, and the promotion in every way of the interests of the corporation to be formed." On the back of the writing was an agreement, signed by the three, fixing the salaries which they were severally to receive in the new corporation, and an additional stipulation as to the allowance for assets of the three corporations. It was provided that the agreement should be binding only as approved by a majority of the shareholders or boards of directors of the three corporations. The Anchor Electric Company was afterwards established as a corporation under the laws of Maine, in accordance with the contract. In this connection there was another agreement made on October 12, 1894, between the Anchor Electric Company and the other three corporations, whereby the assets and goodwill of the three were transferred to the new corporation at specified agreed prices, which were paid in stock of the new corporation. A part of this agreement of the three old corporations with each other and with the Anchor Electric Company was in these words: "They will not hereafter at any time continue the business of manufacturing and dealing in electrical goods

or specialties of any sort or description, after the 15th day of October, 1894, except to sell and dispose of merchandise on hand at this date, not herein transferred to the Anchor Electric Company, and will do no business of any sort or description except such as is necessary in liquidation of said three electric companies." The agreement was signed by each of the four corporations, by their respective officers, Hawks, Reynolds, and Marshall, and the stipulation in question was the 6th article of the agreement. The judge found that the instrument had been executed in all its parts except this 6th article, and had been adopted by the corporations. There was a provision in the first agreement whereby either of the three persons could withdraw from the new corporation if he was at any time put at a financial disadvantage by the other two in reference to salary or income, and could sell his stock to the others at a price to be agreed upon or fixed by arbitration. The judge before whom the case was heard found that the defendant sold his stock in the new corporation, and withdrew from it, but not under the provision above referred to; and that he has violated, and intends to violate, the 6th article of the last agreement. He found that all the allegations of the bill bearing upon the validity of the 6th article were proved. He also found as a fact, so far as he could properly so find, that the 6th article was reasonable and necessary for the carrying out of the transaction set forth in the agreement, and that the value of the stock of the Hawks Electric Company was largely dependent upon its being kept. It is found that the business of the plaintiff is of a nature that may extend over the whole country. We are thus brought to a consideration of the law applicable to the case.

From very early times certain contracts in restraint of trade have been held void as against public policy. They are objectionable on two grounds: They tend to deprive the party restrained of the means of earning a livelihood, and they deprive the community of the benefit of his free and unrestricted efforts in his chosen field of activity. The distinction was long ago taken between contracts involving a partial restraint of trade and contracts involving a general restraint of trade; the former being held valid if not unreasonable, and the latter invalid. The changes in the methods of doing business, and the increased freedom of communication which have come in recent years, have very materially modified the view to be taken of particular contracts in reference to trade. The comparative ease with which one engaged in business can turn his energies to a new occupation if he contracts to give up his old one makes the hardship of such a contract much less for the individual than formerly, and the commercial opportunities which open the markets of the world to the merchants of every country leave little danger to the community from an agreement of an individual to cease to work in a particular field.

The general principle that arrangements in restraint of trade are not favored is, however, firmly established in law, and now, as well as formerly, is given effect whenever its application will not interfere with the right of everybody to make reasonable contracts. Whenever

one sells a business with its goodwill, it is for his benefit as well as for the benefit of the purchaser that he should be able to increase the value of that which he sells by a contract not to set up a new business in competition with the old. The right to make reasonable contracts of this kind in connection with the sale of the goodwill of a business is well established. But the particular provisions which are reasonably necessary for the protection of the goodwill of many kinds of business are very different now from those required in the days of Queen Elizabeth. Then the courts had occasion to inquire whether a limitation upon the right to engage in the same business as that sold was unreasonable because it included a town instead of a single parish, or extended a distance of 10 miles instead of 5. Now the House of Lords in England has held by a unanimous decision in a recent case that such a limitation which covered the whole world was not unreasonable. Because in early times it seemed inconceivable that an agreement to refrain from establishing a business of the same kind anywhere in the Kingdom should be necessary to the protection of the goodwill of any existing business, it was laid down as an arbitrary rule that agreements so comprehensive in their terms were void. Thus the restriction between a general restraint of trade and a partial restraint of trade grew up. Contracts applying to any territory less than the whole Kingdom were considered in reference to their reasonableness, having regard to the purpose for which the contract was made. By the unanimous decision of the House of Lords in the case of *Nordenfelt v. Maxim Nordenfelt Guns & A. Co.* [1894] A. C. 536, affirming the unanimous judgment of the court of appeal in [1893] 1 Ch. 630, it is now settled in England that a covenant, unrestricted as to space, not to engage in a particular kind of business for twenty-five years, made in connection with the sale of the property of a manufacturing establishment, is valid if, having regard to the nature of the business and the limited number of its customers, it is not wider than is necessary for the protection of the covenant, nor injurious to the public interests of the country, as were found to be the facts in that case. The earlier English authorities are reviewed at length in the opinions, and it is unnecessary to refer to them here. Arbitrary rules which were originally well founded have thus been made to yield to changed conditions, and underlying principles are applied to existing methods of doing business. The tendencies in most of the American courts are in the same direction. *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 23 L. R. A. 639; *Fowle v. Park*, 131 U. S. 88-97, 33 L. ed. 67-74; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 23 L. ed. 315; *Tode v. Gross*, 127 N. Y. 480, 13 L. R. A. 652; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464; *Whitney v. Slayton*, 40 Me. 224; *Western Wooden-ware Assn. v. Starkey*, 84 Mich. 76, 11 L. R. A. 503.

In this commonwealth the general doctrine of the cases seems to be that, in connection with the sale of the goodwill of a business, the vendor will be bound by any covenant which is reasonably necessary for the preservation and protection of the property which he sells. 41 L. R. A.

Pierce v. Fuller, 8 Mass. 223; *Perkins v. Lyman*, 9 Mass. 523; *Stearns v. Barrett*, 1 Pick. 443, 11 Am. Dec. 223; *Palmer v. Stebbins*, 3 Pick. 188, 15 Am. Dec. 204; *Pierce v. Woodward*, 6 Pick. 206; *Angier v. Webber*, 14 Allen, 211, 92 Am. Dec. 748; *Dean v. Emerson*, 103 Mass. 480; *Morse Twist Drill & Mach. Co. v. Morse*, 103 Mass. 73, 4 Am. Rep. 513; *Boutelle v. Smith*, 116 Mass. 111; *Bopen v. Upton*, 125 Mass. 258; *Handforth v. Jackson*, 150 Mass. 149.

In cases in which such covenants have been held bad they were deemed to go further than was reasonable to give full value to the property sold. In *Bishop v. Palmer*, 146 Mass. 469, relied on by the defendant, the covenant was unrestricted as to space and was made in connection with the sale of the property and goodwill of a local business, not peculiar in its nature, for the protection of which so extensive a covenant was held to be unnecessary. The case of *Gamewell Fire Alarm Tel. Co. v. Crane*, 160 Mass. 50, 22 L. R. A. 673, is not inconsistent with the contention of the plaintiff. It is said in the opinion that the "plaintiff did not buy the goodwill of a mercantile business, and the defendant, Crane, had no customers for fire alarm and police telegraph machines and apparatus." A ground of the decision stated by a majority of the court is as follows: "The stipulation seems to us to be something more than is reasonably necessary to protect the plaintiff in the enjoyment of the property it bought, even if that should be adopted as the test, upon which we express no opinion." Inasmuch as the stipulation in the present case is only to do no business for five years that shall interfere with or compete with the proposed business of the Anchor Electric Company, it seems quite clear, under the authorities in Massachusetts, that the stipulation goes no further than is reasonably necessary to protect the goodwill of the business sold by the defendant's corporation, and that it should, therefore, be held valid, unless a distinction is to be made between competition with the business of the Anchor Electric Company and competition with the business sold by the defendant and his company. The business sold by the defendant was chiefly installing and constructing electric plants and appliances. The business of the new corporation included with this that which formerly was done by the other two companies, namely, manufacturing and dealing in electrical appliances. In considering this branch of the case, the nature of the contract of sale should be regarded. The defendant's business was sold to be conducted as a part of a new and more general business. Very likely the price paid for it was larger, and the goodwill was deemed more valuable, because it was to be so conducted. The plaintiff corporation carried on different, but closely connected, departments of the electrical business, and the different departments were so related to each other that sometimes it would be difficult, if not impossible, to distinguish between competition with one department and competition with another. Moreover, this was a contract for mutual profit in conducting the new business, which, under the findings of the court, has all presumptions in its favor. Each party was to devote himself to the inter-

ests of the new corporation. Although the parties provided for the establishment of a corporation, their arrangement was in the nature of a copartnership. The profits of the new corporation were to be shared by the old corporations, which had sold their property, and become stockholders in the new one. It is difficult to see any good reason why the contract of the three persons to promote the interests of the new corporation should not be binding upon them. This contract necessarily includes the agreement not to enter into competition against the new corporation. The case seems to come within the language of Chief Justice Chapman in *Morse Twist Drill & Mach. Co. v. Morse*, 103 Mass. 78-75, 4 Am. Rep. 518, where he says the "defendant did not technically become a partner with the plaintiffs, yet he became the associate of the other stockholders in the business, he himself inducing them to join him in it, and having a large interest in the formation of the company; and the same principle that enables a partner to bind himself to do nothing in competition with the business of the firm ought to apply to him." We are of opinion that the stipulation not to compete with the business of the plaintiff corporation is as binding on the defendant as if it were merely not to compete with such business as previously had been done by the Hawks Electric Company.

Decree for the plaintiff.

Eliza B. YOUNG, Admr., etc.,

v.

NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY.

(.....Mass.....)

1. A person passing from a railroad station across a track to a platform, intending to take a train for which he has purchased a ticket, is a passenger, within the meaning of Pub. Stat. chap. 112, § 212, relating to the liability of a railroad company for negligently causing the death of a passenger.
2. The negligence or carelessness of a railroad company, and the unfitness, or gross negligence or carelessness of its servants or agents, should be submitted to the jury on evidence that a train running at extraordinary speed struck a person as he was attempting to get on a somewhat crowded platform from which passengers were accustomed to take trains, which was across the track from a station, and which was narrow and insufficient for the accommodation of the passengers accustomed to use it.

(May 17, 1898.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County dismissing an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Sustained.*

The facts are stated in the opinion.

NOTE.—As to the rights of a person who has started for a train as a passenger, see *Webster v. Fitchburg R. Co.* (Mass.) 24 L. R. A. 521, and note; also *Wood v. Pennsylvania R. Co.* (Pa.) 35 L. R. A. 41 L. R. A.

Messrs. A. A. Strout, R. W. Bartlett, and H. N. Rice for plaintiff.

Messrs. Benton & Choate for defendant.

Field, Ch. J., delivered the opinion of the court:

There are four counts in the declaration, some of which are counts at common law, and the others are counts under Pub. Stat. chap. 112, § 212, in one of which, at least, it is alleged that the plaintiff's intestate was a passenger. We are of opinion that the evidence does not show that the plaintiff's intestate was in the exercise of due care. He ran across the tracks from the station to the platform, in front of an approaching train, which was in plain sight and which he must have seen. This consideration disposes of all the counts except those brought under Pub. Stat. chap. 112, § 212, in which it is alleged that the plaintiff's intestate was a passenger. Whether there was evidence for the jury that the plaintiff's intestate, at the time he was injured, was a passenger, within the meaning of Pub. Stat. chap. 112, § 212, is a question of more difficulty. The justice presiding at the trial appears to have been of opinion that the decision in *Webster v. Fitchburg R. Co.* 161 Mass. 298, 24 L. R. A. 521, shows that the plaintiff's intestate was not a passenger at the time he was injured. The question whether a person who intends to take a train, but has not taken it, has become a passenger, has been considered in many cases, but not often with reference to this particular statute. The plaintiff's intestate undoubtedly was a passenger in the sense that he had a right to be at the station, and to cross the walk to the platform on the other side, and the railroad company, we think, owed him the duty which it owed to passengers generally, to provide suitable accommodations and safe and convenient ways of access to the train. While he was at the station he was under that protection which railroad corporations owe to all persons who arrive at a station intending to take a train. *Jordan v. New York, N. H. & H. R. Co.* 165 Mass. 346, 32 L. R. A. 101; *Dodge v. Boston & B. S. Co.* 143 Mass. 207, 2 L. R. A. 88; *Warren v. Fitchburg R. Co.* 8 Allen, 227, 85 Am. Dec. 700. It is plain, we think, that the plaintiff's intestate had presented himself at the proper place,—the place provided by the railroad for passengers,—intending to take a train when it arrived. In this respect the case differs from *Webster v. Fitchburg R. Co.* 161 Mass. 298, 24 L. R. A. 521. In *McKimble v. Boston & M. R. Co.* 139 Mass. 542, and in *Merrill v. Eastern R. Co.* 139 Mass. 252, it was held that a passenger continues to be a passenger, within the meaning of Pub. Stat. chap. 112, § 212, while crossing the premises of the railroad company to get upon the street after rightfully leaving a train stopping at a station. The effect of the decision in *Warren v. Fitchburg R. Co.* 8 Allen, 227, 85 Am. Dec. 700, as applied to the facts stated in the exceptions in the present case, is that if the plaintiff's intestate had a ticket for the passage to Boston he was a passenger while passing

199; *Western & A. R. Co. v. Voils* (Ga.) 35 L. R. A. 655. See also *Illinois C. R. Co. v. O'Keefe* (Ill.) 30 L. R. A. 148.

from the station across the track to the platform. One object of the statute now incorporated in Pub. Stat. chap. 112, § 212, is said to be the punishment of a railroad company for negligently causing the death of a passenger. *Com. v. Boston & L. R. Corp.* 134 Mass. 211; *England v. Boston & M. R. Co.* 153 Mass. 490; *Young v. Old Colony R. Co.* 156 Mass. 178; *Connolly v. New York & N. E. R. Co.* 158 Mass. 8; and *Winslow v. Boston & M. R. Co.* 165 Mass. 264.—were actions at common law, in which the plaintiffs were injured, not killed. We think that in Pub. Stat. chap. 112, § 212, the word "passenger" must be held to have its customary meaning, and that, under our decisions, there was evidence that the plaintiff's intestate had become a passenger at the time he was injured. The evidence tends strongly to show that he had not abandoned his intention of taking the train and of proceeding in it to Boston.

Was there evidence for the jury of the negligence or carelessness of the corporation, or of the unfitness or gross negligence or carelessness of its servants or agents, while engaged

in its business? We think that there was. There was evidence that the platform was narrow, and the space insufficient for the accommodation of the passengers who were accustomed to use it in taking in-bound trains; that on this occasion the platform was crowded with passengers who intended to take the train; that the plaintiff's intestate got one foot on the platform, but was somewhat obstructed by the crowd, and but for the crowd might perhaps have saved himself; that the platform was so constructed that the locomotive and cars running on the track next to it overhung the edge of the platform; and that the approaching train was running at an extraordinary rate of speed, up to and beyond the walk along which the passengers were expected to go across the track to take the train. We are of opinion that the case should have been submitted to the jury on the counts, under Pub. Stat. chap. 112, § 212, in which it is alleged that the deceased was a passenger.

For these reasons, in the opinion of a majority of the court *the exceptions should be sustained.*

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

STANDARD LIFE & ACCIDENT INSURANCE COMPANY of Detroit, *Plff. in Err.*,

v.

John CARROLL.

(68 U. S. App. 76, 86 Fed. Rep. 567.)

1. An accident insurance policy is not within Pa. act May 11, 1881, providing that no application, constitution, or by-laws referred to in a life or fire insurance policy shall be received in evidence or considered part of the policy or contract unless correct copies are contained in or attached to the policy.

2. A provision in an accident insurance policy for smaller indemnity, in case the insured is injured while engaged in an occupation more hazardous than that specified in the application is reasonable, and will be enforced by the courts.

(April 11, 1898.)

ERROR to the Circuit Court of the United States for the Western District of Pennsylvania to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on an accident insurance policy. *Reversed.*

Before *Acheson* and *Dallas*, Circuit Judges, and *Bradford*, District Judge.

The facts are stated in the opinion.

Mr. C. Heydrick for plaintiff in error.

Mr. W. J. Breeze for defendant in error.

Acheson, Circuit Judge, delivered the opinion of the court:

The question for our determination is

whether, under the special verdict, judgment should have been entered in favor of Annie Carroll, the plaintiff below, in the sum of \$1,600, with interest from the 1st day of July, 1896, or in the sum of \$4,000 with interest from said date. The action was upon an accident insurance policy dated January 24, 1895, which provides as follows:

"The Standard Life and Accident Insurance Company of Detroit, Michigan, incorporated in 1884, in consideration of the warranties in the application for this policy, and of \$24, hereby insures John Carroll, of Titusville, Pa., by occupation a passenger conductor, under classification extra preferred for the term of twelve calendar months from noon of 24th day of January, 1895, in the sum of \$20 per week, against loss of time, not exceeding fifty-two consecutive weeks, resulting from bodily injuries caused solely, during the term of this insurance, by external, violent, and accidental means, which shall, independently of all other causes, immediately and wholly disable him from transacting any and every kind of business pertaining to the occupation under which he is insured; or if the entire loss of one hand or foot, by severance at or above the wrist or ankle, shall result from such injuries alone within ninety days, will pay the insured one third the principal sum herein named, as a specific indemnity, in lieu of said weekly indemnity; or if such injuries shall, within said period, entirely destroy the sight of one eye, one eighth of said principal sum, as a specific indemnity, in lieu of said weekly indemnity; or in the event of the entire loss of two hands or two feet, or of one hand and one

NOTE.—The above case decides what seems to be a new question as to the application of statutes respecting life-insurance companies to accident insurance.

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See also 41 L. R. A. 467; 47 L. R. A. 650.

As to the distinction between benefit associations and insurance companies, see *note* to Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co. (C. C. App. 6th C.) 86 L. R. A. 33.

foot, by severance at or above the wrist or ankle, or of the entire loss of the sight of both eyes, within ninety days, solely through the injuries aforesaid, will pay the insured the full principal sum hereof; or, if death shall result from such injuries alone within ninety days, will pay the principal sum of \$4,000 to Annie Carroll, wife, if surviving, or, in the event of her prior death, to the legal representatives or assigns of the insured; except that, if the insured be injured in any occupation or exposure classed by this company as more hazardous than that stated in said application, the insurance, weekly indemnity, or specific indemnity shall be only for such sum as the premium paid will purchase at the rate fixed by said company for such increased hazard."

The plaintiff's own evidence in chief showed that, while exercising the occupation of a conductor of a mixed railway train,—composed of freight cars, with a combination passenger and baggage car attached,—the insured, John Carroll, received injuries, by external, violent, and accidental means, from which his death resulted within ninety days thereafter. The defendant gave in evidence, under objection, the application of John Carroll for this accident policy, in which he stated his occupation to be that of a "passenger conductor"—the same occupation as that stated in the policy itself; and the defendant also gave in evidence its "Accident Manual," exhibiting its classification of risks and premiums of insurance in the several classes of hazards, and showing that the occupation of conductor of a mixed railway train was classed by the company as more hazardous than that stated in the said application and policy, and that the premium paid for the said policy of insurance would purchase, at the rate fixed by the company for such increased hazard, the sum of \$1,600, and no more.

From the above extract from the policy, it will be perceived that subsequent change of occupation by the insured during the term of insurance was contemplated by the parties to the contract, and was provided for in and by the policy. To effectuate their intention in this regard, the parties made the application of the insured, and the company's classification of hazards, essential parts of their contract. Nevertheless it is contended that the application and classification of hazards are to be excluded from consideration by reason of the Pennsylvania act of May 11, 1881. That act is as follows:

"An Act Relating to Life and Fire Insurance Policies. Section 1: Be it enacted," etc., "that all life and fire insurance policies upon the lives or property of persons within this commonwealth whether issued by companies organized under the laws of this state or by foreign companies doing business therein, which contain any reference to the application of the insured, or the constitution, by-laws, or other rules of the company, either as forming part of the policy or contract between the parties thereto, or having any bearing on said contract, shall contain or have attached to said policies correct copies of the application, as signed by the applicant, and the by-laws referred to; and unless so attached and accompanying the policy, no such application, constitution, or by-laws shall be received in evidence in any controversy between

the parties to, or interested in, the said policy, nor shall such application or by-laws be considered a part of the policy or contract between such parties." Pub. Laws 1881, p. 20 (Purdon, Dig. 1646, pl. 62).

At the date of this act there was, and still is, in Pennsylvania, a legislative classification of insurance. The act of May 1, 1876 (Pub. Laws, 53), No. 46, provides for the incorporation of four different kinds of insurance companies: First, to make insurance against fires and marine risks; second, to make insurance upon lives; third, to make insurance upon health, and against accidents; and fourth, to make insurance upon live stock. And the act contains distinctive provisions applicable to these several classes of insurance companies. Now, the act of May 11, 1881, does not purport to cover all policies of insurance, but it is limited to two specified classes. The subject matter of the act is expressed in its title, "An Act Relating to Life and Fire Insurance Policies;" and the enacting clause reads, "All life and fire insurance policies upon the lives or property of persons," etc. Presumably the legislature intended to exclude from the operation of the act the classes of insurance policies not named. The suggestion that the act includes policies of insurance against bodily accidents seems to us to be quite inadmissible. The instrument sued on here is strictly an accident insurance policy. The form of the policy is that commonly used in insurance against bodily accidents. The primary purpose is to secure a weekly indemnity in money to the insured in the event of his disability from accidental injury. In certain specified contingencies, resulting from accidental injury, a specified gross sum is to be paid. In some of these resulting contingencies the stipulated specific payment is a proportionate part of the principal sum named in the policy, and in other contingencies the whole principal sum is to be paid. One of the latter is death resulting from the accident within ninety days thereafter. But this contingent provision does not make the instrument a life-insurance policy, either in a popular or in a legal sense.

The views we have thus expressed require a reversal of this judgment, unless, as the counsel for the defendant in error contends, the supreme court of Pennsylvania has construed the act of May 11, 1881, as embracing accident insurance policies, equally with life and fire insurance policies. It is claimed (and the reporter's syllabus gives some color to the contention) that in the case of *Pickett v. Pacific Mut. L. Ins. Co.* 144 Pa. 79, 13 L. R. A. 661, that learned court put such a construction upon the act of 1881. Now, we have examined that case with great care, verifying our understanding of the facts as stated in the official report by consulting the copy of the record contained in the paper books found in the First Law Library, Philadelphia (vol. 140, Paper Book Series); and we feel entirely justified in saying that the decision by no means goes to the length supposed. The plaintiff there declared upon "a policy of insurance in the sum of \$5,000 upon the life of John W. Moore." The stipulation upon which the plaintiff relied and under which recovery was had was in these words: "The Pacific Mutual Life Insurance

Company of California, . . . in consideration of the warranties in the application [for this insurance, and the stipulations herein contained] and of the sum of \$37.50, insured John W. Moore, by occupation, profession, or employment a contractor and driller [residing in Warren, county of Warren, and state of Pennsylvania], in the sum of \$5,000, for the term of twelve months ending on June 4, 1890. The said sum to be paid to the legal representative of the insured after due notice and satisfactory proof that the insured has, during the continuance of this policy, sustained such violent and accidental injuries as shall externally be visible upon his person, and which shall alone have caused his death within ninety days of the date of such accident."

This was the only insurance effected by the policy. Following the above-cited clause are the words, "Or, if policy be issued for both death and indemnity, will pay the insured; . . ." but the policy, as issued, was not for both death and indemnity. The insurance was only upon the life of the insured. The instrument, as issued, might well be held to be a restricted life-insurance policy, within the meaning of the act of May 11, 1881. The court ruled that the act did apply to that particular policy. The great question in *Pickett v. Pacific Mut. L. Ins. Co.* was whether a condition against "inhalation of gas" applied to an involuntary and unconscious inhalation of poisonous gas by the insured in the course of his employment, and it was held that the condition did not apply. That question, which went to the substantial merits of the case, and was decisive of the controversy, was discussed with great fullness in the opinion of the court. The other question, namely, the applicability of the act of 1881 to the case, was briefly disposed of thus:

"Another ground of defense suggested in the defendant's fifth, sixth, and seventh points was that the deceased was injured in an occu-

patton or exposure classed by the company as more hazardous than that specified in the policy, etc. The points referred to appear to be predicated of testimony which was improperly before the jury. The company, in disregard of the provisions of the act of May 11, 1881, Pub. Laws, 20, had failed to attach to the policy copies of the by-laws or application, and should not have been permitted, against plaintiff's objection, to give them in evidence. The act was passed in the interest of honesty and fair dealing, and its provisions should be strictly enforced. We have no doubt they apply to such companies as the defendant."

This language, of course, was used with reference to the particular instrument before the court and must be so read. There is no warrant, we think, for the assumption that the court thereby meant to declare that the act of May 11, 1881, applies to accident insurance policies. In the present case the offer of the application was not to defeat a recovery, or to set aside any of the stipulations of the policy. The parties contracted with reference to a future change of occupation by the insured. Such change was not to avoid the policy. It was allowable upon agreed terms. The change of occupation simply altered the amount of indemnity so as to accord with the increased hazard. This is the plain contract of the parties, evidenced by the policy itself. The provision for changes of occupation and hazard is reasonable and just, and, indeed, in the interest of the holders of accident-insurance policies. We discover no good reason here for denying effect to the provision.

The judgment is reversed, with costs to the plaintiff in error in this court; and the cause is remanded to the Circuit Court, with directions to enter judgment in favor of the plaintiff in the sum of \$1,600, with interest from the 1st day of July, 1896, and costs in the court below.

CALIFORNIA SUPREME COURT.

Charles A. SPIER, *Appt.*,

v.

Robert BAKER *et al.*, *Repts.*

(.....Cal.....)

1. The words "for other purposes" in the title of a statute have no effect under Const. art. 4, § 24, providing that a statute shall have but one subject, which shall be expressed in the title, and provisions on other subjects shall be void.

2. Provisions as to political conventions, and nominations thereby and voting therein, and as to expenditures by candidates, and the placing of names on official ballots, are void, when made in a statute providing for general primary elections.

3. A primary election provided for by

NOTE.—The above case is a pioneer on the question of the validity of statutes for state regulation of caucuses or primaries of political parties.

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statute is an election "authorized by law," within the meaning of Const. art. 2, § 1, prescribing the qualifications of electors at all elections authorized by law.

4. The qualifications as to residence of voters at primary elections, prescribed by the act of March 13, 1897, do not comply with the Constitution, as the only condition they provide is thirty days' residence in the county prior to the election, whereas the Constitution requires residence in the state for one year, in the county ninety days, and in the precinct thirty days, and that naturalized citizens must have been such ninety days.

5. The restriction of the right to vote at the primary elections by act of March 13, 1897, § 22, to those whose names appear upon the great or precinct registers, or the supplements thereto, used at the last general election, is unconstitutional, as it excludes various classes of electors who have a constitutional right to vote.

6. The power of the legislature to require an oath of a bona fide present

intention to support the nominees selected by the delegates there elected as a test of the right to vote at a primary election presents a matter demanding most serious consideration, but is not decided in this case.

(March 24, 1896.)

APPEAL by plaintiff from a judgment of the Superior Court for Tulare County in favor of defendants in an action brought to enjoin defendants from carrying out the provisions of a primary election law. *Reversed.*

The facts are stated in the opinion.

Mr. Thomas V. Cator for appellant.

Mr. F. B. Howard for respondents.

Garoutte, J., delivered the opinion of the court:

This is an action to determine the constitutionality of a primary election law passed at the last session of the legislature, and approved March 13, 1897. It is contended upon the part of the various counsel assailing this law that its enforcement will be an expensive burden upon the people; that, under the guise of a great reform, a system of elections has been devised which, by its expensive and complicated procedure, greatly increases the tendency to place the political life of the state in the hands of those who make politics a profession; that the whole theory of the law is wrong in regulating the political action of parties, associations, and individuals, and thereby destroying that freedom of political associations which has heretofore always existed in this country, and under which it has become so great; that the act, as a whole, is incapable of practical operation by reason of complicated matters of detail, its inconsistencies, and contradictory provisions; that it has no applicability to small counties and sparsely-settled districts; and that no demand for such a law is found aside from a few of the larger cities of the state. It is shown by the brief of Mr. F. J. Sullivan, representing the nonpartisan party, that the inevitable tendency of the operation of the act will be to overwhelm and destroy all small political parties, and prevent the organization of new parties; that, inasmuch as no party may be organized after a convention, and secure representation upon the official ballot, it follows that if this law had been in force at the last presidential election there could have been neither a Gold Democratic party nor a Silver Republican party in this state; that it has the greatest tendency to discourage independent parties and independent voting, and thereby nullifies some of the vital and most meritorious provisions of the Australian ballot law. All the claims advanced by counsel in these regards as to the objectionable character of the law may be true. We are satisfied that many of them are true. But this court has no power to correct the evils in this law. It is not our province to approve good legislation and condemn bad legislation. The act stands upon the statute book as the lawful expression of the will of the people of the state, and with the good or bad policy exercised in enacting it we cannot deal. By its passage the legislature has attempted to meet existing political conditions, and remedy great evils found therein. It is not for the court to say whether

failure or success will follow as a result of its practical operation. Within its domain the legislative power is absolute, and the remedy for unwise legislation is not with the courts, but with the people. In the present proceeding it is our duty alone to pass upon the validity of this act, tested by the various provisions of the Constitution of the state. The act is entitled "An Act Providing for General Primary Elections within the State of California, and to Promote the Purity thereof by Regulating the Conduct thereof, and to Support the Privileges of Free Suffrage thereat, by Prohibiting Certain Acts and Practices in Relation thereto, and Providing for the Punishment thereof, and for Other Purposes." Acts 1897, p. 115. A provision of the state Constitution provides: "Every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title." Const. art. 4, § 24.

Let us test the title of this act in the crucible furnished by the foregoing provision of the Constitution. The legislature in framing this title were above all things candid. Upon its very face the law-making power challenged the sound policy of this provision of the Constitution, and, avowedly disregarding it, declared that the purpose of the act was the creation of a primary election law and "other purposes." Under the cloak of "other purposes," all and every conceivable kind of legislation could hide and thrive in the body of the act, and thus the constitutional provision be set at naught. In this state when these words "for other purposes" are found in the title of an act of the state legislature they accomplish nothing, and in reading the title our eyes are closed to them. We then have before us tested by its title an act dealing solely with general primary elections, and providing penalties for violating the law relating thereto. Any matters of legislation contained in the body of the act not bearing upon primary elections must go out; the constitutional provision quoted so declares. Weighing and measuring the legislation found in the act by this test, very many provisions have no place there. It would seem that the legislature, in using the words "for other purposes" in the title, used those words advisedly, and in good faith lived up to them fully. For the legislation found in section after section of the act can find no justification in its title, save under those words of boundless meaning, "for other purposes."

Section 1 defines what are state, district, and local conventions of political parties. Section 2 declares that state conventions shall have power at their option to divide themselves into district conventions to nominate candidates for Congress, or other district nominees. Section 10 declares that, after a call for a primary election has been issued by the election commissioners, the governing body of any political party or organization desiring to secure a place upon the official ballot for its nominees at the succeeding election must publish a call for a convention, and provides in detail for the time when the convention may be called, and re-

quires notice to be given in certain papers thereof. Section 12 declares that no person shall be allowed to hold more than one proxy at any convention. Section 13 provides that no nomination by any political convention (with certain exceptions) shall be put upon any official ballot, unless such convention is constituted in accordance with this act. Section 17 declares who may sign a petition authorizing the placing of names of candidates upon the official ballot without the aid of conventions. Section 24 declares certain powers of state conventions. Section 33 provides that no candidate nominated by a convention shall be placed upon the official ballot unless he files an affidavit setting forth certain facts as to the expenditure of moneys in securing his nomination. Section 34 provides that candidates shall make an itemized statement of all moneys expended in securing nominations. Section 35 provides for penalties against candidates in refusing or neglecting to file the above-mentioned statement. Section 36 declares who shall be entitled to have their names placed upon the official ballot. The foregoing matters, taken from the body of the act, are fairly illustrative as comprising legislation not justified by its title. Many of these things are totally foreign to any question relating to primary elections, and others are so remotely connected with that subject as to clearly come within the prohibition of the constitutional provision. These matters of legislation, not being embraced within the purview of the title, are void and fall to the ground. Yet, while the elimination of them from the act to some extent may leave it weak and enfeebled, it still has sufficient vitality to stand alone, and we pass to a further examination of its condition viewed from other angles, and tested by the aid of other crucibles furnished by the Constitution.

Section 1, art. 2, of the Constitution provides: "Every native male citizen of the United States, every male person who shall have acquired the rights of citizenship under or by virtue of the treaty of Queretaro, and every male naturalized citizen thereof, who shall have become such ninety days prior to any election, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, and of the county in which he claims his vote ninety days, and in the election precinct thirty days, shall be entitled to vote at all elections which are now or may hereafter be authorized by law." And, in furtherance of this constitutional declaration, § 11, art. 20, of the Constitution provides: "The privilege of free suffrage shall be supported by laws regulating elections, and prohibiting under adequate penalties all undue influence thereon from power, bribery, tumult, or other improper practice."

When tested in the crucible furnished by these provisions of the organic law, the whole act must give way, as failing to meet the requirements there laid down. The primary election provided for in the present act is an election "authorized by law" under the foregoing provision of the Constitution. This must be so, for the law is a mandatory law. It has been directly decided to be an election referred to in the Constitution. *Murphy v. Hanly*, 111 Cal. 868. It must be an election

under this provision of the Constitution, or the legislature would have no power to provide that money should be taken from the state and county treasuries to pay the expenses of conducting it. The validity of any taxation, looking towards the raising of money for such purposes, would be absolutely void if the elections provided for by the act are not elections recognized by and referred to in this constitutional provision. These things being true, the legislature has no power to deprive any citizen of the state, who fills all the requirements demanded by the section of the Constitution quoted, from voting at an election provided for by this act. In this country the right to vote is recognized as one of the highest privileges of the citizen. It is so recognized, not only by the citizen, but by the law; and any infringement by legislative power upon that right as granted by the Constitution is idle legislation. If the legislature by this act has deprived citizens of the right to participate in the elections therein provided, who are qualified to participate under the Constitution,—aye, even if the legislature has deprived one citizen so qualified of such right,—the act is void, as an attempted exercise of power it does not possess. As we have seen, § 11, art. 20, of the Constitution, authorizes the legislature to pass laws in support of the privilege of free suffrage. This certainly does not mean the authorization of laws looking towards the curtailment and deprivation of free suffrage. The legislature has the power to pass laws looking to the proper and reasonable regulation of the exercise of the right of free suffrage, and when that has been done its power has been exhausted.

Before passing to an examination of the act itself, for the purpose of ascertaining who are entitled to participate in the elections held thereunder, we will consider another matter closely allied to the question now under consideration. Among other things found in § 23 of the act, it is provided: "Any native born citizen who since the last general election has become of legal age, or any person who has become naturalized since the last general election, shall be entitled to vote at any primary election; providing he has made application to have his name placed upon the precinct register of the county in which he resides, and of which he has been a legal resident for thirty days prior to any primary election." It will be seen by this provision that all native-born citizens who since the last general election have become of legal age, and who have been legal residents of the county for thirty days prior to the election, are entitled to vote. It will also be observed that all citizens who have become so by reason of naturalization since the last general election, and are legal residents as aforesaid, are likewise entitled to vote. Under this provision, citizens made so by naturalization upon the day next preceding the election would be entitled to vote. Such legislation is not a curtailment of the constitutional right of suffrage, but an enlargement of that right; that is, the legislature has attempted to extend the right of suffrage to certain classes of citizens outside of those classes mentioned in the Constitution. If the legislature has such power, it could extend the right to aliens,

to minors, to women. It has no such power. The legislature can no more extend the right of suffrage to persons not included in the constitutional provision than it can deprive persons there included of the right. The application of the maxim, *Expressio unius est exclusio alterius*, bears with full force upon this provision of the Constitution declaring who are competent to vote at elections authorized by the laws of this state. The legislation just quoted from the act bearing upon native-born citizens arriving at the age of twenty-one years after the last general election, and citizens naturalized since the last general election, is void, as being in direct contravention of the Constitution of the state. This contravention of the Constitution consists in this: that a legal residence in the county alone for thirty days prior to the election is the only condition required by the act, whereas the Constitution requires a legal residence in the state for one year, and in the county ninety days, and in the precinct thirty days. This legislation is also in contravention of the Constitution, in this: that the naturalized citizen under the Constitution is not entitled to vote unless his naturalization occurred at least ninety days prior to the day of election.

Section 22 of the act provides: "No person shall be allowed to vote whose name does not appear upon the great or precinct register of the county, or the city and county, used at the last general election held before such primary election, in the precinct in which he desires to vote as a person entitled to vote in such precinct, or unless his name appears upon the supplements to such great or precinct registers." Here is a direct, bald declaration that only those electors whose names appear upon the great or precinct registers, or the supplements thereto used at the last general election, are entitled to vote. In § 23 we find that portion of the statute giving to certain naturalized citizens and native-born citizens who have arrived at years of majority since the last general election the right to vote at the primary election, and providing the means by which they may have their names placed upon the register; but this provision of the law we have already held void as violative of the constitutional provision bearing upon the qualification of voters. The same section also provides that an elector moving from one county to another since the last general election may secure a transfer of his registration; but there are no means provided by which he may have his name placed upon the register used at the primary election. Hence his transfer of registration avails him nothing; for no man may vote unless his name appears upon the register or supplement thereto.

Keeping in view the law's demand that no person shall be allowed to vote whose name does not appear upon the register or supplement mentioned, we will enumerate the various classes of electors, qualified under the Constitution to participate in elections, that are debarred from participating in elections held under this act: (1) All native born citizens who have arrived at age since the last general election. (2) All foreign-born citizens naturalized since the last general election and ninety days prior to the primary election. (3) All

electors who have changed their residence from one county to another since the last general election. (4) All electors who have secured a residence in the state since the last general election. (5) All electors of the state at the last general election who failed to have their names placed upon the great or precinct registers or supplements thereto prior to that election. (6) All foreign-born citizens who were naturalized within ninety days next preceding the last general election.

It will thus appear that the legislature has declared only those electors whose names appeared upon the great or precinct register of the county, or the supplement thereto, at the last general election, entitled to participate in elections held under this act. If the legislature had enacted similar legislation as to a state or national election, it would have been so palpably void as to fall at the mere suggestion of its appearance before a judicial tribunal. Yet it would be a judicial absurdity to say that citizens of a state having the right under the Constitution to participate in state and national elections may be deprived by the legislature of the right to participate in the elections authorized and fostered under this act. As before suggested, these elections are made mandatory by the law. Revenue is raised by the ordinary means of taxation upon all the property of the state to pay the expense of conducting them. Their exclusive conduct and management is taken from political parties, associations, and individuals, and placed in the hands of the state. Their validity can only be upheld upon the theory that they are matters of vital import to the general welfare of the state, and therefore matters in which every citizen and every taxpayer is beneficially interested. In other words, the legislature, believing a sound public policy demanded such a course, has made these elections a state institution. By the whole tenor of the act they are placed upon the plane of state elections, and in the consideration of the law bearing upon them must be so recognized. If the legislature has the power to deprive one class of constitutional electors of the right to participate therein, it has the power to deprive six classes; and, if it be conceded that it has the power to so legislate, of necessity an election thus held would be a stranger to the Constitution, and a pure creature of the statute. Such conditions cannot exist, for the Constitution declares, that the men here debarred from voting shall be entitled to vote at all elections which may hereafter "be authorized by law." The word "elections," as here used, refers to elections affecting the political life of the state. This is such an election. It is essentially a political election "authorized by law," and therefore an election within this provision of the Constitution.

Section 17 provides that by the act of voting the voter declares as a test of his right to so vote a bona fide, present intention of supporting the nominees selected by the delegates there elected, and before voting an oath to that effect may be required. The power of the legislature to affix such a test to the right to vote will be alluded to hereafter; but, conceding the existence of the power, then all electors entitled to vote under the Constitution, who are ready and

willing to comply with this requirement of the law, have a common right to participate in such election, and any discrimination in favor of or against any class or individual is special legislation and prohibited by the Constitution. For this reason, even if it be assumed that the elections provided for by the act are not elections recognized by the constitutional provisions which we have had under consideration, still the act must fall by reason of the special legislation to which we have here drawn attention.

The power of the legislature to establish a test for voters at any election presents a matter demanding the most serious consideration. If it were a state or national election, where state officers or presidential electors were chosen, no one would have the temerity to say that a legislative test could be invoked. And the moment you recognize the existence of power in the legislature to create tests in these primary elections you recognize the right of the legislature to create any test which to that body may seem proper. While the test prescribed in this act may be said to be a most reasonable one, yet the right to make it carries with it the right to make tests most unreasonable. If the power rests in the legislature to create a test, then the power is found in a Democratic legislature to make the test at a primary election a belief in the free coinage of silver at the ratio of sixteen to one, and the same power is found in a Republican legislature to make the test a belief in a protective tariff. If such a power may be sustained under the Constitution, then the life and death of political parties are held in the hollow of the hand by a state legislature. These suggestions present matters for grave consideration, even conceding that the elections provided for in the act come within the provision of the Constitution bearing upon elections, and

that they are therefore mere matters of legislation with which the legislature has full and untrammelled power to deal. We understand this law is the first of its kind in the United States. Its mandatory features present one of the greatest and most important innovations upon past legislation in this country bearing upon primary elections. Under the mandates of this act, all political parties and associations must come under its wing or be destroyed. They must all bow down before it as the price of their existence. These things are only done by giant strides in state legislation, and the power of the state legislature to thus enact with reference to political parties presents grave and interesting questions. The foregoing suggestions are put forth in order that the state legislature in future, when dealing with this question, may appreciate the importance of its work when viewed in the light of the constitutional difficulties to be met and overcome. For the reasons previously given, wherein we held the law invalid, we have refrained from discussing these important matters but content ourselves with merely suggesting them.

For the foregoing reasons *the judgment is reversed*, and cause remanded, with directions that the proceeding be dismissed.

We concur: **McFarland, J.; Henshaw, J.; Van Fleet, J.; Harrison, J.; Temple, J.**

Supplemental Opinion.

Per Curiam:

The judgment heretofore rendered in this cause is hereby modified by striking therefrom the words, "with directions that the proceeding be dismissed."

CONNECTICUT SUPREME COURT OF ERRORS.

John CHANNON

v.

SANFORD COMPANY, *Appt.*

(70 Conn. 573.)

Liability for the safety of the staging is not placed by law upon a manufacturer of ornamental decorations who, at the request of a building contractor, sends his servant to put up decorations ordered for the building, telling him the builder will see to the staging, when the servant is injured by the fall of an additional staging erected at his request by an employee of the builder, although he was assured by his foreman, who urged him to go to do the work, that the staging would be entirely safe.

(*Andrews, Ch. J., dissents.*)

(June 1, 1898.)

NOTE.—On the question which of two persons is liable as master to another who is conceded to be the servant of one of them, see note to *Hardy v. Shedden Co.* (C. C. App. 6th C.) 37 L. R. A. 33.

41 L. R. A.

See also 41 L. R. A. 389.

APPEAL by defendant from a judgment of the Court of Common Pleas for Hartford County assessing damages after defendant's default in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. *Reversed.*

Statement by **Torrance, J.:**

The questions in the case arise entirely upon the finding of facts, which is as follows: "(1) On June 8, 1897, the plaintiff was sixty-seven years old, and had been for many years an ornamental plasterer. He was then, and for eight or nine months had been, in the employ of the defendant. (2) The defendant was, and now is, a corporation organized, under the joint stock laws of the state of Connecticut, for the manufacture of plastic ornaments and decorations, and placing the same in buildings, located and having its principal place of business in the city of Hartford. (3) The defendant in the spring of 1897 had made, on the order of one John F. Caulfield, a mason and contractor of New Britain, certain plaster ornaments for St. Joseph's Roman Catholic Church, which at that time was in process of

erection at New Britain by said Caulfield, as general contractor. (4) Said Caulfield was an experienced mason and contractor, having been engaged in business as such for thirteen years. (5) The masonwork and plain plastering of said church had been practically completed by said Caulfield, and the interior woodwork was being placed in position, when the injury to the plaintiff occurred. A solid and substantial staging had been built by said Caulfield or his workmen for the purpose of reaching said work, and stood about 2 feet distant from the walls, measured from the inside of the staging to the face of the walls. Said staging had been used, and was being used, by all the workmen engaged on the interior of the church. (6) After said ornament had been delivered to Caulfield, he told the defendant that his men could not put it in place, and requested the defendant to place the ornamental work in position; and Caulfield agreed to furnish whatever was necessary,—that is, staging, a helper, plaster, putty, etc. The plaintiff had no knowledge of this agreement, except as hereinafter stated. (7) On June 8, 1897, the defendant, by its foreman, requested the plaintiff to go to New Britain and place said ornaments in position. The plaintiff told the foreman that he had never put ornaments in place; that he had never worked on staging in his life, and knew nothing about building them; and that he would not do it. These statements as to his lack of experience with, and knowledge of, staging were true. The foreman told him that Caulfield was to see to the staging, that the main staging was already in place, and that it had been used by all the workmen on the interior of the church, and assured him that the staging would be entirely safe. The plaintiff thereupon consented to go. (8) The plaintiff asked that he might have one Schwartzing as a helper, and the foreman agreed to send him with the plaintiff. (9) On the next day the plaintiff and Schwartzing went to New Britain. Defendant's foreman met them there, by agreement, and took them to the church. He there pointed out to the plaintiff the places where the several ornaments were to go, and told him, if he wanted any help, as, for instance, the bringing of water, plaster, or putty, or the shifting of any staging, to call on a workman then present, whom he pointed out to the plaintiff. This was one Burns, a mason in the employ of Caulfield. (10) Burns was an experienced mason, competent to build staging. He was paid by Caulfield. (11) The plaintiff was paid by defendant, who charged his time at an increased rate to Caulfield. He was in the exclusive employment and control of defendant while doing the work. He was himself in charge of this job, and received no orders from anyone after beginning work. He did not in any way communicate with Caulfield. (12) The plaintiff and Schwartzing were engaged in placing the ornaments in position Friday, Saturday, and Monday, June 4th to 7th. On the afternoon of Monday the plaintiff was about to fasten up a frieze which ran between, and on the same level as, the capitals of two small pilasters, which latter projected from the wall about 6 inches, and were about 15 feet from the floor. Up to this time they had used the main stag-

ing mentioned in paragraph 5 hereof. They could not conveniently reach the location for this frieze from the main staging, and the plaintiff asked Burns to make an additional stage, projecting from the main staging towards the wall. (13) Burns built said additional staging, but he negligently failed to properly support it, and it was not strong enough for the use required. (14) Almost immediately after the plaintiff went upon the staging, it gave way and precipitated him to the floor. (15) The plaintiff was seriously bruised, and received injuries to the spine, which have rendered him permanently unable to do the usual work of his trade, or any work except of a very light kind. He was confined to the house for three months, and has constantly suffered much pain. (16) The defendant suffered a default, and the hearing was as to the damages after such default. Upon the foregoing facts the plaintiff claimed that the negligence of said Burns in constructing the staging was imputable to the defendant, and constituted a breach of the duty owed by a master to his servant, and that substantial damages should be awarded. The defendant claimed that the negligence of said Burns was the negligence of a servant of an independent contractor, and was not imputable to the defendant. The defendant claimed further that the accident which caused the plaintiff's injuries was one of the risks of employment assumed by plaintiff; that, if said Burns was not the servant of an independent contractor, he was a fellow servant of the plaintiff, and that, therefore, defendant was not liable for his negligence; and that only nominal damages should be awarded. The court overruled the claims of the defendant, and rendered judgment for the plaintiff in the sum of \$1,000 and costs of suit.*

* The memorandum of decision by the lower court, Peck, J., was as follows:

On these facts the plaintiff seems to me clearly entitled to recover in this action.

"It is the master's duty to exercise reasonable care to provide for his servant a reasonably safe place in which to work, reasonably safe appliances and instrumentalities for his work, and fit and competent persons as his collaborators. . . . The designation of an agent, however fit and competent that agent may be for the execution of the master's duties, does not fill out the sum of the master's obligation, nor serve to relieve the master from further responsibility. Until the agent, thus selected and empowered, in fact acts up to the limit of the duty of his master to act, the master's duty is not done. The master's duty requires performance. He may at his option perform in person, or delegate performance to another. In either case reasonable care must be exercised in the doing of the act required to be done by the master." *McEligott v. Randolph*, 61 Conn. 157; *Wilson v. William L. Linn Co.*, 60 Conn. 453, 47 Am. Rep. 658; *Gerrish v. New Haven Ice Co.*, 63 Conn. 9; *O'Keefe v. National Folding Box & Paper Co.*, 66 Conn. 38.

"The duties of a master in most cases are easily distinguished from those of an employee. The proprietor of a cotton mill is bound to have a safe building, a safe dam or engine, and safe machinery, and he is bound to keep them so. To do that he must employ skilled mechanics, who perform his duties. Their negligence is his negligence. The English rule says that he has done his whole duty when he has employed skillful, careful men to do this work. We think that a more salutary rule would be to require him to see that the work is actually done with care and skill." *Darrigan v. New York & N. E. R. Co.*, 52 Conn. 285, 52 Am. Rep. 590.

Whether the scaffolding on which a workman is to stand in doing his work is a "place" or an "ap-

Messrs. Gross, Hyde, & Shipman, for appellant:

Caulfield was an independent contractor in furnishing the staging, helper, and material.

Lawrence v. Shipman, 39 Conn. 536; *Burke v. Norwich & W. R. Co.* 84 Conn. 474; *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495.

The test of the responsibility of one person for the negligence of another is the control of the former over the latter.

Burke v. Norwich & W. R. Co. 84 Conn. 474; *Corbin v. American Mills*, 27 Conn. 274, 71 Am. Dec. 63; 1 Parsons, Contr. *102; Wood, Mast. & S. pp. 614, 615; *Ziegler v. Danbury & N. R. Co.* 52 Conn. 549; *Johnson v. Lindsay* [1891] A. C. 371; *Murray v. Currie*, L. R. 6 C. P. 24; *Rourke v. White Moss Colliery Co.* L. R. 1 C. P. Div. 556; *Johnson*

v. Boston, 118 Mass. 114; *Hasty v. Sears*, 157 Mass. 123; *Stone v. Hills*, 45 Conn. 44, 29 Am. Rep. 635.

There are cases where the attempt has been made to hold the contractor liable at the suit of his own servant for the negligence of the contractor's servant, and the plaintiff has failed.

Butler v. Townsend, 126 N. Y. 105; *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Hardy v. Shedden Co.* 47 U. S. App. 363, 78 Fed. Rep. 610, 24 C. C. A. 261, 37 L. R. A. 33; *Byrne v. Kansas City, Ft. S. & M. R. Co.* 22 U. S. App. 290, 61 Fed. Rep. 605, 24 L. R. A. 698; *Cameron v. Nystrom* [1898] A. C. 308; *Currier v. Henderson*, 85 Hun. 300.

If Burns was not the servant of an independent contractor, he must have been the servant

or an "instrumentality" is not a very important question in view of the language of the Connecticut cases. It must surely come within one of the three terms, and no distinction is made between them as to the extent of the master's obligation.

To a workman like the plaintiff, whose own duties have nothing to do with the making of the scaffold, but who cannot do his work at all until one is provided for him, it is both the place of his work and an instrumentality necessary to be provided for him by the master. A difference might exist in the case of a carpenter or mason, who by the usual course of his employment is required to put up his own staging. In that case the servant's employment includes the putting up of the staging. In the case at bar his employment could not begin till the staging was provided.

The defendant recognized the duty, and undertook its performance. He agreed with Caulfield to provide necessary staging. He assured the plaintiff that safe staging would be provided, and he pointed out Burns to him as the person to whom he was to look to build it. The plaintiff relied solely on the master's obligation and assurance, employed the man whom the master had pointed out to him, and received the injury through that person's negligence.

It makes no difference that Burns was in the employ of Caulfield, and paid by him. The defendant designated him to do the especial duty which it owed to its servant, and for that purpose he was its representative. When the master had bidden his servant, "Apply to Burns for any needed staging," the servant had no occasion to ask who paid Burns's wages, or who sent him to the church.

The defendant claims that Burns, if acting in behalf of the defendant, was the fellow servant of the plaintiff, within the familiar fellow servant doctrine. But this doctrine does not constitute an exception to the rule of the master's liability. No person is a fellow servant within the meaning of the rule who is performing the master's peculiar duty.

"The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow servants of those who are engaged in operating it. They are charged with the master's duty to his servant." *Ford v. Fitchburg R. Co.* 110 Mass. 240, 14 Am. Rep. 568, quoted in *Wilson v. Williamantic Linen Co.* 50 Conn. 457, 47 Am. Rep. 653. See also *Darrigan v. New York & N. E. R. Co.* 52 Conn. 285, 52 Am. Rep. 590; *McElligott v. Randolph*, 61 Conn. 157, and *Gerrish v. New Haven Ice Co.* 63 Conn. 9.

The question whether the determining mark of a vice principal, as distinguished from a fellow servant, is his superiority in grade, or the nature of the duties which he performs, that is, whether they are or are not the duties of the master, upon which the American courts have differed so widely, has been definitely decided for this state in favor of the latter test in *McElligott v. Randolph*, 61 Conn. 157, and *Sullivan v. New York, N. H. & H. R. Co.* 62 Conn. 200.

Nor is it any more possible for the master to avoid his own obligations by casting them upon an "independent contractor." The duty constantly remains upon the master until its performance, and whatever means he adopts to fulfil it, whether the hiring of a servant, or the contracting with a

contractor, are but his own efforts toward its performance, which must result in the actual use of reasonable care in providing the place or the instrumentality, before he is relieved. The law of independent contractors has its principal application to the relations between the master and third persons.

The defendant made the ingenious claim that the defendant, while the employer of the plaintiff, was not his master in the legal sense. This distinction can only exist where the employer has for the time given up the control and direction of its employee to another, who has become his master for the time being. But the facts furnish no foundation for this claim. The defendant's foreman took the plaintiff to the church, and gave him all the direction as to his duties which were required. It in no way appeared that he passed under the direction of Caulfield, or that he ever communicated with or even saw him. He was paid for his time by the defendant, who charged it to Caulfield at an increased rate.

The defendant relies largely upon the cases of *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311, and *Butler v. Townsend*, 126 N. Y. 107, both of which were cases of injury by the insufficiency of a scaffolding, and somewhat similar in their facts to the case at bar.

Devlin v. Smith seems to be decided on a theory of the master's responsibility quite different from that which is held in the Connecticut cases. The court says: "Where injury to an employee results from a defect in the implements furnished, knowledge of the defect must be brought home to the employer, or proof given that he omitted the exercise of proper care to discover it. Personal negligence is the gist of the action."

This states a rule as to the master's liability in regard to the implements furnished to the servant so different from the Connecticut rule as to make the case of little authority here.

In *Butler v. Townsend*, a later case, the court below had charged the jury that the master was bound to furnish place for his servant, and that the contractors entrusted with the work of putting up a staging were fulfilling his duty, and he was responsible for their negligence. The court of appeals reversed the judgment by the vote of four judges to three, the majority putting the case squarely on the ground of a distinction between a "place" and an "instrumentality" as to the master's obligation, and holding that a scaffolding is an "instrumentality," to which the rules stated in *Devlin v. Smith* were applicable. They concede that if the scaffolding were a "place" the master would not be excused by the existence of an independent contract for its erection, nor by the absence of personal negligence.

All our Connecticut cases define the rule as applying exactly to the same extent to the place in which, and the instrumentality with which, the servant is put to work, the distinction is very minute and doubtful, and the cases seem to me to be inconsistent with the comprehensive and liberal rule for the protection of the servant laid down in the cases in this state already cited.

The damages suffered by the plaintiff reached at least the full jurisdiction of the court, and judgment is rendered that he recover of the defendant \$1,000 and his costs of suit.

of defendant and, if so, he was the fellow servant of plaintiff.

Butler v. Townsend, 126 N. Y. 111; *O'Connor v. Neal*, 153 Mass. 281; *Kimmer v. Weber*, 151 N. Y. 417.

Caulfield was the master of both Burns and of the plaintiff. If the plaintiff was lent or hired out by defendant to Caulfield, the defendant is not liable for the negligence of Caulfield's servant.

Donovan v. Laing, W. & D. Constr. Syndicate [1893] 1 Q. B. 629; *Johnson v. Lindsay* [1891] A. C. 371; *Delaware, L. & W. R. Co. v. Hardy*, 59 N. J. L. 35; *Rourke v. White Moss Colliery Co. L. R. 2 C. P. Div. 206*.

The payment of plaintiff's wages by defendant is not conclusive, nor is the fact that defendant rendered Caulfield a charge additional to the same.

Rourke v. White Moss Colliery Co. L. R. 2 C. P. Div. 205; *Murray v. Currie*, L. R. 6 C. P. 24; *Johnson v. Boston*, 118 Mass. 114; *The Harold*, 21 Fed. Rep. 428.

It was a mistake to assume as the duty violated that of providing a safe place for the work of the servants. The staging was not, in the sense of the rule, the place in which the work was to be done, but an appliance or instrumentality by means of or through the aid of which the work was to be done.

Butler v. Townsend, 126 N. Y. 110. See *Hogan v. Smith*, 125 N. Y. 774; *McCampbell v. Cunard S. S. Co.* 144 N. Y. 552; *Kimmer v. Weber*, 151 N. Y. 417; *Adasken v. Gilbert*, 165 Mass. 443.

The foreman's language cannot be construed as a guaranty of the safety of every appliance which the plaintiff might choose to order when he was on the job, and of course it was beyond the scope of the foreman's power to give such assurance.

Kimmer v. Weber, 151 N. Y. 423.

Mr. Timothy E. Steele for appellee.

Torrance, J., delivered the opinion of the court:

The decisive question in this case is whether, upon the facts found, it was the duty of the defendant to provide the staging upon which the plaintiff was to do his work in the church building. If it was, there is no error. If it was not, there is. In the discussion of this question it will be assumed that the plaintiff, while doing the work in the church, was and remained, as the finding shows, the servant of the defendant; and, further, that the staging furnished to the plaintiff was, as claimed by him, a place for the servant to work in, rather than a mere tool or appliance, within the meaning of the rule hereinafter referred to.

The general rule requiring the master to use reasonable care to provide a reasonably safe place for the servant to work in, and performance of that requirement, as the full measure of his duty in this respect, is well settled in this state. *Wilson v. Willimantic Linen Co.* 50 Conn. 483, 47 Am. Rep. 653; *McElligott v. Randolph*, 61 Conn. 157. This was the rule applied in this case in the trial court, and the important question is whether it was applicable under the facts found. The first part of the rule above referred to is usually stated as follows: "It is the master's duty to exercise

reasonable care to provide for his servant a reasonably safe place in which to work." *McElligott v. Randolph*, 61 Conn. 157, 161. This, as a general statement of the general rule applicable in most of the cases of this kind, is accurate enough. It is sufficiently accurate as applied to cases like the two hereinbefore cited from our own Reports. As thus stated, however, the duty, and the liability arising from a negligent failure to perform it, would appear to rest upon the master at all times and under all circumstances, whenever and wherever his servants may be at work for him; but this, clearly, is not so. There are cases where the servant may be at work for the master, and yet no such duty or liability rests upon the master. In cases where the servant does his work upon staging, scaffolding, or similar structures, it frequently happens that it is the duty of the servant, by force of his employment, to make such structure reasonably safe for his own use. In such cases the general rule does not apply in favor of such servant. 1 Shearm. & Redf. Neg. 5th ed. § 195, and cases cited; *McGorty v. Southern New England Teleph. Co.* 69 Conn. 635. Then, again, this general rule is not ordinarily applicable to cases where the master neither has nor assumes possession, use, or control, legal or actual, of the premises or place where the servant may be at work. The general rule is based upon such possession, use, and control by the master of the premises where he puts his servants at work for him; and, speaking generally, his duty to use due care to make and keep such place reasonably safe flows from, and is measured by, such possession, use, and control. Just as the master's liability for the acts of his servants while engaged in his business is based upon his power to control them, so his duty to provide reasonably safe premises is founded essentially upon his occupation, use, and control of such premises. This being the reason of the rule, when the reason does not exist the rule is inapplicable. If an employer sends his servant to a distant place, by rail, to do a piece of work on the premises of B, it would hardly be contended, in the absence of a special agreement to that effect, that the master would be responsible to the servant for the negligence of the transportation company in failing to carry the servant safely, or for the negligence of B in failing to keep his premises in a reasonably safe condition. In the case supposed, the servant, both while being carried, and while at work on B's premises, is at work for his master, and the railroad car and the premises of B are places where he is directed to and does perform work for his master; and yet the master, as master merely, would be under no duty to use reasonable care to make such places reasonably safe. The law in such cases reads no such duty into the contract of hiring. If the master assumes possession and control of the premises of B. with his consent, even temporarily, for the purpose of doing the work there, the result might be different. Such a case might be, under certain circumstances, within the reason of the rule. Ordinarily, however, we think the law reads such a duty on the part of the master towards the servant into the contract of hiring only with reference to premises used, occupied, or controlled by

the master. If this were not so, the duty and liability of the master would be very burdensome. He would be, in effect, frequently made responsible for the negligence of third parties with reference to premises he had never seen, and about the condition of which he knew, and perhaps could know, nothing. The merchant would, in effect, be liable to his clerk for the negligence of the customer with respect to the safety of the premises upon which the clerk goes to deliver his master's goods, and the master, plumber, or carpenter to his workman for the negligence of the householder upon whose premises he sends the workman simply to make some slight repairs. In all such cases the servant, if injured, without fault on his part, by the negligent failure of the owner or occupier of the premises to keep them in a reasonably safe condition, has his remedy against such owner or occupier, and, in the absence of some agreement to that effect, has none against the master. We think the case at bar, upon a proper construction of the finding, falls within this class of cases. Unless it was the duty of the defendant to furnish the staging in question, the judgment in this case cannot be supported. Such a duty could rest upon the defendant only upon two grounds: (1) Because it had specially assumed it in this case; or (2) because the law imposed it upon the defendant as master. We think the facts found fail to show either that the defendant specially assumed, or that the law imposed, any such duty. If the defendant specially assumed any such duty, that was a fact to be found by the trial court, either expressly or by necessary implication. It is not found expressly, nor by necessary implication. The question on this part of the case is whether, if no such duty rested upon the defendant by law, the facts found warrant the conclusion, as matter of law, that it assumed such a duty. The strongest thing in the finding in favor of such a conclusion is the fact that the defendant assured the plaintiff that the staging would be entirely safe; but this fact, taken either alone or with the other facts found, clearly does not warrant any such conclusion as matter of law. The assurance was given at the very time that the defendant told the plaintiff about the strong staging that had been already erected and in use in the building, and at the very time when plaintiff was informed that Caulfield, and not the defendant, was to see to the staging. What the defendant said to the plaintiff, as detailed in the finding, falls far short of an agreement to be responsible for the staging already built, or to be built, by Caulfield or his servants. The most that can be said about the finding upon this point is that it contains evidential facts tending to prove such an agreement, but such facts do not, as matter of law, constitute such an agreement. Taking the finding as a whole, it is quite clear that it does not show that the defendant specially assumed the duty in question. In justice to the trial court, we ought to say that its decision is not based upon the ground that the defendant specially assumed any such duty, but upon the ground that such duty was imposed by law upon the defendant, as master, under the cir-

41 L. R. A.

cumstances; and the remaining question is whether this is so.

The facts clearly show that Caulfield was, before and at the time the plaintiff went to work in the building, in the exclusive occupation and control of the building and premises and staging, and so remained till after the plaintiff's injury. The building was in New Britain. The defendant's place of business was in Hartford, where plaintiff worked for the defendant. The agreement between the defendant and Caulfield was, in effect, that the defendant should furnish a skilled workman to place the ornament, and Caulfield would furnish staging and all else. The plaintiff was not informed of the details of this agreement, but this is of no importance on this part of the case. It was important as evidence bearing upon the question whether the defendant specially assumed the duty to furnish staging, but not upon the question whether the law imposed the duty upon the defendant as master. The defendant sent the plaintiff from Hartford to this church building in New Britain to perform this work. The defendant had never been in possession or control of the premises, even temporarily, up to the time the plaintiff went there. It never was, upon the facts found, in possession or control of these premises at all, in any such sense as to make it responsible to its servants for their safety. The case, then, as disclosed by the record, is simply the ordinary one where a master, without more, sends his servant to work upon the premises of B, at B's request. In such case, in the absence of agreement to that effect, the law does not impose on the master the duty of caring for the safety of the servant upon B's premises.

There is error in the judgment complained of, and the cause is remanded for the assessment of nominal damages.

The other Judges concur, except **Andrews**, Ch. J., who dissents.

James F. CHAMBERLIN'S APPEAL From Probate.

(70 Conn. 383.)

1. **Intestate property wanted for distribution is assets for an administrator *de bonis non*, under the Connecticut statutes, even if the property has been "administered" within the common-law meaning of that term.**
2. **An administrator *de bonis non* has the right, even at common law, to receive intestate property which still exist, in specie, unchanged and unconverted, in the hands of a third person, who has no legal right to it, even if he has received it from an executor whose accounts have been settled and approved.**
3. **It is not the duty of the court of probate to pass upon the legal validity of claims sought to be made available through the appointment of an administrator *de bonis non* when asked to appoint him, but only to deter-**

NOTE.—On the question, What assets pass to the administrator *de bonis non*?—see *Hodge v. Hodge* (Me.) 40 L. R. A. 83, and note.

mine that a claim is made in good faith, and appears to have some foundation in fact or in law.

4. A court of probate has incidental power to construe wills for the purpose of deciding whether a claim under them is made in good faith and is or is not *prima facie* utterly without any foundation in law or in fact, so far as this is necessary to determine the existence of the conditions for the exercise of its power to appoint administrators *de bonis non*.

(March 2, 1898.)

A PPEAL by Adeline L. Snow and Mary E. Snow from a judgment of the Superior Court for Tolland County reversing a judgment of the Probate Court which refused to appoint administrators *de bonis non* for the estates of Elijah S. Chapman and Eunice Chapman, deceased. *Affirmed*.

The facts sufficiently appear in the opinion.

Messrs. Lewis Sperry and Charles Phelps, for appellants:

Not only is no further administration needed, but the appointment of an administrator *de bonis non* would avail nothing, because, upon the facts as they appear of record, the administrator could have no jurisdiction in the premises.

Alsop v. Mather, 8 Conn. 584, 21 Am. Dec. 708; *American Bd. of Comrs. for Foreign Missions*, 27 Conn. 844; *Schouler Exrs. & Admrs.* 2d ed. § 408; *Woerner*, American Law of Administration, p. 395; 2 *Woerner*, American Law of Administration, p. 743; *Beall v. New Mexico*, 16 Wall. 540, 21 L. ed. 294; *United States*, *Wilson*, v. *Walker*, 109 U. S. 258, 27 L. ed. 927; *Wilson v. Arrick*, 113 U. S. 83, 28 L. ed. 617; *Fiak v. Norvel*, 9 Tex. 13, 58 Am. Dec. 128; *Boyle v. Forbes*, 9 Tex. 41; *Murphy v. Menard*, 14 Tex. 62; *Finn v. Hempstead*, 24 Ark. 117; *Wilcoxon v. Reese*, 68 Md. 542; *Catlin v. Huestis*, 11 Ohio C. C. 120.

When it appears that substantially all of the outstanding debts have been paid by the parties entitled to the fund, under the terms of the decedent's will, the appointment of an administrator to close up the estate is improper as involving unnecessary expense.

Catlin v. Huestis, 11 Ohio C. C. 120.

Expressions have been sometimes used which would seem to indicate that this court has heretofore held that a bequest of a life estate, with remainder over to the heirs of the life tenant, is void as contravening the statute of perpetuities.

Welles v. Olcott, Kirby (Conn.) 118; *Chapdel v. Brewster*, Kirby (Conn.) 175; *Manwaring v. Tabor*, 1 Root, 79; *Allin v. Bunce*, 1 Root, 96; *Borden v. Kingsbury*, 2 Root, 39; *Hamilton v. Hempsted*, 3 Day, 833; *Dart v. Dart*, 7 Conn. 250; *Allyn v. Mather*, 9 Conn. 114; *Williams v. McOall*, 12 Conn. 328; *Comstock v. Comstock*, 23 Conn. 349; *Rand v. Butler*, 43 Conn. 298; *Joelyn v. Nott*, 44 Conn. 55; *Alfred v. Marks*, 49 Conn. 473; *Comstock v. Gay*, 51 Conn. 45; *Wheeler v. Fellowes*, 52 Conn. 258; *Farnam v. Farnam*, 53 Conn. 261; *Storrs Agri. School v. Whitney*, 54 Conn. 342; *Anthony v. Anthony*, 55 Conn. 257; *New Haven Young Men's Inst. v. New Haven*, 60 Conn. 42; *Leake v. Watson*, 60 Conn. 498; *Landers v. Dell*, 61 Conn. 189; *Belfield v. Booth*, 63 Conn. 299; *Morris v. Bolles*, 65 Conn. 45; *Ketchum* 41 L. R. A.

v. Corse, 65 Conn. 85; *Johnson v. Edmond*, 65 Conn. 493; *Johnson v. Webber*, 65 Conn. 501; *St. John v. Dann*, 66 Conn. 401.

In the case at bar both wills had run their course. The property had already vested in the heirs, subject, however, of being divested by the right of Eunice Chapman to expend the principal. This is not an action upon the construction of a will. There is nothing uncertain or indefinite regarding the terms of either will. The heirs are now and have always been the children of Elijah and Eunice Chapman, and the sisters of Doremus D. Chapman. The property has never been in danger of being carried beyond the line drawn by the statute of perpetuities. No danger other than that of a mere naked possibility ever threatened the property given by the will. Both wills have been approved by the probate court and have remained on file for a term of years; in their provisions the parties interested have acquiesced.

In *St. John v. Dann*, 66 Conn. 404, the court held the provisions of the will valid, although recognizing the possibility of their contravening the statute of perpetuities.

Messrs. William Waldo Hyde and Joel H. Reed for appellee.

Torrance, J., delivered the opinion of the court:

In 1879, Mr. Chapman died, leaving a will, in which he gave the life use of all his property to his wife, and at her death he gave it to such person or persons as she by her will should appoint. In 1880, the executor under this will rendered his final administration account, which was accepted and allowed. In 1884, Eunice, the wife of Mr. Chapman, died, leaving a will in which she appointed Gelon W. West as the person to receive all the estate of her husband in her possession at her decease, and also gave to him the entire residue of her own estate, in trust to pay the rents and profits of the entire property to her son, Doremus, during his life, and at his decease to distribute the trust property to those persons who should then be his natural heirs at law. In November, 1889, West, the trustee and executor under the will of Eunice, filed his accounts as trustee and as executor, which were duly allowed and accepted. He then had in his possession something over \$15,000 belonging to the trust fund, consisting of both real and personal estate. He resigned his office of trustee, and Mr. Paulk was appointed his successor in that office. West died in 1890. Paulk has acted as trustee under the will of Eunice since his appointment. In December, 1896, Doremus died, leaving a will, in which he left all his property to his widow. The executor under that will claimed that the trust property in Paulk's hands at the death of Doremus was intestate property belonging to the estates of Elijah and Eunice, in which he had an interest, and that an administrator *de bonis non* upon each estate should be appointed, in order that said claim might be tried and determined. The superior court took the executor's view of this matter, and the principal question here is whether it erred in so doing.

The claim that the property in Paulk's hands is intestate property is based upon the

assumption that the gift over to the heirs of Doremus, in his mother's will, is void. The appellant's claim, in substance, (1) that, even on the assumption that the property in Paulk's hands is intestate estate, it would not be assets in the hands of an administrator *de bonis non*, because it has been already fully administered, and consequently such an administrator ought not to be appointed, for he would have nothing whatever to do; (2) that the question whether the property is or is not intestate estate was not properly before the lower court, and could not be determined by it; (3) that, if such question was before it for determination, it should have held the gift over to be valid, and not void.

The first claim is not tenable. It is based mainly upon rules of the common law which were never adopted in this state, or have been changed or modified by statute, or have little or no application in these cases. At common law "executors and administrators took the legal title to the goods and chattels of the deceased; nor were they, before the statute of distribution (22 & 23 Car. II. (1670)) bound to distribute the surplus after the payment of debts and legacies. Both held *in autre droit*; and therefore neither could dispose by will of the property remaining in specie; but both had the power, while living, of changing, altering, and converting the property; and whatever was thus altered or converted became their own goods, and descended on their deaths to their own representatives. Such change or conversion of the goods was (so far as regards the administrator *de bonis non*) a complete administration, and put them as effectually beyond the reach of his commission as if they had never belonged to the testator or intestate." *Coleman v. M'Murdo*, 5 Rand. (Va.) 51; *Potts, Wollerton, v. Smith*, 8 Rawle, 361, 24 Am. Dec. 359; *Beall v. New Mexico*, 16 Wall. 535, 21 L. ed. 292, and cases cited in note in 24 Am. Dec. 379. A somewhat technical meaning was thus given to the word "administered," so far as regarded the administrator *de bonis non*. As to him, goods, chattels, or credits of the decedent, changed, altered, or converted by the executor or administrator, were "administered." The administrator *de bonis non* succeeded only to goods, chattels, and credits of the decedent which had not been administered; and goods, chattels, and credits "not administered" meant goods, chattels, and credits which had been the property of the decedent at his death, and remained in specie, unchanged and unconverted, when the administrator *de bonis non* was appointed. Thus, money received by the former executor or administrator in his representative capacity, and kept by itself separate from his own money, is regarded as "not administered;" but, if mixed and mingled with his own money, so that its identity is gone, it is regarded as converted, and so "administered" so far as the administrator *de bonis non* is concerned. *Beall v. New Mexico*, 16 Wall. 535, 21 L. ed. 292; *Marvel v. Babbitt*, 143 Mass. 226. The administrator *de bonis non* was regarded as taking the specific property of the decedent as his immediate successor, and not as succeeding to a prior executor or administrator; hence there was said to be no priority between them. Suits brought by or against the predecessor could not, as a rule, be prosecuted by or against

his successor, and judgments obtained by or against the predecessor were not available in favor of or against the successor. *Alsop v. Mather*, 8 Conn. 584, 21 Am. Dec. 708; *American Bd. of Comrs. for Foreign Missions' Appeal*, 27 Conn. 844.

These rules of the common law have been changed or modified to some extent in many, if not most, of the states, including our own. The rule that an executor or an administrator was entitled to the surplus of the personal estate after the payment of debts was never adopted in this state. *Bacon v. Fairman*, 6 Conn. 121-129. They are regarded here as mere agents or trustees for those beneficially entitled to the property as creditors, legatees, heirs, or distributees. *Woodhouse v. Phelps*, 51 Conn. 521-523; *Robbins v. Coffing*, 52 Conn. 118, 143; *Wilmerding v. Russ*, 38 Conn. 67. And it is now made a crime for any executor or administrator to "wrongfully appropriate and convert to his own use the money, funds, or property" of the estate. Gen. Stat. § 1579. At the very beginning of this century it was by statute made the duty of an administrator *de bonis non* "to ask for, demand, and receive" of his predecessor, "his heirs or administrators, all the goods and effects of the deceased, and also all the books of accounts, bonds, notes, or other securities, documents, or papers whatsoever, touching the estate, which may be needed in the settlement thereof;" and it was further then provided that all actions at law or in equity, pending against such predecessor when he went out of office, should survive, and might be prosecuted by or against his successor. Revision 1808, p. 271. These provisions, in substance, have been law ever since, and other changes in the same direction have been made from time to time, as shown by the General Statutes. An executor of an executor is no longer, as at common law, entitled to administer the estate of the first testator. Gen. Stat. § 553. When a will disposes of only a part of the estate, the executor or administrator with the will annexed is *ex officio* the administrator of the intestate estate. Id. § 564. When an executor or administrator dies before completing or accounting for his trust, his personal representative must settle the account in the court of probate, and pay the amount found due to the successor. Id. § 617. Courts of probate, after the removal of an executor or administrator and the appointment of his successor, may enforce the delivery of property, held by the former, to the latter "in the same manner as a court of equity might do." Id. § 612. Under § 445, an executor or administrator paying money or delivering property pursuant to the order of a court of probate having jurisdiction is protected from personal liability, even if the order is subsequently set aside, but the property so delivered or money paid may be recovered, "by the person entitled, from any person receiving or in possession of the same." These and other statutory changes, which it is unnecessary to refer to, have modified the doctrines of the common law with reference to the rights and duties of an administrator *de bonis non*. Under the changes thus made in our law, this court, in *Pinney v. Barnes*, 17 Conn. 420, held that money of the estate in the hands of an executor removed from office,

"no matter from what source received, nor for whom ultimately destined," belonged to the administrator *de bonis non*, and that he was the proper party to institute proceedings to recover the same against his predecessor in office. In *Mansfield v. Lynch*, 59 Conn. 320, 12 L. R. A. 285, it was held that, where an executor had paid over money of the estate by mistake to a creditor, the administrator *de bonis non* could sue for and recover from the creditor the money so paid. In that case the money so paid by the executor wrongfully or mistakenly was an asset of the estate which had been "administered" by him, within the technical common-law meaning of that word; but this fact was not allowed to defeat the right of the administrator to sue for and recover it.

If, then, the property here in question is intestate estate, and has already been "administered," within the common-law meaning of that term, so that under the rules of that law an administrator *de bonis non* could not claim it, nor administer it, still we think that under our law such an administrator would be entitled to claim and recover and administer it. It does not appear to be wanted to pay debts, but, if it be intestate property, it is wanted for distribution, and administration is never complete until the assets of the estate have been turned over to those rightfully entitled to them. But, even if the strict rules of the common law are to govern in this matter, we think, on the facts found, that the administrator *de bonis non* would be entitled to recover, hold, and administer this property if intestate. It is found that the property in Paulk's hands is substantially the same identical property which belonged to Elijah and to Eunice Chapman. It still exists *in specie*, unchanged and unconverted, so far as appears, in the hands of a third person, who, if it be intestate property, has no legal right to it. Under these circumstances, it would, even under the rules of the common law, go to the administrator *de bonis non*. *Beall v. New Mexico*, 16 Wall. 535, 21 L. ed. 292. In either view of this matter, then, if the property is in fact intestate, we think the administrator *de bonis non* of the estates of Elijah and Eunice Chapman is entitled to recover, hold, and administer it as assets of those estates. Indeed, he is the only person who can properly do so. *Pinney v. Barnes*, 17 Conn. 420. The appellants say that the distributees of Elijah and Eunice can sue for and recover it, and divide it among themselves, all the debts having been paid. But who are the distributees? That question must be settled by the court of probate, and, in order that it may do so, "it is plainly essential that such an estate [an intestate estate] should be pending for settlement in said court, in the orderly and prescribed way." *Connecticut Trust & S. D. Co. v. Security Co.* 67 Conn. 438, 442. And, to secure this essential in the cases at bar, the executor of both estates being dead, and no successor ever having been appointed, it is necessary that an administrator *de bonis non* upon each estate should be appointed. The claim of the appellants that Paulk was appointed as the successor of West in the administration

and was now administrator, is not borne out by the finding, and need not be further considered.

The other two grounds of error claimed may be considered together. They are briefly, first, that the court below erred in construing the wills at all; and second, that it erred in holding that the gift over in Eunice's will was void. The power to determine directly and conclusively the construction to be given to wills is not committed to the court of probate, nor to the superior court sitting as an appellate court of probate. Such a power involves the right, to try and finally determine disputed titles to property, real and personal, and this is not given to those courts. *Hewitt's Appeal*, 53 Conn. 24; *Mallory's Appeal*, 62 Conn. 218; *Cone's Appeal*, 68 Conn. 84. But, though the court of probate cannot directly try and finally determine questions of title to personal property, it has the power to pass upon them incidentally and indirectly, and for some specific purpose, whenever such an incidental power is necessary to the exercise of a jurisdiction confessedly conferred upon it. Thus it has been held that, although it is not competent for the court of probate to determine directly the amount or validity of creditors' claims it had power, in its settlement of the administration account, to decide on the validity of the claims of creditors paid by the administrator or executor, so far as it respects the allowance of such payments in his account (*Edmond v. Canfield*, 8 Conn. 87); and that it had the incidental power to determine who the heirs are "for the particular purpose of completing the settlement of the estate, and in order that the executor may be protected" (*Davenport v. Richards*, 16 Conn. 310, 319). The court of probate has the exclusive power to appoint executors and administrators, under conditions prescribed by law; and in determining in a given case whether it will exercise that power, it must possess the incidental power to decide, subject to review on appeal, whether the conditions for the exercise of its power to appoint exist; and this may include, in cases like the present, the power to construe wills, for the purpose of deciding whether the claim made under them is made in good faith, and whether it is or is not *prima facie*, utterly without any foundation in law or in fact.

In the cases at bar, the executor of Doremus claimed before the probate court that the property in question here was intestate estate because the gift over in the will of Eunice Chapman was void; that, if that were so, part of said property belonged to him as the representative of Doremus; that the executor upon both estates was dead, and no one had been appointed in his stead; and that he desired to have an administrator *de bonis non* appointed upon each estate, to the end that he might properly prosecute his claim. These claims he also made in the superior court. It was the province and duty of both courts to look at the wills, and to construe them, to the extent and for the purpose of determining whether the claims were made in good faith, and whether they were or were not utterly without foundation in law or in fact. Further than this they were not bound to go. It was not within the province of either court, nor was it its duty, to pass finally upon

the validity of the executor's claim that the gift over was void, nor did the superior court, we think, attempt to do this. In *Woodhouse v. Phelps*, 51 Conn. 521, an administrator *de bonis non* was appointed, though it turned out that there was nothing for him to do. In *State v. Smith*, 52 Conn. 557, such an administrator was appointed, although it turned out that there was no property belonging to the estate. In *Connecticut Trust & S. D. Co. v. Security Co.* 67 Conn. 488, such an administrator was appointed, although it was claimed that the property sought to be recovered through him had never vested in his decedent. In these and cases like them it is not the duty of the court of probate, when asked to appoint an administrator *de bonis non*, to pass upon the legal

validity of the claims sought to be made available through such an appointment. *Mallory's Appeal*, 62 Conn. 218. It is enough that the claim is made in good faith, and appears to have some foundation in fact or in law. If the claim of the executor was made in good faith, and did not *prima facie* appear to be utterly without reason or foundation in fact or in law, and if the appointments might avail the executor, then we think that, upon the other facts found, it was the duty of the probate court to make them.

In this view of the law, *there is no error apparent on the record.*

The other Judges concur.

DISTRICT OF COLUMBIA COURT OF APPEALS.

Frederick W. MOORE, *Plff. in Er.*,

v.

DISTRICT OF COLUMBIA.

(.....D. C.....)

1. **The reasonableness or unreasonableness of an ordinance or regulation prohibiting any person to ride on the streets a bicycle having handlebars of which the lower end is on a plane more than 4 inches below the top of the saddle at its center is more or less a question of fact depending on the proof as to the safety of such a vehicle when used by a person of ordinary care and skill in riding.**
2. **Extrinsic evidence is admissible to show that an ordinance or regulation is unreasonable, arbitrary, and oppressive in its operation.**
3. **A decision that a regulation is reasonable upon its face, as matter of law, without regard to the facts in proof, is subject to review, although, if the court had decided the question as it should have done, as a question of fact, there could have been no appeal.**

(May 3, 1896.)

ERROR to the Police Court for the District of Columbia to review a judgment convicting defendant of violating an ordinance against using a bicycle with the handlebars more than 4 inches below the seat. *Reversed.*

The facts are stated in the opinion.

Mr. D. S. Mackall for plaintiff in error.

Messrs. S. T. Thomas and A. B. Duvall, for defendant in error:

The joint resolution of Congress, approved February 26, 1892, authorizes the Commissioners to make and enforce all such reasonable and usual police regulations in addition to those already made under act of January 26, 1887, as they may deem necessary for the protection of lives and limbs, health, comfort, and quiet of all persons, and the protection of all

property within the District of Columbia. Congress intended thereby to increase the powers of the commissioners to the full extent of those frequently, if not generally, intrusted to municipal corporations.

Baltimore & O. R. Co. v. District of Columbia, 10 App. D. C. 111.

Whether the regulation in question is unreasonable can only be determined by experience.

Baltimore & O. R. Co. v. District of Columbia, 10 App. D. C. 111; *Twilley v. Perkins*, 77 Md. 260, 19 L. R. A. 684.

Alvey, Ch. J., delivered the opinion of the court:

This case is brought here on writ of error from the police court of this district, and presents the question of the right to ride bicycles of a certain structure on the streets of the city of Washington, in violation of the terms of police regulation No. 80.

The defendant, Frederick W. Moore, the plaintiff in error, was charged by information in the court below, with having, on the 8th day of January, 1896, on Sixth street, in the city of Washington, ridden a certain bicycle, "with the lower end of the handle bars on a plane lower than 4 inches below the top of the saddle at its center, contrary to and in violation of the police regulations of the District of Columbia." The defendant pleaded not guilty, and was tried and convicted, and was sentenced to pay a fine of \$5, and in default thereof to stand committed to the workhouse for fifteen days.

The commissioners of this district are authorized by the act of Congress of January 26, 1887, to make and enforce usual and reasonable police regulations, and, among other things, "to regulate the movements of vehicles on the public streets and avenues, for the preservation of order and protection of life and limb," and, in addition to this provision, the commissioners, by joint resolution of Congress of Feb-

NOTE.—As to regulation of bicycle riding, see *Twilley v. Perkins* (Md.) 19 L. R. A. 682, and *note*.

As to negligence in riding bicycle, see *Peltier v. Bradley, D. & C. Co.* (Conn.) 32 L. R. A. 651; *Thompson v. Dodge* (Minn.) 28 L. R. A. 608; *Myers v. Hinds* 41 L. R. A.

(Mich.) 33 L. R. A. 356; *Everett v. Los Angeles Consol. Electric R. Co.* (Cal.) 34 L. R. A. 350; *Cook v. Fogarty* (Iowa) 39 L. R. A. 488.

As to riding on sidewalk, see *Com. v. Forrest* (Pa.) 29 L. R. A. 365.

ruary 26, 1892, "are authorized and empowered to make and enforce all such reasonable and usual police regulations as they may deem necessary for the protection of lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the District of Columbia."

It was in pursuance of the power thus delegated that the commissioners of the District made and published, among others, the following regulation relating to the use of bicycles on the streets and avenues of the city, and which regulation was in force at the time of the commission of the offense charged.

Article X., § 30, as amended, provides that "every bicycle on a public highway shall at all times be under the control of the rider. And inasmuch as safety in passing with rapidly moving vehicles requires that the riders or drivers approaching each other shall be able to judge of the probable movement of the approaching vehicle, no cycle shall be ridden on the streets within the city limits with the lower end of the handlebar on a plane lower than 4 inches below the top of the saddle at its centre, and the rider shall at all times keep his head in such a position as to command a view ahead of not less than 800 feet. But this provision shall not be applicable to members of the bicycle squad of the police force."

At the trial it was proved, in support of the prosecution, and the facts as proved were admitted to be true, that on the 8th day of January, 1898, the defendant was riding on a bicycle on one of the streets of the city, and that the lower end of the handlebars on said bicycle were on a plane lower than 4 inches, to wit, between 7 and 8 inches below the top of the saddle at its center; that the defendant was in all other respects complying with the provisions of § 30 of the police regulations. And, this being all the evidence offered in chief, the prosecuting attorney rested the case.

The defendant then proved by quite a number of witnesses, many of whom were expert bicycle riders, that the effect of enforcing the regulation would be to deprive the defendant and many others of the use of their private property, by preventing the use of their bicycles, constructed as that belonging to the defendant; and that said regulation was unusual and unreasonable, and that it was unnecessary, unjust, and oppressive. The prosecution then produced evidence in rebuttal by quite a number of witnesses, to show the contrary of the facts proved on the part of the defendant.

Upon the evidence thus produced, and upon the whole case, the defendant asked the court to rule, as matter of law, that the portion of the 30th section of the police regulations hereinbefore quoted, relating to bicycles, requiring the lower end of the handle bars on such vehicles to be on a plane not lower than 4 inches below the top of the saddle at its centre, (1) is unconstitutional and void; (2) that the commissioners had no power to enact any such regulation; (3) that, even if the commissioners had the general power to enact a regulation upon the subject, that said portion of said regulation here involved is unreasonable, unjust, and oppressive, and deprives the defendant of the use and enjoyment of his property. But the court refused to make any of the rulings

as requested; and ruled that the portion of the regulation here in question was constitutional and valid; that the commissioners had power to make the regulation; and that the regulation on its face was usual, reasonable, and valid; and thereupon convicted the defendant. From which rulings the defendant excepted.

The several rulings were assigned as error at the hearing in this court.

With respect to the question of the unconstitutionality of the regulation attempted to be enforced, we are clearly of the opinion that there is no foundation for that objection. The power of Congress over this District is plenary; and the power delegated to the commissioners by the act of 1887, and the joint resolution of 1892, is sufficiently comprehensive to embrace the power to make and enforce the regulation complained of by the defendant. The limitations or restrictions imposed by the acts of Congress upon the exercise of the power are only that the regulations made in pursuance thereof shall be both reasonable and usual in their character and manner of enforcement. If it be shown and determined that the regulations, or any material parts thereof, are unusual or unreasonable, they would be inoperative and void, to the extent that they are so unusual or unreasonable, because, in such case they would not be within the power delegated by Congress. For it is a settled principle that municipal ordinances or regulations cannot enlarge or change the legislative grant of power to the municipal agency.

And even without respect to the special limitations or restrictions imposed by the acts of Congress, and in the absence of express delegations of authority, all by-laws, ordinances, and police regulations of municipal corporations must be reasonable, and not inconsistent with any statute of the legislature, nor with the general principles of the common law that prevails in the state or district, particularly those having relation to the liberty of the citizen or the right of private property. Nor must any ordinance or regulation be unnecessarily oppressive to the citizen; nor can an ordinance or regulation be legally made and enforced which contravenes a common right, unless the power to do so be plainly conferred by legislative grant. 1 Dill. Mun. Corp. §§ 819, 820, 825; *Yick Wo v. Hopkins*, 118 U. S. 556, 371, 80 L. ed. 220, 226.

But the municipal government usually possesses the power, either by express grant, as in the present case, or by virtue of their general authority, to make by-laws and ordinances relating to the public safety and good order of the inhabitants; to regulate the rate of speed of the travel of vehicles in the public streets; the route or street over which omnibuses, stage coaches, drays, etc., may run; the time of day in which the streets may be used for certain purposes; to interdict stoppages in the streets to the delay of others; to exclude vehicles of all kinds from entering upon or passing over the sidewalks, etc. And it has been decided in many cases that bicycles and tricycles are vehicles within the meaning of that term, and are subject to municipal regulation as are other vehicles that travel upon the streets. *Twilley v. Perkins*, 77 Md. 260. 19

L. R. A. 634; *State v. Yopp*, 97 N.C. 477; *Taylor v. Goodwin*, L. R. 4 Q. B. Div. 228. The public safety and convenience may require regulations of this character, but they must not, unless made by virtue of specific authority, be unreasonable, or improperly in restraint of trade, or of the exercise of personal rights, or of the lawful use of private property. *Com. v. Stodder*, 2 Cush. 562, 48 Am. Dec. 679; *Com. v. Robertson*, 5 Cush. 488.

But in a case such as the present, the question whether the regulation is reasonable or unreasonable and oppressive to the citizen, in the exercise of his rights and in the use of his private property, is more or less a question of fact. The bicycle is a vehicle of comparatively recent use upon the streets, and is of various construction. Its safe use upon the streets may depend greatly upon the expertness of the rider, as well as upon the construction of the vehicle itself. If the vehicle, such as that of which the defendant is accused of riding on the streets, is ordinarily safe to persons traveling the streets, when used by a person of ordinary care and skill in riding, then there would seem to be no reasonable necessity for excluding the use of such vehicle on the streets; and the regulation by which such vehicle is excluded from the streets may be said to be unreasonable, and to operate to deprive the defendant of the lawful use of his property. But, on the other hand, if the ordinary and reasonably careful use of the vehicle on the streets in any manner tends to endanger and annoy the traveling public on the streets, and this by reason of the non-conformity in the construction of the vehicle to the requirement of the regulation, then the regulation is reasonable and proper, as applied in restraint of the use of the vehicle on the streets.

The regulation is required to be reasonable and usual; and it was competent to the defendant to show that, in its application to his vehicle, it is both unusual and unreasonable, and therefore unnecessary to effect the purposes contemplated by the acts of Congress under which the regulation was made. He introduced evidence for this purpose, but that evidence appears not to have been considered by the court below, in holding the regulation to be reasonable and valid on its face, without regard to extrinsic facts. In this we think the court erred. The court should have considered the facts as proved, in connection with the regulation.

In holding that the regulation "on its face was usual, reasonable, and valid," the court, of course, excluded all consideration of the evidence introduced by both the defendant and prosecution. But, as we have said, it was the right of the defendant to show, if he could, by introducing extrinsic evidence, that the regulation was both unusual and unreasonable as applied to his vehicle, and this could only be done by the practical test of experience of those capable of making an ordinary skillful use of the particular vehicle, or vehicles constructed on the same plan and

model—by showing that the ordinary use of such vehicles was reasonably safe to the streets and traveling public thereon. The *onus* of thus showing rests, of course, upon the defendant.

"What is reasonable," says Dillon (Mun. Corp. vol. 1, § 338), "depends upon the nature of the offense [charged] and the circumstances." Of course, the circumstances must be shown and considered. The question of the right to introduce extrinsic evidence to show that the ordinance or regulation sought to be enforced was unreasonable, arbitrary, and oppressive in its operation, is fully illustrated by the cases of *Yick Wo and Wo Lee v. Hopkins*, 118 U. S. 856, 30 L. ed. 220. In those cases, extrinsic evidence of the application of the ordinances and the manner of their execution was admitted; and the court, in referring to the aid derived from the extrinsic evidence, said: "In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the 14th Amendment to the Constitution of the United States." Page 373, 30 L. ed. 227. See also the case of *Baltimore & O. R. Co. v. District of Columbia*, 10 App. D. C. 111.

By the act of Congress of March 2, 1897, providing for writs of error from this court to the police court of this district, this court has no power to review and decide upon the facts of the case. Its power is of a special nature, and that is to review questions of law that have been presented to and decided or refused to be decided, by the court below and certified to this court by bill of exception. The question of fact, as presented to the court below, as to whether the facts on proof were sufficient to show that the regulation in question was reasonable or unreasonable, is a question, on the proof in the case, that this court is without authority to decide the one way or the other. But where, as in this case, the court erroneously rules upon the construction and application of the regulation in question, upon its face alone, and without regard to the facts in proof, there is such error in law as requires this court to reverse the judgment and to remand the cause that a new trial may be had.

The judgment below is therefore reversed, and a new trial awarded; and it is so ordered.

GEORGIA SUPREME COURT.

Charles MARSHALL, by Next Friend, *Pff.*
in Err.,
v.

MACON SASH, DOOR, & LUMBER COMPANY.

(.....Ga.....)

*A child has no right of action for the homicide of its stepfather.

(March 24, 1893.)

ERROR to the Macon City Court to review a judgment in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's stepfather. *Affirmed.*

The facts are stated in the opinion.

Mr. Marion W. Harris for plaintiff in error.

Messrs. Dessan, Bartlett, & Harris for defendant in error.

Lewis, J., delivered the opinion of the court:

The question made in this case arose as follows: Suit was brought by three minor children, by their next friend, to recover damages from the defendant company by reason of its negligence, whereby Jim Price, the stepfather of the plaintiffs, was killed. It is alleged that plaintiffs are the only heirs of Price, he having left no widow and no other children, and that he married their mother eight years prior to his death; and, from the time of said marriage to the day of his death, he maintained and supported plaintiffs as his children, rearing them in his own home, feeding, clothing, and schooling them, and exercising over them complete parental control, by consent of their mother and of themselves; and that such relation continued up to date of his death, up to which time he not only contributed to their support, but they were entirely dependent upon him for a livelihood. The action was dismissed on demurrer, on the ground that stepchildren have no right of action for a homicide of a stepfather, under the law of Georgia. To this ruling of the court the plaintiffs excepted.

The plaintiffs base their action upon this provision of the Civil Code: "A widow, or, if no widow, a child or children, may recover for the homicide of the husband or parent; and if suit be brought by the widow or children, and the former or one of the latter dies pending the action, the same shall survive in the first case to the children, and in the latter to the surviving child or children. The husband may recover for the homicide of his wife, and if she leaves child or children surviving, said husband and children shall sue jointly, and not separately, with the right to recover the full value of the life of the deceased, as shown by the evidence, and with the right of survivorship as to said suit if either die pending the action. A mother, or, if no mother, a father, may recover for the homicide of a child minor or *sui juris*, upon whom she or he is dependent, or who contributes to his or her sup-

*Headnote by LEWIS, J.

port, unless said child leave a wife, husband, or child. Said mother or father shall be entitled to recover the full value of the life of said child." § 8828. The clear meaning of these words in the first sentence quoted is that a widow may recover for the homicide of her husband, and, if no widow, a child or children may recover for the homicide of the father. It is contended in this case that the stepfather stands *in loco parentis* as to his stepchildren, and that the latter may recover damages for the negligent homicide of the former. Our attention has been called to no authority in which it has ever been decided that the word "parent," either in the legal or ordinary acceptance of that term, includes a stepfather or stepmother. It is true that cases have arisen in which it has been held for some purposes that the stepfather may stand *in loco parentis* as to the children of his deceased wife. For instance, where he assumes the care and custody of his infant stepchildren, so long as he maintains them as members of his family under the parental roof, the law would give him the right to control and govern them as he would his own children; and he would also have the right to protect them against wrong and injury. But it would not follow from this, either that he was under any legal obligation to maintain and support them, or that the children would have any legal interest in his life. Plaintiff in error cites several authorities, and among them the case of *Holloway v. Holloway*, 86 Ga. 576, 11 L. R. A. 518, where it was held that one who undertakes to care for stepchildren is the head of a family, and, as such, is entitled to a homestead. This right grows out of the statute which gives to each head of a family the right to a homestead, and does not confine the right simply to the parent of minor children. One who assumes the care and support of an infant brother left fatherless and motherless by the death of its parents stands in some respects *in loco parentis* as to such infant; but it certainly cannot be urged that on this account the minor would have a right of action for the homicide of the older brother, under the provisions of § 8828 of the Civil Code. The word "parent" is used in the statute for the manifest reason that the child or children might, under certain circumstances, recover either for the homicide of the mother or the father. In the event of no widow, the statute gave them a right of action for the homicide of their father. In the event of the homicide of the mother, the statute gave them a joint right of action with the husband. The right of action provided for in the above Code section did not exist at common law. This statute is therefore in derogation of the common law, and applying to it the universal rule of strict construction, we cannot see how there is any escape from the conclusion that the legislature never contemplated giving a child any right of action for the homicide of a step-parent.

Judgment affirmed.

All the Justices concur.

NOTE.—As to meaning of "heirs" in statute as to right of action for death, see *Noble v. Seattle* (Wash.) 40 L. R. A. 822.

41 L. R. A.

On the question, Who are relatives or relations, see *Bennett v. Van Riper* (N. J. Eq.) 14 L. R. A. 343, and note.

INDIANA SUPREME COURT.

STATE of Indiana, *ex rel.* John A. BURGHS, *Appl.*,

v.

John C. WEBSTER *et al.*

(.....Ind.....)

1. One already practising medicine by virtue of a license issued under the old law is not entitled to a new certificate and license, as a matter of course, under the law of March 8, 1897, but the board of registration and examination can inquire whether his former license was rightfully obtained, and also whether he is a fit person to practise medicine.
2. The requirement that all physicians shall obtain a new certificate and license under the act of March 8, 1897, although they had been previously practising medicine and held a license under the old law, and that the validity of the old license, and the fitness of the applicant, might be examined by the medical board, is a valid exercise of the police power of the state.

(June 7, 1898.)

APPEAL by relator from a judgment of the Superior Court for Marion County refusing a writ of mandamus to require defendants to issue to him a certificate entitling him to practise medicine. *Affirmed.*

The facts are stated in the opinion.

Messrs. Elliott & Elliott and Noel & Laehr, for appellant:

If the statute is to be construed as giving power to take away vested rights without notice, or by retroactive provisions, or as conferring upon officers belonging to the administrative or ministerial department of government, judicial powers, or as delegating to officers belonging to such department legislative functions, then the whole act is void, because the provisions are not distinct and separate, and hence the whole act must fall.

State, Corwin, v. Indiana & O. Oil, Gas, & Min. Co. 120 Ind. 575, 6 L. R. A. 579, 2 Inters. Com. Rep. 758, and authorities there cited; *Pollock v. Farmers' Loan & T. Co.* 158 U. S. 601, 39 L. ed. 1108.

The statute creates an imperative duty.

Eastman v. State, 109 Ind. 278, 58 Am. Rep. 400; *Gray v. State, Coghlen*, 73 Ind. 567; *Harding v. People*, 10 Colo. 387; *State Bd. of Pharmacy v. White*, 84 Ky. 626; *Flournoy v. Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468; *Young v. State, Morgan*, 188 Ind. 206; *Marcum v. Ballot Comrs.* 42 W. Va. 263, 36 L. R. A. 296.

Upon the production of the license and requisite affidavits the whole evidence was before the board, and to that evidence the law assigned full force and effect, leaving nothing for the board to do except to obey the mandate of the law by issuing a certificate.

State, Roberts, v. Bever, 148 Ind. 488; *Madison v. Smith*, 83 Ind. 503.

The case is strictly analogous to that of canvassers charged with the duty of acting upon

reports or returns in election cases. In such cases mandamus will lie to compel the officers to perform the act designated by law.

Brouer v. O'Brien, 3 Ind. 428; *Moore v. Kessler*, 59 Ind. 152; *Kisler v. Cameron*, 89 Ind. 488; *State, Bennett, v. Barber*, 4 Wyo. 50, and cases cited.

The board can no more go behind the documents, that is, the license and the affidavits, than an election board can "go behind the returns."

Dalton v. State, Richardson, 48 Ohio St. 652; *Bowen v. Hixon*, 45 Mo. 340; *O'Ferrall v. Colby*, 2 Minn. 180.

Mandamus will lie to compel a court to restore to practice an attorney who has not been legally disbarred, or to admit one to practice who has been improperly denied that right.

Ex parte Bradley, 7 Wall. 364, 19 L. ed. 214; *Walls v. Palmer*, 64 Ind. 498, and cases cited.

The act of 1897 divides into classes and makes special provisions for each class.

The possessors of licenses issued under the former law constitute a distinct class. To that class the relator belongs.

State, Walker, v. Green, 112 Ind. 462; *State Bd. of Pharmacy v. White*, 84 Ky. 626.

A license to pursue a calling or profession cannot be revoked except by a court, after notice and hearing.

State, Walker, v. Green, 112 Ind. 462.

The state board is a mere creature of the statute, and can exercise no authority but such as the statute confers.

Hamilton v. State, Bates, 3 Ind. 452; *Muttler v. Schaffner*, 53 Ind. 245; *White v. Conover*, 5 Blackf. 462.

The notice given by law of the meetings of the board simply brought one desiring a certificate from it before it for the purpose of submitting the statutory evidence prescribed by the statute. He was not before the board for any other purpose.

Where individual rights are involved, notice to the individual as to such individual rights is necessary, and a general notice of the time and place of meeting of a board does not bring him before the board to respond to or controvert charges against his character.

Kunts v. Sumption, 117 Ind. 1, 2 L. R. A. 655.

The fact that the statute empowers an officer or board to decide preliminary questions does not make the duties of such officer judicial or discretionary. If the principal question is to be decided upon "specified evidence," or "upon a given state of facts," mandamus will lie.

State, Humboldt County, v. Blossom, 22 Nev. 71; *Marcum v. Ballot Comrs.* 42 W. Va. 263, 36 L. R. A. 296; *Merrill, Mandamus*, § 80.

It was only necessary for the relator to show a prima facie right.

Swindell v. State, Mazey, 143 Ind. 153, 35 L. R. A. 50; *Mannix v. State, Mitchell*, 115 Ind. 245; *Madison v. Korbly*, 32 Ind. 74.

Statutes never operate retrospectively, unless the words employed directly and clearly give it a retroactive effect.

Rogers v. Rogers, 187 Ind. 151.

NOTE.—For constitutional right to practise medicine, see *note* to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. on page 581.

This language is clearly prospective, and does not apply to acts performed under former laws.

Aurora & L. Turnp. Co. v. Holthouse, 7 Ind. 59; *Voigt v. Kersten*, 164 Ill. 814; *Benton v. Brotherhood of Railroad Brakemen*, 146 Ill. 570.

When a new right is created by statute and a remedy prescribed for enforcing it, that remedy must be pursued to the exclusion of all others.

Storms v. Stevens, 104 Ind. 46; *Edgerton v. Huntington School Trp.* 136 Ind. 261; *Ryan v. Ray*, 105 Ind. 101.

Denial of a judicial hearing to one, and the grant of it to another, both confronted by the same charges, involving the loss of substantially the same right to each, both in the same situation except that the application of one has been granted and the other denied, is a denial of the equal protection of the law.

This doctrine requires that § 5 be held unconstitutional if it be construed as giving the board power to revoke the license of the relator without a finding or judgment of the circuit court.

Stratton Claimants v. Morris Claimants, 89 Tenn. 497, 12 L. R. A. 70; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789; *Gulf, O. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666; *Janesville v. Carpenter*, 77 Wis. 288, 8 L. R. A. 808; *State v. Goodwill*, 83 W. Va. 179, 6 L. R. A. 621; *State v. First Creek Coal & C. Co.* 33 W. Va. 188, 6 L. R. A. 859; *Pearson v. Portland*, 69 Me. 278, 31 Am. Rep. 276; *Park v. Detroit Free Press Co.* 72 Mich. 560, 1 L. R. A. 599.

The relator has a vested right, an estate or interest, in his profession, of which he cannot be deprived without "due process of law."

See *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 628; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 882; *O'Hara v. Stack*, 90 Pa. 477; *Live Stock Dealers & B. Asso. v. Crescent City, L. S. & S. H. Co.* 1 Abb. (U. S.) 398; *Ex parte Garland*, 4 Wall. 383, 18 L. ed. 866; *Cooley, Torts*, p. 277; U. S. Const. 14th Amend.

Due process of law implies notice and a hearing.

Cooley, Const. Lim. p. 480; *Dartmouth College v. Woodward*, 4 Wheat. 519, 4 L. ed. 680; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 239.

A question involving a vested right, or a property right, such as the right to practise medicine, cannot be adjudicated except by a tribunal invested with purely judicial powers.

State, Walker, v. Green, 113 Ind. 462; *State v. Robbins*, 124 Ind. 808, 8 L. R. A. 458; *Louvy v. Rainwater*, 70 Mo. 152, 35 Am. Rep. 420; *Greene v. James*, 2 Curt. C. C. 187; *Hey Sing Ieck v. Anderson*, 57 Cal. 251, 40 Am. Rep. 115; *Ex parte Garland*, 4 Wall. 383, 18 L. ed. 866.

Retroactive statutes which assume to impair vested rights are void.

Sutherland, Statutory Constr. § 206; *Cooley, Const. Lim.* p. 112; *Aurora & L. Turnp. Co. v. Holthouse*, 7 Ind. 59.

The state board of medical registration and examination has no judicial powers, and none can be conferred upon it by the legislature.

State, Hovey, v. Noble, 118 Ind. 850, 4 L. R. A. 101; *Shoultz v. McPheeters*, 79 Ind. 878; 41 L. R. A.

Gregory v. State, Gudgel, 94 Ind. 334, 48 Am. Rep. 163; *Campbell v. Monroe County Comrs.* 118 Ind. 119; *Vandercook v. Williams*, 106 Ind. 846; *Langenberg v. Decker*, 181 Ind. 471, 16 L. R. A. 108; *Fressley v. Lamb*, 105 Ind. 171.

Neither the statute in question, nor any other statute of Indiana, defines "gross immorality," and no board not possessing judicial powers can determine what acts shall constitute "gross immorality," if, indeed, it may be determined at all anywhere except in the legislature.

Pick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220; *Ex parte McVuity*, 77 Cal. 614; *Ex parte Cox*, 68 Cal. 21; *Bills v. Goshen*, 117 Ind. 221, 3 L. R. A. 261; *Richmond v. Dudley*, 129 Ind. 112, 13 L. R. A. 587; *Robison v. Haug*, 68 Mich. 549.

The legislature can no more delegate legislative power than it can confer judicial power. *Dowling v. Lancashire Ins. Co.* 92 Wis. 68, 81 L. R. A. 112.

The standard of immorality and crime must be the general sense of the people embodied in the law. There can be no other.

Cooley, Torts, p. 84; *Woolsey's Political Science*, § 82; *Cooley, Const. Lim.* pp. 471 *et seq.*

A statute providing for a proceeding affecting one's property or rights must in itself provide for notice to him, and, failing to do so, is unconstitutional and void.

See *Kunts v. Sumption*, 117 Ind. 1, 2 L. R. A. 655; *Garvin v. Dausman*, 114 Ind. 429; *Diets v. Neenah*, 91 Wis. 422.

Notice not authorized by law is no notice.

Cummings v. Stark, 188 Ind. 101; *Kunts v. Sumption*, 117 Ind. 1, 2 L. R. A. 655.

The board cannot avoid obedience to the writ by pleading a construction of the statute which would render it unconstitutional.

See *Louisiana Bd. of Liquidation v. McComb*, 92 U. S. 540, 23 L. ed. 628; *Sumner v. Beeler*, 50 Ind. 841, 19 Am. Rep. 718.

The court will give the statute such construction as will sustain it as valid, if there be such a reasonable construction which can be given it.

McComas v. Krug, 81 Ind. 327, 42 Am. Rep. 185. See also *Campbell v. Driggins*, 83 Ind. 478; *Warren v. Britton*, 84 Ind. 14; *Hays v. Tippy*, 91 Ind. 102; *Mazwell v. Fulton County Comrs.* 119 Ind. 20.

Mr. Merrill Moores, with Mr. W. A. Ketcham, Attorney General, for appellees:

The state of Indiana seems to have been behind its sister states and other civilized countries in attempting to place restrictions upon the practice of medicine.

College of Physicians v. Butler, Litt. Rep. 168, 212, 349; *Allbutt v. General Council of Medical Education & Registration*, L. R. 23 Q. B. Div. 400.

All persons are interested in the rectitude of an attorney at law, and may oppose admission to practise law.

Ex parte Walls, 73 Ind. 106; *Re Leach*, 134 Ind. 671, 21 L. R. A. 706.

If this be true of a privilege, which it has not been attempted to regulate by statute—the privilege to practise law—and if the courts possess the inherent power to prescribe reasonable rules for the admission of persons desiring

to practise, is there any reason why a quasi-judicial body created for the purpose of examining into the character and qualifications of applicants for the privilege of practising medicine may not possess the power which it is expressly given?

(Here follows quotation found in opinion.)

A license is not a contract.

State v. Gazlay, 5 Ohio, 22; *Cohen v. Wright*, 22 Cal. 317; *Ex parte Yale*, 24 Cal. 242, 85 Am. Dec. 62; *Languille v. State*, 4 Tex. App. 820; *Simmons v. State*, 12 Mo. 271, 49 Am. Dec. 184.

The right to regulate the practice of medicine stands upon a higher ground even than the right to license the practice of law. The regulation of the law is one which, at the best, can concern only property rights, and does not come as clearly as does the practice of medicine within the police power of the state.

Eastman v. State, 109 Ind. 279, 58 Am. Rep. 400.

The regulation of the practice of medicine being an exercise of the police power of the state, a license granted in the exercise of that power is subject at any time to revocation by the sovereign who grants it.

People v. Hasbrouck, 11 Utah, 302; *McKinney v. Salem*, 77 Ind. 214; *State, Kelley, v. Bonnell*, 119 Ind. 495; *LaCroix v. Fairfield County Comrs.* 50 Conn. 321, 47 Am. Rep. 648; *Brown v. State*, 82 Ga. 224; *Metropolitan Bd. of Excise v. Barrie*, 84 N. Y. 666; *Moore v. Indianapolis*, 120 Ind. 494; *McCoy v. Clark (Iowa)* 78 N. W. 1050; *Gray v. Connecticut*, 159 U. S. 76, 40 L. ed. 81; *State v. Woodward*, 89 Ind. 114, 46 Am. Rep. 160. See also *Douglas v. Kentucky*, 168 U. S. 488, 42 L. ed. 553; *Com. v. Douglass*, 15 Ky. L. Rep. 581; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Jamison v. Indiana Natural Gas & Oil Co.* 128 Ind. 565, 12 L. R. A. 652, 8 Inters. Com. Rep. 618; *Cleveland, C. C. & I. R. Co. v. Harrington*, 181 Ind. 486; *Chicago, B. & Q. R. Co. v. Nebraska, Omaha*, 170 U. S. 57, 42 L. ed. 948; *Fry v. State*, 68 Ind. 560, 30 Am. Rep. 288; *Wert v. Clutter*, 87 Ohio St. 352.

If, by complying with the act of 1895, one acquired a vested right to do everything which was not prohibited in that act, then by observing the laws in existence at the time of his birth, a citizen would, by the same processes of reasoning, acquire a vested right to violate all penal statutes which might thereafter be enacted.

People v. Phippin, 70 Mich. 18; *State v. Carey*, 4 Wash. 427; *People v. Moorman*, 86 Mich. 438; *State v. Creditor*, 44 Kan. 566; *Logan v. State*, 5 Tex. App. 806.

A medical board may refuse a license to physicians already engaged in the practice of their profession, upon failure to present evidence of competency.

State v. Mosher, 78 Iowa, 325; *State, Hathaway, v. State Bd. of Health*, 103 Mo. 27; *State, Granville, v. Gregory*, 88 Mo. 123, 53 Am. Rep. 565; *State, Johnston, v. Lutz*, 136 Mo. 633; *Wilkins v. State*, 113 Ind. 519; *State, Powell, v. State Medical Examining Board*, 32 Minn. 324, 60 Am. Rep. 575; *Gage v. New Hampshire Eclectic Medical Soc. Censors*, 68 N. H. 95, 56 Am. Rep. 492; *People, Sheppard, v. State Bd. of Dental Examiners*, 110 Ill. 180; *Chicago, B. & Q. R. Co. v. Nebraska, Omaha*, 170 U. S. 57, 41 L. R. A.

42 L. ed. 948; *People, State Bd. of Health, v. McCoy*, 125 Ill. 289; *State v. Schulte*, 11 Mont. 429; *Young v. Blaisdell*, 138 Mass. 344.

The power to inquire into and determine questions with regard to the revocation of certificates and licenses is not a judicial power.

Wilkins v. State, 113 Ind. 518; *People v. Hasbrouck*, 11 Utah, 305; *Donahue v. Will County*, 100 Ill. 94; *Ex parte Wall*, 107 U. S. 289, 27 L. ed. 563; *Re Smith*, 10 Wend. 458; *Hildreth v. Crawford*, 65 Iowa, 348; *State, Chapman, v. State Bd. of Medical Examiners*, 84 Minn. 387; *Gage v. New Hampshire Eclectic Medical Soc. Censors*, 68 N. H. 94, 56 Am. Rep. 492; *Francis v. State*, 83 Ohio L. J. 289; *Miles v. State, McLane (Neb.)* 73 N. W. 678; *Ex parte La Mert*, 4 Best & S. 582; *Allbutt v. General Council of Medical Education & Registration*, L. R. 28 Q. B. Div. 407; *Re Washington*, 28 Ont. Rep. 299.

The falsely advertising one's ability to effect cures, and falsely and fraudulently guaranteeing cures, are unprofessional and dishonorable conduct.

State, Chapman, v. State Bd. of Medical Examiners, 84 Minn. 391; *State, Hathaway, v. State Bd. of Health*, 103 Mo. 22; *People, State Bd. of Health, v. Blue Mountain Joe*, 129 Ill. 375.

Unprofessional and dishonorable conduct is immoral.

State, Powell, v. State Medical Examining Board, 32 Minn. 328, 50 Am. Rep. 575; *People, Moses, v. Goodrich*, 79 Ill. 148.

Such literature as is made a part of appellees' return in this case, and charged to have been circulated by the relator, is indecent and obscene.

United States v. Chesman, 19 Fed. Rep. 497; *United States v. Clarke*, 38 Fed. Rep. 500; *United States v. Smith*, 45 Fed. Rep. 476; *United States v. Bennett*, 16 Blatchf. 338; *United States v. Jones*, 74 Fed. Rep. 545; *United States v. Britton*, 17 Fed. Rep. 782; *United States v. Bebout*, 28 Fed. Rep. 522; *Bates v. United States*, 10 Fed. Rep. 92.

The publication of obscene literature is immorality at common law.

Rez v. Curl, 2 Strange, 788.

Mandate will not lie to control official discretion.

State, Fry, v. Martin County Comrs. 125 Ind. 250; *White v. Burkett*, 119 Ind. 432; *State, Hathaway, State Bd. of Health*, 103 Mo. 28; *State, Granville, v. Gregory*, 88 Mo. 136, 53 Am. Rep. 565; *State, Powell, v. State Medical Examining Board*, 32 Minn. 328, 50 Am. Rep. 575; *Barmore v. State Bd. of Medical Examiners*, 21 Or. 308; *Allbutt v. General Council of Medical Education & Registration*, L. R. 28 Q. B. Div. 408; *People, Sheppard, v. Illinois State Bd. of Dental Examiners*, 110 Ill. 185; *Williams v. State Bd. of Dental Examiners*, 93 Tenn. 628; *Van Vleck v. Dental Examiners (Cal.)* 48 Pac. 225; *Ex parte Paine*, 1 Hill, 665; *Gage v. New Hampshire Eclectic Medical Soc. Censors*, 68 N. H. 95, 56 Am. Rep. 492; *Davies County Comrs. v. State, Washington*, 141 Ind. 191; *State, Magnet, v. Komp*, 141 Ind. 125; *State, Reynolds, v. Tippecanoe County Comrs.* 45 Ind. 504; *Holliday v. Henderson*, 67 Ind. 108; *Burnet v. Wabash & E. Canal*, 50 Ind. 251; *Indianapolis School Comrs. v. State, Sander*, 129

Ind. 42, 18 L. R. A. 147; *Life & Fire Ins. Co. v. Adams*, 9 Pet. 604, 9 L. ed. 245; *People, Opdyke, v. Brennan*, 89 Barb. 653; High, Extr. Legal Rem. § 532.

The relief sought in a mandate proceeding is the only relief that can be granted. As the relief prayed in this case is not only that the board act, but that it act affirmatively, if the board cannot be compelled to act affirmatively all relief must be denied.

People, Highway Comrs. v. Dutchess County Supers. 1 Hill, 55; *People, Hasbrouck, v. Dutchess County Supers.* 185 N. Y. 538; *Life & Fire Ins. Co. v. Adams*, 9 Pet. 605, 9 L. ed. 245; High, Extr. Legal Rem. § 539; *Trant v. State, Grant County Comrs.*, 140 Ind. 421; *State, Rader, v. Union Twp. Committee*, 48 N. J. L. 518; *State, Rosenfeld, v. Einslein*, 46 N. J. L. 479; *State, Atty. Gen., v. Kansas City, St. J. & C. B. R. Co.* 77 Mo. 143.

Howard, J., delivered the opinion of the court:

This was an action brought by the relator, in the name of the state, for a writ of mandate, to require the appellees, who constitute the state board of medical registration and examination, to issue to him a certificate entitling him to a license to practice medicine, under the provisions of an act of the general assembly regulating the practice of medicine, and for other purposes, approved March 8, 1897. Acts 1897, p. 255; Horner's Rev. Stat. 1897, § 5352a, and following sections. On the issue of an alternative writ as prayed for, the appellees made return, and to this return the relator filed his demurrer. A supplemental return was also made to the alternative writ, to which exceptions were filed. A demurrer was also filed to the return as a whole, including the supplemental return. Both demurrers were overruled, as were also the exceptions to the supplemental return. Judgment was then entered, that the relator take nothing by his action.

In his complaint the relator recites that he has been practising medicine in Indiana continuously since September 19, 1896, under a license regularly issued on that day by the clerk of the Marion circuit court, according to the law regulating the practice of medicine in force prior to the act of 1897. Acts 1885, p. 197; Burns's Rev. Stat. 1894, §§ 7818 *et seq.* In his complaint he also sets out his application and affidavit for a certificate to practise medicine under the new law, showing that he was a graduate, in 1893, of the American Electric Medical College of Cincinnati, and in 1897 of the American Medical College of Indianapolis. He also exhibits an affidavit filed with the board to the effect that he has not been guilty of felony or gross immorality, and is not addicted to the liquor or drug habit, and that his general reputation for moral character is good. He also recites a tender to the board of \$1 as a license fee, as provided in the act, and says that he has repeatedly demanded a certificate, and that the board has refused to issue him one; and he prays an alternative writ of mandate, requiring the defendants to issue him a certificate entitling him to a license to practise medicine. The appellees, in their return, set up, in brief, that they have been delayed in

acting upon relator's application, by reason of the great amount of work required for the satisfactory discharge of their duties; that they have been notified verbally that charges would be filed against the relator, and for that reason have postponed action upon his case, which is still pending. In the supplement to the original return, filed a day or two thereafter, it is averred that on October 19, 1897, written charges were filed with the board in the matter of the application of John A. Burroughs for a certificate entitling him to be licensed to practise medicine, charging that the licenses received by him on September 19, 1896, and March 26, 1897, were obtained by misrepresentation as to the character of the colleges upon whose diplomas the licenses were granted, and that he has been and is guilty of gross immorality in seeking and obtaining medical practise by false and fraudulent representations as to his ability to effect cures, and by falsely and fraudulently guaranteeing cures, and that he is also guilty of gross immorality in circulating indecent and obscene literature through the mails and through the community; and the return further shows that upon the filing of duly verified charges, as shown, the board set a date for the hearing and determination of the charges, and immediately served a copy of the charges, with written notice of the time and place of the hearing set by the board, upon the relator. The provisions of the act of 1897 which affect the questions raised in this case are found in §§ 1, 2, and 5 of the act. Section 1 provides: "That it shall hereafter be unlawful for any person to practise medicine, surgery, or obstetrics in this state without first obtaining a license so to do, as hereinafter provided." In § 2 it is provided that any person desiring to begin the practice of medicine, surgery, or obstetrics shall procure from the state board a certificate that he is entitled to a license. In order to procure such certificate, the applicant shall submit to the board his diploma, with his affidavit setting for the time and under what circumstances it was received, and that he is the person to whom it was issued. His identity as the person to whom the diploma was issued is to be further corroborated by the affidavit of two freeholders. Provision is also made for the examination of any applicant whose diploma is from a college not recognized by the board as maintaining a sufficiently high standard of medical education. Further provision is made in this section for the giving of certificates to persons already engaged in the practice of medicine under former laws. Upon the receipt of the certificate from the board and the presentation of the same to the county clerk, the applicant will be entitled to receive from the clerk the required license. In § 5, among other things, it is provided that the board shall fix a schedule of the minimum requirements which must be complied with by applicants for examination for license, and must also establish rules for the recognition of medical colleges, so as to keep the requirements up to the average standard of medical education in other states. In fixing such rules it is expressly provided that the board shall not "discriminate for or against any school or system of medicine." Provision is also made for re-

fusing certificates in certain cases, and also for revoking licenses when granted.

The relator was in the practice of medicine at the time the law of 1897 took effect, under licenses procured under the act of 1885, *supra*. Those licenses he filed with the board, as required by § 2 of the act of 1897; and he claims the right to a certificate under the following provisions of said section: "All persons practising medicine, surgery, and obstetrics in the state of Indiana when this law goes into effect, and desiring to continue the same, shall within ninety days thereafter obtain a certificate that they are entitled to do so by presenting to the state board of medical registration and examination the license possessed by them at the time of the passage of this law, together with an affidavit that they are the legal possessors of the same, and the persons mentioned therein; and such applicant shall pay to the board the sum of one dollar (\$1) at the time of making such application. The board shall thereupon issue to such applicant a certificate, which, when presented to the county clerk of the proper county, shall entitle the holder to a license to practise medicine, surgery, and obstetrics in the state of Indiana."

If the foregoing provisions were all that were contained in the act in relation to persons already in the practice of medicine at the date of the approval of the law, there is no doubt that the relator would have been entitled to the writ of mandate asked for. The act would then mean that anyone already practising medicine by virtue of a license issued under the old law would be entitled to a certificate and license, to be issued under the new law. The simple fact that a license had been given under the old law would be the only evidence needed to entitle him to a license under the new law. And this is what the relator contends for. But there are provisions in § 5 of the act which materially modify the foregoing provisions of § 2, as follows: "The state board of medical registration and examination shall have the right to review the evidence upon which a license has been obtained, and, if it shall be found that a license has been obtained by fraud or misrepresentation, the board may revoke such license. The board may refuse to grant a certificate to any person guilty of felony or gross immorality, or addicted to the liquor or drug habit to such a degree as to render him unfit to practise medicine or surgery, and may, after notice and hearing, revoke a certificate for like cause. An appeal may be taken from the action of the board." These words certainly authorize the board to do something more than merely inspect the old license before they issue the certificate for a new one. Under those sweeping provisions the old license is merely *prima facie* evidence of a right to the new one. The board, in effect, is given authority to inquire whether the former license was rightfully obtained; and, even then, if the applicant is an unfit person to practise medicine, by reason of criminal conduct or immoral character or habits, the board may refuse a certificate. Moreover, after the giving of the certificate, provided no license has been issued upon it, the board may after notice and hearing, revoke the same. To protect the applicant from any injustice on

the part of the board in so refusing or revoking a certificate, the act provides for an appeal. The tribunal of appeal, though not named in this section, is the circuit or superior court of the proper county,—the county of his residence,—as shown in § 2 of the act. It thus appears, when all the sections of the act, particularly §§ 2 and 5, are read together, as they must be, that the relator's license, issued to him under the act of 1885, did not necessarily entitle him to a certificate from the board, unless the board were also satisfied, upon examination, that such licenses were obtained without fraud or misrepresentation, and besides, that the applicant was morally a fit person to engage in the practice of medicine. As to "any person holding a license under the provisions of this act" (the act of 1897), if he be guilty of any of the acts of immorality or other wrongdoing named in § 5, it is further provided that such license "may be revoked" by the board, upon the finding and judgment of the circuit court. This provision, however, has no application to such a case as that before us, where the relator's license was granted, not under this act, but under a former law. The act of 1897, in effect, revoked such former license, as appears from § 1, above set out; and the new license can be issued in its place only in the manner set forth in the act itself. The board may revoke its own certificate, on notice and hearing, before a license has issued thereunder; but, if the license has actually issued under the new law, then it can be revoked only on the finding and judgment of the court. The appellant is therefore in error in contending that any finding or judgment of a court is necessary to the revoking of a license granted under the old law. Such license, as already said, was revoked by the law itself, in the act of 1897, and remains in force only until the board has acted upon the application for the new license. If the new license is granted, it takes the place of the old one. If it is refused, the applicant has no right to practise medicine, unless on appeal to the court from the action of the board, the board is required to issue a license.

Whether the law is a wise one is not for the courts to say. It may be, as contended, that, as men are free to choose those who shall minister to the needs of the soul, so also should they be free to choose those who shall minister to the ills of the body. It may be that such laws repress independent investigation, and so retard the progress of medical knowledge. It may be that many of the most valuable medical discoveries were made in spite of the prejudice and protest of men learned in the old and time-tested lore of their day. It may be, finally, that such laws are out of harmony with our free institutions, according to which each citizen may pursue his own work, his own studies, his own occupation, in so far as he does not trench on the equal rights of his fellows and the welfare of the community in which he lives. These are, however, questions for the legislature; and, so long as the act is not clearly in violation of any provision of the Constitution, it cannot be held invalid. The legislature has judged that the safety of the public health requires the guards that are placed around the

practice of medicine by this law; and, notwithstanding the questions made by counsel, we are unable to see that the act is not a valid exercise of the police power of the state. Had the board refused to act on the application of the relator, he could undoubtedly have compelled action. But the petition for mandate is not to compel the board to act on his application, but to compel it to grant him certificate for a license. This, under the act, as we have seen, he cannot compel the board to do. The board must act after investigation, and then grant or refuse the application, as may be found right. In case of refusal, the statute grants the right of appeal. The relator has therefore no cause to complain.

We do not understand what failure as to notice is shown in the statute. The statute itself is notice that the legislature has set aside the old licenses, and given a reasonable time in which to apply for new licenses in their place. The applicant for a new license has presented himself before the board, and, of course, must be held to have notice of whatever disposition the board may make of his application. In case he is granted a certificate, and the board sees fit to revoke it before he has procured his license, notice and a hearing are provided for. And, if he actually receives his license, it cannot be revoked until a formal action is had in court, including the filing of a verified charge against him, by way of complaint, followed by summons, finding, and judgment. There is no failure of notice. Indeed, the statute of 1897 is a much more guarded and limited exercise of the police power in regard to the licensing of physicians than many that have been upheld by the courts as valid and constitutional. As said by counsel for appellees: "Statutes similar to the one under consideration, denying to all physicians in the state, lawfully engaged in practice, the right to continue such practice, until they conform to the requirements of the statute, and restricting the practice of medicine to persons who are able to demonstrate their qualifications, have been held constitutional, as a proper exercise of the police power of the state in nearly every state of the Union and in the Supreme Court of the United States. *Eastman v. State*, 109 Ind. 278, 58 Am. Rep. 400; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623; *State v. Dent*, 25 W. Va. 1; *Ex parte Frazer*, 54 Cal. 94; *Harding v. People*, 10 Colo. 387; *Williams v. People*, 131 Ill. 84; *People, State Bd. of Health, v. Blue Mountain Joe*, 129 Ill. 370; *State v. Mosher*, 78 Iowa, 331; *Iowa Eclectic Medical College Assn. v. Schrader*, 87 Iowa, 660, 20 L. R. A. 355; *Driscoll v. Com.* 98 Ky. 398; *Hewitt v. Charier*, 16 Pick. 353; *State v. Phippin*, 70 Mich. 6; *State, Powell, v. State Medical Examining Board*, 32 Minn. 324, 50 Am. Rep. 575; *State, Chapman, v. State Bd. of Medical Examiners*, 34 Minn. 387; *State v. Fleischer*, 41 Minn. 69; *Craig v. State Bd. of Medical Examiners*, 12 Mont. 208; *State, Kellogg, v. First Judicial District Ct.* 13 Mont. 370; *Dogge v. State*, 17 Neb. 140; *Gee Wo v. State*, 36 Neb. 241; *Ex parte Spinney*, 10 Nev. 323; *Re Roe Chung* (N. M.) 49 Pac. 952; *Re Smith*, 10 Wend. 449; *People v. Fulda*, 52 Hun. 65; *State v. Van Doran*, 109 N. C. 864; *State v. Call*, 121 N. C. 648; *Frances v. State*, 38 Ohio L. J. 239; *Barnors v. State Bd. of Medical Ex-* 41 L. R. A.

aminers, 21 Or. 301; *State v. Randolph*, 28 Or. 74, 17 L. R. A. 470; *Logan v. State*, 5 Tex. App. 306; *People v. Hasbrouck*, 11 Utah, 391; *Fox v. Territory*, 2 Wash. Terr. 297; *State v. Carey*, 4 Wash. 424.

Similar statutes have been construed and recognized as the law in cases where their constitutionality was not questioned, as follows: *Richardson v. Dorman*, 28 Ala. 679; *State v. Russell*, 45 Ark. 65; *Richardson v. State*, 47 Ark. 562; *Thompson v. Hazen*, 25 Me. 104; *Bibber v. Simpson*, 59 Me. 181; *Spaulding v. Alford*, 1 Pick. 38; *State, Hathaway, v. State Bd. of Health*, 103 Mo. 22; *Gage v. New Hampshire Eclectic Medical Soc. Censors*, 63 N. H. 92, 56 Am. Rep. 492; *Sheldon v. Clark*, 1 Johns. 513; *Thompson v. Staats*, 15 Wend. 395; *Weeden v. Arnold*, 5 Okla. 578; *Haworth v. Montgomery*, 91 Tenn. 16; *Townshend v. Gray*, 62 Vt. 373, 8 L. R. A. 112.

Similar statutes have been sustained for the regulation of the practice of dentistry. *Wilkins v. State*, 118 Ind. 514; *Gosnell v. State*, 52 Ark. 228; *State v. Creditor*, 44 Kan. 565; *State v. Vanderstuis*, 42 Minn. 129, 6 L. R. A. 119.

It has been held that the practice of pharmacy may be similarly regulated. *Hildreth v. Crawford*, 65 Iowa, 389; *People v. Moorman*, 86 Mich. 433; *State v. Donaldson*, 41 Minn. 74; *State v. Forcier*, 65 N. H. 42.

It has been held that the state may regulate the trade of plumbing, and limit the privilege by examinations (*Singer v. State*, 72 Md. 464, 8 L. R. A. 551; *People, Nechameus, v. Warden of City Prison*, 144 N. Y. 529, 27 L. R. A. 718); and also engineers (*Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508); and even lawyers (*State v. Gaslay*, 5 Ohio, 15; *Goldthwaite v. Montgomery*, 50 Ala. 486; *Cohen v. Wright*, 23 Cal. 293; *Ex parte Yale*, 24 Cal. 241, 85 Am. Dec. 62).

In every one of these cases it has been held that it is within the power of the general assembly to prescribe qualifications for the practice of the professions or trades named, and to regulate and control these professions, even to the point of taking away the right to practice from persons lawfully engaged in the practice who may be deemed insufficiently qualified in the judgment of the board or official to whom the examination of the applicant has been intrusted."

In *Eastman v. State*, 109 Ind. 278, 58 Am. Rep. 400, this court said: "The practice of medicine and surgery is a vocation that very nearly concerns the comfort, health, and life of every person in the land. Physicians and surgeons have committed to their care the most important interests, and it is an almost imperative necessity that only persons possessing skill and knowledge should be permitted to practise medicine and surgery. For centuries the law has required physicians to possess and exercise skill and learning, for it had mulcted in damages those who pretend to be physicians and surgeons, but have neither learning nor skill. It is therefore no new principle of law that is asserted by our statute; but, if it were, it would not condemn the statute, for the statute is an exercise of the police power inherent in the state. It is, no one can doubt, of high importance to the community that health, limb, and life should not be left to the treatment of igno-

rant pretenders and charlatans. It is within the power of the legislature to enact such laws as will protect the people from ignorant pretenders, and secure them the services of reputable, skilled, and learned men." And in *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, it was said by the Supreme Court of the United States: "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition. This right may, in many respects, be considered as a distinguishing feature of our Republican institutions. Here all vocations are open to everyone on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them,—that is, the right to continue their prosecution,—is often of great value to the possessors, and cannot be arbitrarily taken away from them, any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society. The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud. As one means to this end it has been the practise of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of the parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation. Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires, not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and

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prescribe appropriate remedies for its removal. Everyone may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. Due consideration, therefore, for the protection of society, may well induce the state to exclude from practise those who have not such a license, or who are found upon examination not to be fully qualified. The same reasons which control in imposing conditions upon compliance with which the physician is allowed to practise in the first instance, may call for further conditions as new modes of treating disease are discovered, or a more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected. It would not be deemed a matter for serious discussion that a knowledge of the new acquisitions of the profession, as it from time to time advances in its attainments for the relief of the sick and suffering, should be required for continuance in its practice, but for the earnestness with which the plaintiff in error insists that, by being compelled to obtain the certificate required, and prevented from continuing in his practice without it, he is deprived of his right and estate in his profession without due process of law. We perceive nothing in the statute which indicates an intention of the legislature to deprive one of any of his rights. No one has a right to practise medicine without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering to the community his services as a physician, that he possess such learning and skill, shall present evidence of it by a certificate or license from a body designated by the state as competent to judge of his qualifications." See also *Hawker v. New York*, 170 U. S. 189, 43 L. ed. 102. While in some respects quasi judicial, the action of the board is not judicial, any more than is the action of a county surveyor in fixing a boundary line, or of a county superintendent in giving or refusing a teacher's certificate, or the action of numberless other officers or boards in making investigations and decisions in matters committed to them. Neither is the circumstance that an appeal is allowed from a decision of the board an indication that its action is judicial. "The right of appeal from the action of boards in their administrative character," it was said by this court in *Huntington County Comrs. v. Heaton*, 144 Ind. 583 and 597, "is frequently conferred by statute. The appeal in such cases is not permitted because the action of the board is considered judicial, but it is granted as a method of getting the matter involved before a court that it may be determined judicially."

Judgment affirmed.

KENTUCKY COURT OF APPEALS.

Mollie NEAF, *Appt.*,

v.

E. PALMER *et al.*

(.....Ky.....)

An injunction against keeping a bawdy house on certain premises cannot be granted on the ground that it is obnoxious to the neighborhood, and unfavorably affects the salable value of property in the locality.

(April 27, 1893.)

A PPEAL by defendant from a judgment of the Circuit Court for McCracken County in favor of plaintiffs in a suit brought to enjoin defendant from keeping a bawdy house. *Reversed.*

The facts are stated in the opinion.

Messrs. Campbell & Campbell and *W. G. Bullitt* for appellant.

Mr. Charles K. Wheeler for appellees.

Haselrigg, J., delivered the opinion of the court:

It is agreed that the appellant keeps a bawdy house on a certain street in Paducah, and that its presence there is shocking to the moral sense of the community, and is especially obnoxious and disagreeable to the immediate neighborhood. The proof also conduces to show that the maintenance of such a house unfavorably affects the salable value of property in its locality. The question is: May the chancellor, under these circumstances, enjoin the appellant from using the house in question as a bawdy house? The chancellor below answered this question in the affirmative, and at the instance of certain real-estate owners in the neighborhood, entered the order of perpetual injunction appealed from. At the threshold it is noticeable that this is the first time in the jurisprudence of the state that the attempt has been made to suppress this evil by the substitution of the chancellor's orders in lieu of the processes of the criminal courts. This cannot be because new conditions have arisen, calling for the ever-expanding powers of the chancellor. The bawd we have always had with us, and the bawdy house. The absence of the exercise of such a power may not be conclusive against its use, but it is at least strongly persuasive that such power does not exist. It is not alleged that there are offensive sights or sounds about the obnoxious premises, but only that property is made less valuable in the vicinity, and that the moral atmosphere is tainted and pestilential. The injury is wholly consequential. It seems to us, under these circumstances, the criminal courts had best be left to enforce the criminal laws. These are confessedly entirely adequate for the purpose of suppressing such evils. To keep a bawdy house is to erect and maintain a nuisance, and is in itself a crime. The suppression of a nuisance, therefore, is but the infliction of a punishment

for the crime. The one is inseparable from the other. The chancellor would therefore be, in effect, punishing the criminal by the civil process of injunction. In *Anderson v. Doty*, 38 Hun, 160, where this precise question was involved, the court held that courts of equity were not the proper tribunals in which to suppress the evil of keeping bawdy houses; that the usual and customary means, and those always theretofore employed, were set in motion by the courts which administer the criminal law, whose machinery was sufficient to give the community full relief. The only opposing authority is the older case of *Hamilton v. Whitridge*, 11 Md. 128, 69 Am. Dec. 184, which we cannot follow, as we conceive, without doing violence to the long-established practice in this state of relegating the enforcement of our laws against crime to the criminal courts.

We are constrained, therefore, to take a different view of this question from the chancellor, and his judgment is reversed, to the end that the petition for injunction be dismissed.

Christ KNAUER, *Appt.*,

v.

City of LOUISVILLE

(.....Ky.....)

An ordinance prohibiting the owner of a carcass of a dead animal removing it, but requiring him to pay a public contractor, for its removal, a fee greater than the value of the carcass, is unconstitutional as an indirect confiscation of the property.

(April 29, 1893.)

A PPEAL by defendant from a judgment of the Circuit Court for Jefferson County convicting him of violating an ordinance against hauling dead animals through the streets of the city. *Reversed.*

The facts are stated in the opinion.

Messrs. Pryor, O'Neal, & Pryor for appellant.

Messrs. Kohn, Baird, & Spindle, for appellees:

If the subject-matter regulated or prohibited, as the case may be, is of such a nature that it can be reasonably said it might do harm unless regulated or prohibited, as the case may be, the legislature of the state or the local government has full power either to regulate or prohibit.

It is the class, and not the particular instance, that gives to the legislative department authority to put in force against it the police power of the state; nor has the court any jurisdiction to say that the legislative department has not exercised the power which it possesses in the most convenient or advantageous way.

Powell v. Pennsylvania, 127 U. S. 678, 82

NOTE.—For dead animals as a nuisance within the police power of the municipality, see *note* to *Harrington v. Providence* (R. L.) 26 L. R. A. on page 380.

NOTE.—For injunction against saloon as a nuisance, see *Haggart v. Stehlin* (Ind.) 22 L. R. A. 577. 41 L. R. A.

L. ed. 253; *Sinking Fund Cases*, 99 U. S. 718, 25 L. ed. 501; *Fletcher v. Peck*, 6 Cranch, 123, 3 L. ed. 175; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629; *Livingston County v. Darlington*, 101 U. S. 407, 25 L. ed. 1015; *Wible v. Struss*, 84 Ky. 290.

If the legislature has the right to regulate the removal, it necessarily has the right to select the agency; and its discretion in the exercise of this power cannot be invaded by the court.

Alpers v. San Francisco, 32 Fed. Rep. 508; *National Fertilizer Co. v. Lambert*, 48 Fed. Rep. 458.

So far as a police ordinance only attempts to regulate the uses of property, as distinguished from a destruction of the property itself, it is paramount to any property right.

Burnside v. Lincoln County Ct. 86 Ky. 428; *Mugler v. Kansas*, 123 U. S. 682, 31 L. ed. 205; *Slaughter-House Cases*, 16 Wall. 86, 21 L. ed. 411; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Walker v. Jameson*, 140 Ind. 591, 28 L. R. A. 679; *Smiley v. MacDonald*, 42 Neb. 5, 27 L. R. A. 540; *Vandine, Petitioner*, 6 Pick. 187, 17 Am. Dec. 351; *Boehm v. Baltimore*, 61 Md. 259; *State, Nicoulin, v. Lowery*, 49 N. J. L. 891.

To illustrate to what extent the police power has been upheld, even where it conflicts with property rights to their destruction, see

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 885, 119 N. Y. 226, 7 L. R. A. 134; *Sentell v. New Orleans & C. R. Co.* 166 U. S. 698, 41 L. ed. 1169.

Due process of law does not necessarily mean a judicial investigation upon a solemn trial, but what is due process of law with reference to any class of property depends upon the character of the property, its history, its condition, how it has been treated in the history of our people, and the uses to which it is ordinarily put.

Jenkins v. Ballantyne, 8 Utah, 245, 16 L. R. A. 689.

The question of regulating or prohibiting an industry or subject-matter that is of a generic kind to harm the public health, safety, or morals, is a question wholly of power vested in the legislative department, and with the manner of its exercise the courts have no concern; nor is it any objection that particular instances may be free of the objections pertaining to the class.

Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253; *Wible v. Struss*, 84 Ky. 290; *Alpers v. San Francisco*, 32 Fed. Rep. 508; *National Fertilizer Co. v. Lambert*, 48 Fed. Rep. 458; *Burnside v. Lincoln County Ct.* 86 Ky. 428; *Mugler v. Kansas*, 123 U. S. 682, 31 L. ed. 205; *Slaughter-House Cases*, 16 Wall. 86, 21 L. ed. 411; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Walker v. Jameson*, 140 Ind. 591, 28 L. R. A. 679; *Smiley v. MacDonald*, 42 Neb. 5, 27 L. R. A. 540; *Vandine, Petitioner*, 6 Pick. 187, 17 Am. Dec. 351; *Boehm v. Baltimore*, 61 Md. 259; *State, Nicoulin, v. Lowery*, 49 N. J. L. 891.

Removal and disposition of dead animals is essentially a matter affecting the public health, and with reference thereto the police power is unlimited.

Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253; *Wible v. Struss*, 84 Ky. 290; *Walker* 41 L. R. A.

v. Jameson, 140 Ind. 591, 28 L. R. A. 679; *Smiley v. MacDonald*, 42 Neb. 5, 27 L. R. A. 540; *National Fertilizer Co. v. Lambert*, 48 Fed. Rep. 458; *Slaughter-House Cases*, 16 Wall. 86, 21 L. ed. 411; *Alpers v. San Francisco*, 32 Fed. Rep. 508; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Vandine, Petitioner*, 6 Pick. 187, 17 Am. Dec. 351; *Boehm v. Baltimore*, 61 Md. 259; *State, Nicoulin, v. Lowery*, 49 N. J. L. 891; *River Rendering Co. v. Behr*, 7 Mo. App. 345; *Underwood v. Green*, 8 Robt. 86.

To regulate the removal of dead animals by granting the exclusive right to a public contractor, for fixed fees, invades no right of property, and grants no exclusive privilege, and is open to no constitutional objection. It is a customary and proper exercise of police power.

Wible v. Struss, 84 Ky. 290; *Walker v. Jameson*, 140 Ind. 591, 28 L. R. A. 679; *Smiley v. MacDonald*, 42 Neb. 5, 27 L. R. A. 540; *National Fertilizer Co. v. Lambert*, 48 Fed. Rep. 458; *Alpers v. San Francisco*, 32 Fed. Rep. 508; *Vandine, Petitioner*, 6 Pick. 187, 17 Am. Dec. 351; *Boehm v. Baltimore*, 61 Md. 259; *State, Nicoulin, v. Lowery*, 49 N. J. L. 891; *River Rendering Co. v. Behr*, 7 Mo. App. 345; *Underwood v. Green*, 8 Robt. 86.

Paynter, J., delivered the opinion of the court:

The general council of the city of Louisville passed an ordinance giving the exclusive privilege to the public contractor to remove the carcasses of dead animals, not slain for food or to be used in useful arts, out of the city, such as horses, cattle, hogs, sheep, etc.; and it is the duty of such contractor, within twenty-four hours after he has received notice that there is a dead animal in the city, to remove it outside of the city to a place that appears to have been established, or to one that might thereafter be established, within the county of Jefferson. The owner or person in charge of any carcass may direct the place to which it shall be removed, upon the payment to the public contractor, of certain fees prescribed in the ordinance, to wit, \$2.50 per head for each ox, bull, steer, or cow, \$1 per head for each hog, etc.; and, upon the failure of the owner or person in charge to prepay the fee prescribed in the ordinance, the contractor is authorized to take possession of the carcass, and remove it to such rendering establishment as such public contractor may own or control outside of the city of Louisville, inside the county of Jefferson, where he shall proceed to render the same, and out of the proceeds of the materials and substances thus received from the rendering of the carcass he is to pay himself the fees prescribed in the ordinance for removing same, together with reasonable compensation for the services done by him in rendering or causing to be rendered such carcass of a dead animal; and if, after paying himself the fee and expenses indicated, there be any surplus left, he shall hold it for the benefit of the owner, provided the owner claims it within six months after the removal of the carcass. The ordinance further provides that it shall not be lawful for any person whatsoever, or copartnership of persons or corporation, except the public contractor, to

remove the carcass of any dead animal, unless the public contractor fails to remove the same within twenty-four hours after being notified thereof; and if any person, copartnership of persons, or corporation, except the public contractor, shall remove, haul, or drag a carcass of a dead animal through, along, or across any of the public ways, streets, or alleys of the city of Louisville, they shall be subject to a fine.

The city of Louisville, pursuant to the ordinance, made a contract with certain persons to remove the carcasses of dead animals as provided by the ordinance. Tatum, Embry, & Co. and two other firms were factors in the city of Louisville engaged in the business of buying stock and of selling stock which was consigned to them. It appears that cars are overloaded with stock, thus causing the death of part or all of the carload. Other causes produce the death of stock which is shipped to them, and also stock dies at the stock yards of these factors. Owing to the fact that they are large dealers in stock, they have for disposal a large number of carcasses, principally of hogs and cattle. It is to the interest of these firms to realize all they possibly can out of the remains of dead animals. There appear to be two or more rendering establishments not far distant from the stock yards, and their owners hired the defendant, Christ Knauer, to drive their wagon in, hauling their dead animals over the streets of Louisville to a rendering establishment. This prosecution was instituted for the purpose of imposing a penalty upon the driver, Knauer, because he was hauling the carcass of a dead animal, belonging to one of his employers, on the streets of Louisville to a rendering establishment. The question of his guilt depends upon the validity of the ordinance in question. The evidence offered in this case tends to prove that the remains of their dead hogs can be hauled to the rendering establishment for from 5 to 10 cents per head; that the remains of an ox, bull, steer, or cow belonging to them can be removed to the rendering establishment for much less than 50 cents per head. The proof also shows that the remains of a hog, bull, cow, or steer are not worth hardly so much as the fees which the ordinance requires to be paid for its removal. The result is that they cannot pay the fees and realize anything whatever for the carcasses of their dead animals. In other words, if the public contractor removes them they get nothing for such carcasses.

The sole question in this case is whether the city can pass an ordinance which fixes the fees to be paid the public contractor for the removal of the carcass of a dead animal out of the city at such sums that their owners cannot pay them and realize anything out of them. Can the city in this indirect way confiscate the property of its owner and give it to the public contractor? Dead animals are not *per se* nuisances, and the owner's property rights do not cease at the death of the animal. Until such becomes a nuisance, the owner should have the right to realize whatever he can from it. Under the police power, the municipality certainly has the right, and it is its duty, to prevent carcasses of dead animals from becoming nuisances; and to that end it may prescribe the

manner of and the time in which the owners shall remove or permit them to be removed. The employers of the appellant can remove the carcasses as speedily and in a manner that will cause as little offense to the public sense and taste as can the contractor. They can realize considerable sums by the sale of the carcasses by being permitted to make the removal. In the case of *State v. Morris*, 47 La. Ann. 1663, the court said: "To sustain that portion of the contract we would have to decide that a dead animal is *per se* a nuisance; that the ownership terminates at death. There is no question here of the exercise of eminent domain for the public good requiring compensation. The only question is the right to exercise the police power *vel non*. If the property is not a nuisance, the owner should not be prevented from obtaining its value, and should not be denied the right to make any disposition of it (however innocent and useful). It is not possible, under police regulation, to take property from one man and give it to another. The city might, as a sanitary measure, after having given the owner the opportunity to dispose of his dead animals, authorize a contractor to cart them away and appropriate them to his own use." In the case of *River Rendering Co. v. Behr*, 77 Mo. 98, 46 Am. Rep. 6, the court said: "We do not deny that the general assembly may confer upon municipal authorities the power to abate nuisances, and to declare what shall be deemed nuisances, but the latter power cannot be so absolute as to be beyond the cognizance of the courts to determine whether it has been reasonably exercised in a given case or not. *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984. The ordinance in question cannot be maintained as a police regulation. It can never be necessary to take from one man his property and give it to another until the property is in such condition that it is, or is so used that it is likely to become, a nuisance; and even in the latter case, until it has become a nuisance, an opportunity should be given the owner to change the use, or make such disposition of his property as will prevent the apprehended danger. Or the city might, as a sanitary measure, by ordinance authorize the seizure and sale of dead animals by its proper officers, in order to prevent an improper sale or disposition of them by the owner, provided it secured to such owner the proceeds of such sale. This might be tolerated, but it would be on the very verge of debatable ground. . . . A dead hog or steer or sheep is not *per se* a nuisance. It was so ruled by the New York court of appeals in *Underwood v. Green*, 42 N. Y. 140. It was there observed that 'a dead hog is not *per se* a nuisance, even though it died of suffocation, and is not necessarily dangerous to public health. The owner may still put it to a useful and innocent purpose.' While a dead animal is not *per se* a nuisance, it may become so, and the city, under her charter, may pass such ordinances as are necessary to prevent it from becoming a nuisance, but she must in such legislation pay a proper regard to the rights of the owner of such property. The death of a domestic animal does not terminate the owner's property, and, while he may be required to make such use or disposition of the carcass

as will prevent a nuisance, stench, or other inconvenience to the neighborhood, the municipal authorities cannot arbitrarily deprive him of his property by giving it to another. If not *per se* a nuisance, it is property, in the broadest sense of the term."

It requires no argument to show that neither a municipal nor any other government can take one man's property and give it to another. An ordinance declaring that the carcasses of all dead animals found in the city, which were not slain for food or to be used in the useful arts, become the property of the public contractor, would be unconstitutional. If the municipality cannot directly take the property of one person and give it to another, should it be permitted to do so indirectly? We think not. The fees which the employers of the appellant are required to pay the contractor before they are permitted to direct where the carcass shall be taken are so high that they cannot afford to pay them. The value of the carcasses will not justify them in paying the fees. It results that the contractor gets the carcasses as compensation for hauling them away, as the fee fixed in the ordinance is greater than the value of the carcass, and the owner cannot realize anything from the rendered product, as the cost of rendering is added to the amount of the fee fixed for the removal. The effect of an ordinance which does not allow the owner of a dead carcass to remove it, but requires him to pay a fee for its removal which is greater than its value, is precisely the same in effect as an ordinance which takes the carcass from one person and gives it to another. In so far as the ordinance has that effect it is unconstitutional. The proof offered by the appellee tends to show that the amount which the contractor received for the removal of all dead animals from the city is not unreasonable

because of the fact that he is sometimes required to send his teams many miles to remove a single carcass. We do not think that because it is an advantageous contract to the city, and also to the interest of some of the citizens who may have animals to die that such ordinance should have been passed, can justify the city in taking, in the manner we have indicated, the property of the employers of the appellant. They cannot be compelled to relieve the city of the burden or other citizens of the expense by being forced to surrender their rights in property. Their property cannot be taken simply because the ordinance in question may relieve the city of an expense that it might otherwise have to pay.

The judgment is reversed for proceedings consistent with this opinion.

A petition for rehearing having been filed, the following response was handed down June 18, 1898, by **Paynter, J.**:

The court said in the opinion delivered that the municipality has the right, and it is its duty, to prevent carcasses of dead animals from becoming nuisances, and to that end it may prescribe the manner of and the time in which the owners shall remove them. We may add that the general council may provide by ordinance that in the event the owner of a carcass of a dead animal fails to remove it within the prescribed time, or pay such reasonable fee as may be fixed for its removal, it shall become the property of the city, or of such person as may be authorized, by contract with the city, to remove it; or it may be provided that, upon the failure of the owner to remove it within the prescribed time, it shall become the property of the city, or of such person as may be authorized to remove it.

NEBRASKA SUPREME COURT.

FARMERS' LOAN & TRUST COMPANY v.

M. M. KILLINGER *et al.*
D. A. HALE *et al.*, Impleaded, etc., *Appls.*

(46 Neb. 877.)

***A court, upon setting aside a mere money judgment, has no power to continue**

***Headnotes by RYAN, C.**

NOTE.—Continuing lien of judgment opened or set aside to permit a defense.

I. Distinction between opening and setting aside or vacating judgment.

II. Power to continue lien on opening judgment.

III. The Pennsylvania and Ohio rules.

IV. Effect of continuance of lien.

V. The second or final judgment.

VI. The final enforcement or collection.

I. Distinction between opening and setting aside or vacating judgment.

The power of the court to continue the lien of a judgment upon opening it to let in a defense seems to be well settled. But the principle I. R. A.

in existence the statutory judgment lien of the judgment set aside, that it may attach to such judgment as subsequently may be rendered in the same cause.

(January 2, 1898.)

APPEAL by D. A. Hale *et al.* from a judgment of the District Court for Madison county postponing the lien of the judgment which had been recovered by him against M.

pal case seems to be a pioneer case on the question of the right to continue the lien of a judgment upon setting aside or vacating it, as well as with reference to the distinction between opening and setting aside or vacating a judgment, unless Steinbridge's Appeal, 1 Penn. & W. 481, can be said to bear on that question. In that case it is said that "a judgment may be opened, or it may be set aside. If the former, it remains a judgment still, and with all the attributes as such; of which the order of the court has not deprived it," giving rise to the inference that if it were vacated or set aside it would not be a judgment with its usual attributes. But this was a case of opening, and not of vacating or setting aside.

M. Killinger to a mechanic's lien held by L. B. Baker in the adjustment of liens against Killinger's property in a proceeding to foreclose a mortgage. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Allen, Robinson, & Reed and Robinson, Reed, & Foster, for appellants: The court had a right to make such an order as it did in this case.

Exley v. Berryhill, 36 Minn. 117; *Whereatt v. Ellis*, 68 Wis. 61.

The judgments of the court preserving the attachment and general judgment liens of appellants were judgments of the court until vacated, modified, or disposed of by the process prescribed by law. Entering another judgment is not one of them.

II. Power to continue lien on opening judgment.

In cases where defaults are opened, it is proper practice to allow the judgment already entered to stand as security. *Hanse v. Fiero*, 25 Abb. N. C. 46.

And a defendant failing to serve his answer within the time allowed for that purpose, upon excusing his default and showing a good defense is usually permitted to interpose it on motion to open the default on payment of the costs of the motion, judgment, execution, and levy thus existing to stand as security for the payment of any judgment the plaintiff may thereafter recover. *Clark v. Lyon*, 2 Hilt. 91.

A proceeding to let in a defendant to plead upon terms after judgment by default partakes of the nature of an equitable interposition on his behalf, and should be somewhat controlled by equitable considerations; and it is more just that the old judgment should be allowed to stand and the lien which may have been thereby obtained preserved to the plaintiff. *Dulle v. Lally*, 64 Ill. App. 292.

And on setting aside a default for want of a plea on the ground of merit if it appear probable that the plaintiff may lose his demand by reason of the defendant being in doubtful circumstances the court will order the judgment to stand as security. *Anonymous*, 6 Cow. 390.

And the plaintiff in an action which would abate by the death of the defendant, in which a motion to open a default had been made and denied, and there had been a long delay in renewing the motion, is entitled to have the judgment remain as security to protect his rights, and should not be required to accept in lieu thereof an undertaking to pay such judgment as might eventually be recovered. *Hart v. Washburn*, 42 N. Y. S. R. 440.

Where a defendant moves to open a default upon terms not of right, the court has power, as one of the terms, to require that judgment or execution shall stand as security, and will do so if the safety of the plaintiff demands it. *Wilson v. White*, 7 Cow. 477.

A defendant applying to have a judgment by default against him opened applies to the court for a favor, and in granting it the court has power to impose the condition that the debt shall be secured by lien on his property; and where he accepts the favor and the issue is tried upon the merits, the lien in equity continues until the debt is discharged. *Holmes v. Bush*, 35 Hun, 637.

Under power to open a judgment on such terms as shall be just, as well as under its general powers, a court may modify a judgment by depriving it of its ordinary character as *res*

judicata. *Nuckolls v. Irwin*, 2 Neb. 60; *Flagg v. Cooper*, 22 Jones & S. 50; Am. Dig. 1890, p. 2180, § 886; *Loomis v. Second German Bldg. Assn.* 37 Ohio St. 392; *Leonard's Appeal*, 94 Pa. 180; *Kittanning Ins. Co. v. Scott*, 101 Pa. 449; *Cope's Appeal*, 96 Pa. 294.

If a judgment is opened but allowed to stand as security, for what may be afterwards recovered, it operates, notwithstanding its opening, as a lien upon the land.

Holmes v. Bush, 35 Hun, 637.

Messrs. Campbell & Wallis and Wigton & Whitham for appellees.

Ryan, C., delivered the opinion of the court:

This action was for the foreclosure of a mortgage made to the Farmers' Loan & Trust

judicata, and leaving it in full force as a lien or collateral security. *Griswold Linseed Oil Co. v. Lee*, 1 S. D. 531; *Negley v. Counting Room Co.* 2 How. Pr. N. S. 237.

And the court has authority, under its general powers, as well as by statute, in New York, in its discretion and upon such terms as it believes to be just, to relieve a party from a judgment and allow an answer to be made, and in pursuance of this authority it may modify the judgment by depriving it of its ordinary character as *res judicata*, and leaving it in full force as a lien or collateral security. *Mott v. Union Bank*, 38 N. Y. 18.

And where a judgment is opened under South Dakota Comp. Laws, § 4939, conferring power to relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, upon such terms as may be just, the court may, in addition to costs, impose as terms that the judgment stand as security for any judgment that may be finally recovered by the plaintiff in the action, and where the judgment is for a large amount the terms should be, that in addition to costs the judgment should stand as security, or, in lieu thereof, a good and sufficient bond should be given, conditioned for the payment thereof. *Griswold Linseed Oil Co. v. Lee*, 1 S. D. 531.

So, the court, on opening a default of a plaintiff to reply to a counterclaim set up by the defendant upon which he has taken judgment, may direct the judgment on the counterclaim to stand as security, with the right to either party to make such motion as to such judgment on the decision of the question as to the plaintiff's right to recover his costs of action set up in the complaint, as he shall be advised. *Pomares v. Duncan*, 25 Abb. N. C. 58.

And an order allowing leave to amend a complaint by inserting another count for an additional claim made after the entry of a judgment by default upon the original complaint which had been opened to permit a defense, but left to stand as security for such subsequent judgment as might be obtained, need not be conditioned that such default judgment be vacated, but it may be allowed to stand as security for the subsequent judgment for the consideration stated in the original complaint. *Union Bank v. Mott*, 19 How. Pr. 114, 10 Abb. Pr. 376.

And a requirement of a bond for the payment of any damage which might be recovered in an action to recover unliquidated damages for malicious prosecution, the amount claimed having no relation to the amount the plaintiff would be held entitled to recover if he recovered at all, is improper, and an order requiring such bond will be modified on appeal so as to open

Company by M. M. Killinger and his wife. There were made defendants Louis Stein & Co., David Hale, and L. B. Baker. A controversy not settled to the satisfaction of one party was between L. B. Baker, who had filed his claim for a mechanic's lien against the real property of Killinger on August 6, 1889, and D. A. Hale, who had recovered judgment against M. M. Killinger on May 2, 1889. One of the journal entries introduced in evidence in this case was as follows:

David A. Hale v. M. M. Killinger. Wm. V. Allen's Journal Entry. And now, on this 29th day of July, 1889, it being a judicial day of the regular April, 1889, term of this court, this cause came on for hearing to the court on the defendant's motion to set aside the judgment heretofore

the default and allow the services of an answer, upon payment of costs, and upon condition that the judgment stand as security for any judgment that the plaintiff might ultimately recover. Glickman v. Loew, 29 App. Div. 479.

So, where two partners have been regularly brought into court by process upon a demand owing by them as such, and an attorney employed by one of them appears for both, acting in good faith, and offers to allow judgment, which is accepted, the other, upon swearing to the merits, will be led in to answer to the complaint and defend the action, the judgment and levy therein to stand as security for any judgment finally obtained. Blodget v. Conklin, 9 How. Pr. 442.

And where an attorney appears for a defendant against whom a writ has been issued but not served, and suffers or confesses judgment without authority, if the attorney is not responsible or perfectly competent to answer to his assumed client the court will relieve against the judgment, and, in order to protect the plaintiff from suffering by the act of the attorney and at the same time save the defendant from injury, will let the judgment stand, but stay all proceedings and let in the defendant to plead. Denton v. Noyes, 6 Johns. 296, 5 Am. Dec. 237; Ellsworth v. Campbell, 31 Barb. 134.

So, in Cleveland v. Porter, 10 Abb. Pr. 407, a judgment against several joint debtors, obtained on service of summons upon one only under circumstances arousing a suspicion that it was obtained by connivance of the defendant served, was opened on motion of another defendant to permit a defense,—the judgment and all subsequent proceedings to stand as security, all further proceedings thereon being stayed until the determination of the issues.

And the same thing was done in Ford v. Whitridge, 9 Abb. Pr. 416.

And in Grazebrook v. McCreedie, 9 Wend. 438, proceedings on a judgment entered on a cognovit given by an attorney of two partners as such when in fact he was employed by only one, on whom a declaration had been served of which the other was ignorant, were stayed, and the other partner was permitted to put in a plea and contest the validity of plaintiff's demands.

So, in McTague v. Pennsylvania & N. E. R. Co. 44 N. J. L. 62, in which it appeared that the judgment debtor was entitled to be heard on the merits, the proceedings were opened to permit him to defend on the terms of letting the judgment and execution stand as security.

And in Nitchie v. Smith, 2 Johns. Cas. 286, a judgment by default regularly obtained against an administratrix was opened, and she was allowed to come in and plead, but it was directed **L. R. A.**

entered in this case, and to be let in to defend, supported by the affidavit of the defendant. On consideration of said motion, the same is granted by the court, the judgment set aside, and the defendant let in to defend, on condition that he pay all the costs of this case. To all of which the plaintiff duly excepted. It is further ordered that the plaintiff have forty days from this date to prepare and settle a bill of exceptions. It is further ordered that the attachment and general judgment lien obtained by the plaintiff in this case shall be preserved to him and in no manner be affected by this order.

On May 2, 1890, judgment was rendered in the above-entitled cause against the defendant for the sum of \$888.45 and costs. The

ed to stand as security for the assets remaining after payment of prior judgments confessed, and for assets *quando acciderint*.

And in Hall v. First Nat. Bank, 133 Ill. 234, it was held that a verdict for the plaintiff without the assessment of damages, in an action upon a draft, is not erroneous where, on motion of the defendants to set aside a default and for leave to plead, the court stayed proceedings on the judgment and allowed the defendants to plead, but refused to set it aside, allowing it to stand as a security for the plaintiffs until the trial of the issues, and the defendants availed themselves of the leave of the court to plead to the merits.

So in Dulle v. Lally, 167 Ill. 485, 64 Ill. App. 292, the judgment debtor was given leave to plead judgment to stand as security after the lapse of many terms of court.

And in Selover v. Forbes, 22 How. Pr. 477, a judgment in an action brought by a receiver who had no knowledge of the validity of the claim except that which he obtained from others, the defendant denying positively any indebtedness whatever, was opened upon the terms that the judgment and execution stand as security, and the sheriff be allowed to proceed on the execution, unless the defendant secured him thereon, the defendant to withdraw a pending appeal from an order, and pay all costs and costs of the subsequent proceeding and \$10 costs of the motion to open it.

And in Brownell v. Rushman (N. Y.) 11 Rep. 584, it was held on appeal from an order opening a default, that the condition imposed, of payment of the costs of the action and that the judgment stand as security, was severe and unusual, but it was upheld upon the ground that it appeared to the court that the litigation was not continued in good faith.

So, upon a bill in chancery to enjoin a judgment at law, an absolute right to a certiorari to review which had been lost either by the loss of the bill of exceptions or the death of the judge without signing it, there must not be a decree annulling the judgment and granting a new trial in the law court, but the judgment should be allowed to stand as security for what may be found to be justly due, and the injunction allowed to stand until the retrial, and the decree should direct an issue or issues to be tried in the circuit court to find what the nature of the case requires, and upon the verdict the court will perpetuate or dissolve the judgment wholly or partially, according to the circumstances of the case. Grafton & G. R. Co. v. Davison (W. Va.) 29 S. E. 1028.

And the same rule applies where the justices composing the court before which the cause

judgment which had been rendered just one year previously was for \$620. As has already been stated, the claim of L. B. Baker for a mechanic's lien was filed August 6, 1889. The appellants claim that this lien was subject to the lien of whatever judgment should be recovered ultimately by Mr. Hale, and that, therefore, the final judgment in the sum of \$385.45 should have been declared superior to the aforesaid mechanic's lien. The contention of the appellees that the lien of David A. Hale's judgment dated only from May 2, 1890, was sustained by the district court, and to reverse this postponement of his lien this appeal was taken.

In argument it was urged that the order setting aside the judgment in Mr. Hale's favor was made upon condition that the judgment

lien previously existing should be preserved, and held to attach to whatever judgment ultimately should be rendered. This construction is not borne out by the language employed, for the order with reference to the preservation of said lien was made after, and independently of, the order setting aside the judgment.

It is further insisted that the language of the final paragraph of the above journal entry brought about one result, and that was that the lien of the judgment opened was by the court preserved for the enforcement of whatever final judgment should be rendered. To sustain this, appellants' counsel have cited several Pennsylvania cases. The practice in that state does not seem to depend upon an express provision of the statutes. We infer, however, that there is held to exist a material difference

was tried had left the bench after the verdict was rendered so that a motion for a new trial could not be made. *Knifong v. Hendricks*, 2 Gratt. 212, 44 Am. Dec. 385.

Judgment will not be given as security, however, on an affirmative motion against a party who comes regularly upon the calendar to set aside a verdict or report on the merits; this can only be done where he applies for leave to move upon terms, not of right. *Wilson v. White*, 7 Cow. 477.

III. The Pennsylvania and Ohio rules.

In Pennsylvania the lien of a judgment is neither destroyed nor affected by an order opening the judgment for the purpose of letting the defendant in to make a defense. *Kittanning Ins. Co. v. Scott*, 101 Pa. 449; *Cope's Appeal*, 96 Pa. 294; *Steinbridge's Appeal*, 1 Penr. & W. 481.

But it will continue for the same period of time as if it had not been opened. *Cope's Appeal*, 96 Pa. 294.

And continues from the original date of entry. *Steinbridge's Appeal*, 1 Penr. & W. 481.

A judgment opened to let in a defense continues to be a judgment with all its incidents and for all purposes except execution, and it is not necessary that a special order be made that the judgment shall stand as security. *Kittanning Ins. Co. v. Scott*, 101 Pa. 449.

And pending the defense to a judgment opened for that purpose it may be revived, and the lien thereon continued, by issuing a *scire facias* thereon, but to continue it the plaintiff must proceed within the five years during which it is a lien as in other cases, though the issue remains undetermined, and the judgment opened to let in a defense is not affected or disturbed any further than is necessary for that purpose, and remains a valid and subsisting judgment for all other purposes. *Kittanning Ins. Co. v. Scott*, 101 Pa. 449.

And where an award is filed in favor of a creditor against a debtor, and after the expiration of twenty days therefrom the judgment becomes absolute and an execution is issued, and subsequently the court grants a rule to show cause why the award should not be stricken out, which is afterwards made absolute, but the court subsequently reconsiders its action and reinstates the rule, and afterwards again discharges it permitting an appeal from the award, the creditor recovering judgment on the final trial, the lien of such judgment is not postponed to that of other creditors who obtained judgment after the award and judgment and execution thereon, but previous to the final judgment. *Leonard's Appeal*, 94 Pa. 180.

41 L. R. A.

So, in Ohio it is provided by statute (2 Swan & C. 1160) that where a second trial is granted under the statute the lien of the first judgment shall not be removed or vacated, but the real estate of the judgment debtor shall be bound as if no new trial had been demanded until the final determination of the case. *Loomis v. Second German Bldg. Assn.* 37 Ohio St. 392.

And under that provision the lien of the first judgment takes precedence over a mortgage given subsequently by the judgment debtor but before the final determination. *Loomis v. Second German Bldg. Assn.* 37 Ohio St. 392.

IV. Effect of continuance of lien.

A judgment which has been opened but left to stand as security for any future recovery neither acknowledges nor establishes any indebtedness, and is of no effect except merely as a security for the payment of any sum that may be found due. *Mott v. Union Bank*, 38 N. Y. 18, 8 Bosw. 591; *Holmes v. Rogers*, 18 N. Y. S. R. 652; *Griswold Linseed Oil Co. v. Lee*, 1 S. D. 531.

And where the judgment is left to stand as security on the opening of a default no execution can be issued thereon until the final determination of the controversy. *Negley v. Counting-Room Co.* 2 How. Pr. N. S. 237; *Ford v. Whitridge*, 9 Abb. Pr. 416.

An order opening a default, but leaving the judgment to stand as security, places the parties back where they were before the judgment was entered, and provides for the litigation of their rights, and the execution of the judgment would be inconsistent with the right thus to litigate. *Mott v. Union Bank*, 38 N. Y. 18.

And a defendant who accepts leave to defend granted by an order opening a default on condition that the judgment stand as security, no execution to issue thereon until the determination of the action, cannot afterwards insist that the terms upon which such leave was granted were irregular. *Flagg v. Cooper*, 22 Jones & S. 50.

And a default judgment modified by an order allowing the defendant to answer and litigate the plaintiff's claim, but directing the judgment to stand as security for the alleged indebtedness, is not a final determination of the rights of the parties which will prevent the issue of an order of arrest within the meaning of N. Y. Code, § 183, providing that the order may be made to accompany the summons, or at any time afterwards before final judgment. *Mott v. Union Bank*, 38 N. Y. 18, 8 Bosw. 591.

But a judgment entered by default and docketed, is a final judgment within the provision of N. Y. Code, § 1240, upon which an execution

between opening a judgment and setting it aside. This inference seems justified by the following language, quoted from *Steinbridge's Appeal*, 1 Peur. & W. 491: "A judgment may be opened, or it may be set aside. If the former, it remains a judgment still, and with all the attributes as such, of which the order of the court has not deprived it. Here it was opened to let the party into not even a full defense; consequently it was no further disturbed than to effect that object." In *Troubat & H. Prac.* § 60,—a work specially designed for use in Pennsylvania,—is found this language: "Our remedy, also, for irregularity or collusion

in the rendition of a judgment, is to overturn it; but, for pretermitted matter of defense, it necessarily is to open it, for it is impossible to say what may be found due. Our practice, therefore, is to try collusion by a collateral issue, but matter of defense by an issue in the cause which gives the defendant all proper advantage of matter of original defense without loosening the plaintiff's hold on the security gained by the judgment." The Pennsylvania cases cited in the brief for appellants were where the judgment had been opened, and the defendant let in to defend. They therefore afford no justification of the claim that in that state a

may regularly issue, the order opening a default merely regulating its actual issue, and where the period during which no execution was to issue has expired, the judgment originally entered may be enforced in the way provided by law. *Flagg v. Cooper*, 22 Jones & S. 50.

An order opening a default and permitting a defense, but leaving the judgment to stand as security, modifies it by depriving it of its ordinary character as *res judicata*, but leaves it in force as a lien or collateral security. *Negley v. Counting-Room Co.* 2 How. Pr. N. S. 237.

And where he accepts the favor, and the issues are tried upon the merits, the lien in equity continues until the debt is discharged. *Holmes v. Bush*, 35 Hun, 637.

And an order setting aside a default, and directing that the judgment entered thereon should stand as security for any judgment in the action that might be thereafter rendered, creates a lien upon lands of the judgment debtor or which will justify a purchaser from an heir of the judgment debtor after his death in refusing to accept a deed, though an order had been made providing that a docket of such judgment should be marked suspended upon appeal. *Holmes v. Bush*, 35 Hun, 637.

A judgment by default which is opened but allowed to stand as security is a lien for what may be found to be really due, though obtained by fraud, accident, or surprise, and though what may be due be the whole or only a part of the debt recovered. *Grafton & G. R. Co. v. Davison* (W. Va.) 29 S. E. 1028.

And when another count is added by amendment the judgment may be allowed to stand as security for the subsequent recovery for the consideration stated in the original complaint. *Union Bank v. Mott*, 19 How. Pr. 114, 10 Abb. Pr. 376.

Where an injunction to a judgment which has been allowed to stand as security for what may be found to be justly due in a case in which a right to a certiorari has been lost is only perpetuated as to part of it, or only reversed in part, or the reversal is only of a part of the judgment, the lien of the part not affected continued from the date of the judgment. *Grafton & G. R. Co. v. Davison* (W. Va.) 29 S. E. 1028.

So, a judgment opened to let in a defense may, pending the issue thereof, be transferred to another county for the purpose of becoming a lien on property therein pursuant to the law. *Kittanning Ins. Co. v. Scott*, 101 Pa. 449.

And an order opening a judgment to admit a defense does not prevent the issuing of a scire facias within the statutory period, or of an alias whereby the lien may be continued. *Cope's Appeal*, 96 Pa. 294.

But where more than ten years have expired after the entry of a judgment which had been
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opened but allowed to stand as security, it ceases to be a lien on real estate, and an order for the issue of an execution cannot revive the lien. *Hanse v. Fiero*, 25 Abb. N. C. 46.

And a judgment creditor whose judgment has been opened to let in a defense, who desires to extend the lien of the judgment for a longer term than the statutory period of five years, must issue his scire facias to revive as prescribed by law, the same as in any other case. *Cope's Appeal*, 96 Pa. 294.

An order opening a default, and providing that the judgment shall stand as security, simply retains the judgment as a lien upon any land of the defendant, and does not extend the lien beyond the ten years provided for by N. Y. Code, § 1251, or the additional time under § 1255; and after such period of ten years the court, though it will permit an execution to issue thereon, will not permit it *nunc pro tunc*, as this might expose subsequent purchasers to litigation. *Hanse v. Fiero*, 25 Abb. N. C. 46.

So, an election by the plaintiff in an action in which a default judgment had been opened and permitted to stand as security and to amend his complaint on the trial is not a concession that the original judgment was unauthorized, and does not affect its character as a security. *Hanse v. Fiero*, 25 Abb. N. C. 46.

But the allowance of an amendment to a complaint by the insertion of another account for an additional claim after the opening of a judgment by default upon the original complaint, the judgment to stand as security for any judgment to be recovered, does not extend such judgment as a security for any matter which could not be recovered under the complaint upon which it was entered; it can stand only as security for such subsequent judgment as may be obtained for the consideration stated in the original complaint. *Union Bank v. Mott*, 19 How. Pr. 114, 10 Abb. Pr. 376.

V. The second or final judgment.

Where a judgment has been opened and a new trial ordered, but the judgment allowed to stand as security, a new judgment is required to be entered for the amount recovered on the second trial, without reference to the previous judgment. *Miller v. Eagle Life & Health Ins. Co.* 3 E. D. Smith, 184; *Mott v. Union Bank*, 8 Bosw. 591.

And notwithstanding the fact that the first judgment still remains upon record. *Mott v. Union Bank*, 8 Bosw. 591.

And the entry of a fresh judgment thereon for the amount of the recovery with costs as taxed is not subject to the objection that the practice is irregular, on the ground that there cannot be two judgments for the same demand as the first judgment is merely collateral to the second, and security for its payment. *Negley v. Counting-Room Co.* 2 How. Pr. N. S. 237.

judgment may be set aside, and yet that the lien of such judgment may continue to exist. In the case of *Flagg v. Cooper*, 22 Jones & S. 50, the judgment was not vacated, but leave to defend was granted upon the express condition that the judgment already in existence should stand as security, but that no execution thereon should issue. The fact that the defendant had availed himself of this condition influenced the court somewhat in the direction of holding the defendant bound by this provision. The case of *Loomis v. Second German Bldg. Assn.* 37 Ohio St. 392, also cited by the appellants, rather tends to deny than recognize the claim that a lien may survive a judgment

after it has been set aside; for in that state it had been deemed necessary to effect that result that this statutory provision, quoted in the opinion, should be adopted, to wit: "In all cases where the party against whom a judgment is rendered obtains a second trial under the act to which this is amendatory and supplementary, the lien of the opposite party so obtaining such second trial, created by said judgment, shall not be by the obtaining of such second trial removed or vacated, but the real estate of said party so obtaining such second trial shall be bound in the same manner as if said second trial had not been demanded, until the final determination of the case." From

So, the plaintiff must, if he finally succeeds in the action, file with the clerk a new roll containing the bills or copies thereof with extracts from the minutes of the verdict or decision and other papers necessarily belonging to the judgment, which must be entered for the whole amount of damages and costs as if no former judgment roll had been filed. *Hall v. Templeton*, 4 N. Y. Week. Dig. 120.

And where a creditor recovers a second judgment, the first having been opened to let in a defense, but left to stand as security, the order opening it and such second judgment furnish record evidence that both are for the same cause, and constitute but one debt. *Mott v. Union Bank*, 8 Bosw. 591.

In *Dows v. Boughton*, 3 Hill, 452, however, it was held that where, after judgment and execution against a defendant, he is let in to defend on terms, the judgment and execution to stand as security, and the plaintiff afterwards obtains a verdict, he is entitled to an order upon the defendant to pay the taxed costs of the proceeding subsequent to the judgment on demand, or that judgment issue against him, the ruling being placed on the ground that the court could not amend the record by increasing the amount of their recovery without endangering the lien obtained by docketing the judgment, and that by amending the writ of fieri facias the levy upon personal property might be affected, and that no precedent existed for the rendition of a second judgment.

A subsequent judgment does not have the effect of vacating an original judgment which had been opened to let in a defense but left to stand as security. *Flagg v. Cooper*, 22 Jones & S. 50.

And the judgment which has been opened is not merged by the recovery of the second judgment in the same cause so as to affect its character as a security. *Hansee v. Fiero*, 25 Abb. N. C. 46; *Holmes v. Bush*, 35 Hun, 637; *Loomis v. Second German Bldg. Assn.* 37 Ohio St. 392.

As that would deprive the party of all benefits intended to be secured thereby. *Holmes v. Bush*, 35 Hun, 637.

A lien by docket or levy of a judgment by default directed to stand as security cannot be impaired by the act of the plaintiff in entering up a final judgment. *Heinemann v. Waterbury*, 5 Bosw. 686.

Nor does the lien of the second judgment relate back to the time of the first judgment. *Loomis v. Second German Bldg. Assn.* 37 Ohio St. 392.

Where a judgment has been opened to let in a defense, and the plaintiff falls in his action, however, a return of the security is effected by the cancellation of the collateral judgment, which loses its validity and effect when the action fails. *Negley v. Counting-Room Co.* 2 How. Pr. N. S. 237.

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And where the plaintiff again recovers a judgment, which is reversed on appeal, the former judgment falls with the reversal of the second. *Pierce v. Thomas*, 4 E. D. Smith, 354.

An appeal in an action in which a default judgment has been opened and permitted to stand as security is to be taken from the final or subsequent judgment, and the papers comprising it are to be printed in the case upon appeal, and no reference need be made to the security judgment. *Hall v. Templeton*, 4 N. Y. Week. Dig. 120.

VI. The final enforcement or collection.

Where a judgment by default has been opened to let in a defense if the plaintiff finally succeeds in the action, the ordinary practice is to issue an execution upon the final judgment which is the real judgment in the case, and if that proves unproductive, then to pursue whatever lien the collateral judgment gives. *Negley v. Counting-Room Co.* 2 How. Pr. N. S. 237.

Where a judgment is entered on default, and is set aside but left to stand as security, there is no objection to taking precisely such future proceedings in the action as would be regular if no security had been given in that form or no judgment by default had ever been entered. *Holmes v. Rogers*, 18 N. Y. S. R. 652.

A judgment by default which is opened but permitted to stand as security like any other security is collateral merely to the judgment ultimately recovered, and is to be enforced after such recovery *pro tanto* and the money realized upon it is to be credited upon what may be termed the final judgment. *Hall v. Templeton*, 4 N. Y. Week. Dig. 120.

Where a judgment by default is opened to let in a defense, but is left to stand as security, however, and a levy has already been made on the collateral security, or a proceeding has been founded thereon, and such levy or proceeding has been preserved by the order opening the default, it will not be impaired, but may be enforced by the plaintiff if he finally recovers in the action. *Negley v. Counting-Room Co.* 2 How. Pr. N. S. 237.

So, in *Holmes v. Bush*, 35 Hun, 637, two methods of enforcing the lien of a judgment which had been opened but allowed to stand as security were suggested, the one being the sale of the land by a process to be issued on application to the court in the nature of an execution, and the other a suit in equity founded upon all the proceedings had in the action, and bringing before the court all the parties interested in the premises, but the court found it unnecessary to decide which was the proper method. See also *Flagg v. Cooper*, 22 Jones & S. 50; *Dows v. Boughton*, 3 Hill, 452, *supra*, IV.

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this review of all the cases cited by the appellants upon this point, it is very clear that an order made, as was the one which we now have under consideration, has not been shown to have had the effect claimed to have been generally recognized as resulting from such an order. In *Loomis v. Second German Bldg. Assn.* 37 Ohio St. 892, it was said that "a judgment lien is a creature of the statute, and does not exist except by its authority." The correctness of this proposition will not be questioned. The provision of our statute found in § 477 of the Code of Civil Procedure, by virtue of which appellants' judgment created a lien of any kind, is in this language: "The lands and tenements of the debtor within the county where the judgment is entered, shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered." There is found in the statutes of this state no provision which makes this lien dependent upon any other consideration than the rendition of a judgment. It would be deemed an extraordinary and unwarranted proceeding if a court, contemporaneously with the entry of a mere money judgment, should order that by virtue thereof its lien should date from some time

named before the first day of the current term. If such an order could not be made at the time of the rendition of the judgment, it could scarcely be possible for the court, upon the entry of an order setting aside such judgment, to provide that if thereafter, no matter if a year subsequently, there should be another judgment, its lien, instead of arising as provided by statute, should be deemed to have been in existence from the date at which the first judgment had its origin. We are not considering what order might properly be made by a court, in the exercise of its equity powers, continuing a lien, as between the parties to such an action. In the case wherein judgment was rendered, *M. M. Killinger* was the sole defendant. The party whose lien is sought to be postponed, therefore, could not be bound by an order or judgment on the theory that as to him it was *res judicata*. We are of the opinion that, under the circumstances, the court had no power, upon opening a mere money judgment, to order that the lien thereof should remain in existence, and attach to a subsequent judgment of like character, whenever such judgment might be rendered.

The judgment of the District Court is affirmed.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *ex rel.*
NEW ENGLAND DRESSED MEAT &
WOOL COMPANY, *Resp't.*

James A. ROBERTS, *Appt.*

(155 N. Y. 408.)

1. A corporation is not engaged in "carrying on manufacture," within the meaning of an exemption from taxes, when its business is that of purchasing, slaughtering, and selling sheep and lambs, although it utilizes the hides, wool, tallow, and offal, as well as the carcasses of the animals, and prepares and sells them as refrigerated mutton, rendered tallow, pulled wool, untanned hides, and fertilizer made of the offal, including the blood and legs.
2. The determination of the state controller that an assessment for taxes should be canceled on the ground that the property was not subject to assessment is not *res judicata*, and does not estop his successor from assessing the same property or franchise in subsequent years.
3. No distinction between dividends earned in a state and those earned out of it can be made in the assessment of a foreign corporation under Laws 1896, chap. 908.

(April 19, 1898.)

APPEAL by defendant from an order of the Appellate Division of the Supreme Court, Third Department, setting aside an assessment of corporation taxes upon relator by the state controller. *Reversed.*

NOTE.—On the question, What constitutes manufacturing?—see *Com. v. Northern Electric Light & P. Co.* (Pa.) 14 L. R. A. 107, and *note*; also *People v. Brush Electric Illuminating Co.*, *v. Wemple* (N. Y.) 41 L. R. A.

Relator was a Maine corporation. But its principal business was carried on in Massachusetts. A branch of its business was located at Buffalo in New York state.

Further facts appear in the opinion.

Mr. Theodore E. Hancock, Attorney General, for appellant.

The respondent is not a corporation wholly engaged in carrying on manufacturing in the state of New York within the meaning of the corporation tax laws of the state.

The fact that the business is carried on by a corporation upon an enlarged scale, rather than by an individual, does not change the nature of the act itself.

State, Evening Journal Assn., v. State Bd. of Assessors, 47 N. J. L. 86, 54 Am. Rep. 114; *Frazee v. Moffitt*, 20 Blatchf. 267.

The term "manufactured goods" must be understood in a popular sense, and must mean, not merely goods produced from the raw state by manual skill and labor, but such as are ordinarily produced by manufacturers.

Parker v. Great Western R. Co. 6 El. & Bl. 109; *Hartranft v. Wiegmann*, 121 U. S. 615, 80 L. ed. 1014.

Purchasing coffee in the raw bean, roasting, grinding, and mixing it with other articles, is not manufacturing.

People, Union Pacific Tea Co., v. Roberts, 145 N. Y. 375.

The constructing, using, and providing of one or more docks, as used in the act of 1880, is no more a manufacturing within the meaning of that word than would be the building of warehouses and elevators, etc.

14 L. R. A. 708; *Com. v. Pottsville Iron & S. Co.* (Pa.) 22 L. R. A. 228; *Com. v. Juniata Coke Co.* (Pa.) 23 L. R. A. 223; *Frederick Electric Light & P. Co. v. Frederick City* (Md.) 36 L. R. A. 130.

People v. New York Floating Dry-Dock Co. 92 N. Y. 489.

The process of manufacture is supposed to produce some new article, and does not consist in change of form of the original article.

People, Union Pacific Tea Co., v. Roberts, 145 N. Y. 875; *Pracee v. Moffitt*, 20 Blatchf. 269; *Hartranft v. Wiegmann*, 131 U. S. 609, 30 L. ed. 1012; *United States v. Potts*, 5 Cranch, 284, 8 L. ed. 102; *United States v. Wilson*, Fed. Cas. No. 16, 736; *Byers v. Franklin Coal Co.* 106 Mass. 181; *Dudley v. Jamaica Pond Aqueduct Corp.* 100 Mass. 188; *People v. Knickerbocker Ice Co.* 99 N. Y. 181.

The burden of proof was on the appellant to establish that it came within the statutory exemption, and to show that it was incorporated only for the purpose of manufacturing and transacting a business incident thereto.

People, Tiffany, v. Campbell, 144 N. Y. 178; *People, Western Electric Co., v. Campbell*, 145 N. Y. 587.

It appearing affirmatively that the appellant was engaged, not only in a manufacturing business, but also in other enterprises, it was bound still more clearly to establish by its articles of incorporation that it was organized solely for manufacturing, and that its other business was *ultra vires*, in order to bring itself within the statutory exception. This would apply to the taxes of 1894 and 1895.

People, Tiffany, v. Campbell, 144 N. Y. 166; *New Orleans Canal & Bkg. Co. v. New Orleans*, 99 U. S. 97, 25 L. ed. 409; *Knapp v. O'Neill*, 46 Hun, 818; *Sherrill v. Hewitt*, 36 N. Y. S. R. 821; *Butler v. Oneego*, 56 Hun, 858; *Ford v. De la & Pine Land Co.* 164 U. S. 666, 41 L. ed. 592.

The company, for 1896, would be liable at least to a tax upon the amount of its capital in use here for purposes other than manufacturing in this state.

People, Southern Cotton Oil Co., v. Wemple, 181 N. Y. 64; *People, Roebbing's Sons' Co., v. Wemple*, 188 N. Y. 583; *People, Seth Thomas Clock Co., v. Wemple*, 183 N. Y. 823; *People, Union Pacific Tea Co., v. Roberts*, 145 N. Y. 875.

Exemptions from taxation must be expressed in the clearest and most unambiguous language and not be left to implication or inferences.

New York, Schurz, v. Cook, 148 U. S. 397, 37 L. ed. 498; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 801, 38 L. ed. 450; *Yazoo & M. Valley R. Co. v. Thomas*, 132 U. S. 174, 33 L. ed. 302; *Yazoo & M. Valley R. Co. v. Yazoo Mississippi Delta Levee Comrs.* 132 U. S. 190, 33 L. ed. 308.

The determination of the controller, unless clearly shown to have been erroneous, must stand upon the question of valuation.

People, Roebbing's Sons' Co., v. Wemple, 188 N. Y. 587; *People, American Contracting & D. Co., v. Wemple*, 129 N. Y. 558; *People, Southern Cotton Oil Co., v. Wemple*, 181 N. Y. 64; *People, Seth Thomas Clock Co., v. Wemple*, 183 N. Y. 823; *People, Western Electric Co., v. Campbell*, 145 N. Y. 587.

The basis of taxation is the amount of capital employed in the state.

People, Roebbing's Sons' Co., v. Wemple, 188 N. Y. 583; *People, Seth Thomas Clock Co., v. Wemple*, 183 N. Y. 823; *People, Southern Cotton Oil Co., v. Wemple*, 181 N. Y. 64.

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Mr. James W. Eaton, for respondent:

The appellate division was right in holding that the relator is a corporation engaged wholly in manufacturing within the meaning of the law, and therefore not subject to any tax.

People, Standard Wood Co., v. Roberts, 20 App. Div. 514; *Engle v. Sohn*, 41 Ohio St. 691, 52 Am. Rep. 103; *New Orleans v. La Blanc*, 34 La. Ann. 596; *People, Schwabach & S. Co., v. Roberts*, 11 App. Div. 449; *Nassau Gaslight Co. v. Brooklyn*, 89 N. Y. 409; *People, Brush Electric Mfg. Co., v. Wemple*, 129 N. Y. 543, 14 L. R. A. 708.

The decision of the controller assessing a tax herein is invalid because in contravention of the maxim of *res judicata*.

A decision that the tax for a certain year is void because the company is exempt, is *res judicata* as to the tax for a subsequent year, when the same question is present on the same facts.

New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202; *Osterhoudt v. Rigney*, 98 N. Y. 222; *Doty v. Brown*, 4 N. Y. 71, 53 Am. Dec. 350; *People v. Stephens*, 71 N. Y. 529; *Guent v. Brooklyn*, 79 N. Y. 624; *People, Hatzel, v. Hall*, 80 N. Y. 117; *Pray v. Hegeman*, 98 N. Y. 851; *Griffin v. Long Island R. Co.* 102 N. Y. 449.

The controller was in error in taxing upon the basis of dividends earned outside of the state of New York.

People v. Horn Silver Min. Co. 105 N. Y. 76; *People v. Equitable Trust Co.* 96 N. Y. 887; *People, Seth Thomas Clock Co., v. Wemple*, 183 N. Y. 823.

Sale by relator from its Maine or Massachusetts house cannot, of course, be taken into account, because that falls under the head of interstate commerce, which cannot be taken into consideration.

Robbins v. Shelby County Taring Dist. 120 U. S. 489, 30 L. ed. 694; *People, Southern Cotton Oil Co., v. Wemple*, 181 N. Y. 64; *People, American Contracting & D. Co., v. Wemple*, 129 N. Y. 558; *People, Washington Mills Co., v. Roberts*, 8 App. Div. 201, Affirmed 151 N. Y. 619; *People, Hartan & H. Co. v. Campbell*, 139 N. Y. 68; *People, Davis Colby Ore Roaster Co., v. Campbell*, 66 Hun, 146.

The tax in case of foreign corporations must be reckoned upon the basis of the capital used within the state in the transaction of business.

The attempt to tax the company upon the basis of 108 per cent dividend in 1896, 100 per cent of which is what is known as a stock dividend, is void.

Gibbons v. Mahon, 136 U. S. 549, 34 L. ed. 525; *Williams v. Western U. Teleg. Co.* 93 N. Y. 163; *Re Kernochan*, 104 N. Y. 618; *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705; *Rand v. Hubbell*, 115 Mass. 461, 15 Am. Rep. 121; *Taft v. Hartford, P. & F. R. Co.* 8 R. I. 310, 5 Am. Rep. 575; *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156; *Bailey v. New York C. & H. R. R. Co.* 23 Wall. 604, 23 L. ed. 840.

Martin, J., delivered the opinion of the court:

The principal and most important question involved in this case is whether the business conducted by the relator in this state was manufacturing, within the meaning and intent of

the corporation tax laws, by the provisions of which manufacturing corporations carrying on "manufacture" within the state are exempt from the operation of the laws relating to corporation taxes.

Briefly stated, the principal business carried on by the relator was the purchasing of sheep and lambs, slaughtering them, pulling the wool from the hides or pelts, selling it, selling the hides, taking from the animals the offal, including the blood and legs, converting it into fertilizer, and then reducing the carcasses to a temperature which would retard decomposition, and shipping them to the place of delivery in refrigerator cars. We think this does not constitute "carrying on manufacture," within the spirit and meaning of the statutes.

The business conducted by the relator was obviously that of purchasing, slaughtering, and selling sheep and lambs. While it utilized the hides, the wool, the tallow, and the offal, as well as the carcasses of these animals, yet, to say that refrigerated mutton, rendered tallow, pulled wool, or untanned hides were manufactured articles would be quite incorrect. The words of a statute are to be given their natural, plain, obvious, and ordinary signification. To say that the relator was engaged in manufacturing mutton, wool, hides, or tallow would not be giving to the words "manufacture" or "manufactures" their ordinary and plain meaning. It may be that the fertilizer might be regarded as a manufactured article, but that was not the principal business in which the relator was engaged, but was a mere incident to it. Manifestly, none other of these articles was manufactured. At most, they were merely prepared for market and preserved until sold. We are clearly of the opinion that the relator was not a manufacturing corporation, nor engaged in "carrying on manufacture" in this state, within the spirit and meaning of the statutes.

Moreover, the principle of the decisions of this court is adverse to the contention of the respondent. *People v. Knickerbocker Ice Co.* 99 N. Y. 181; *People, Union Pacific Tea Co., v. Roberts*, 145 N. Y. 375. In the *Knickerbocker Ice Company Case* it was held that a corporation, engaged in collecting, storing, and preserving ice, of preparing it for market, and of transporting and vending it, was not a manufacturing corporation, under the provisions of the statute under consideration, and did not fall within the exception contained in it. In the *Union Pacific Tea Company Case* the relator was engaged in the sale of spices, baking powder, coffee, and tea. It purchased these articles in bulk, and the spices and baking powder were put up by it in packages for sale. Various kinds of tea were mixed together, and the compound was called and sold as "combination tea." The coffee was purchased in the raw bean, then roasted and ground, and in some instances different kinds were mixed together. The relator in that case claimed that it was a manufacturing corporation, and therefore exempt from the corporation tax, but this court held that the business carried on by it was not manufacturing, and that it was liable for the tax imposed. It is quite obvious, both upon principle and authority, that the relator in the case at bar was not a manufacturing

corporation within the meaning of the corporation tax law, and the appellate division erred in holding otherwise.

Another ground upon which the respondent relies to defeat this appeal is that the decision of the controller in 1898, to the effect that the relator was not liable to taxation because it was a manufacturing corporation, was *res judicata*, and therefore the controller in 1897 was bound by that decision and estopped from holding otherwise. It appears from the record that in 1898 the relator applied to the controller for a cancellation of the taxes assessed against it for the years 1890, 1891, and 1892, upon the ground that it was a manufacturing corporation, and was engaged in no other business in the state of New York. That application was accompanied by the affidavit of an officer of the company, describing the business that was conducted in this state by the relator. On the hearing in the present case there was testimony to the effect that an officer of the relator came to Albany in November, 1898, to see the then controller in relation to the taxes thus assessed; that they went over the whole subject, and that subsequently, on December 1, 1898, the deputy controller wrote the relator a letter, which was to the effect that it was the opinion of the department that the relator was exempt from the taxes assessed by reason of its being a manufacturing corporation wholly engaged in carrying on manufacturing within the state of New York. It is to be observed that the assessment under consideration included none of the years for which the former assessment was made. Thus, the single question presented seems to be whether the determination of an assessing or taxing officer that an assessment made for one particular year should be canceled for the reason that the property was not subject to assessment, is conclusive upon succeeding officers against assessments for subsequent years upon the same property or franchise. Officers upon whom the duty of making assessments for the purpose of taxation is imposed are independent public officers, exercising public powers, charged with special public duties, possessing no jurisdiction as agents of the state, and for whose acts the state is not liable. Nor is the state responsible for any mistake or misfeasance by them in the performance of their duty. *Mechem*, Pub. Off. § 28; *Lorillard v. Monroe*, 11 N. Y. 392, 63 Am. Dec. 120. The statute imposes on such officers the duty to perform certain distinct and definite acts. By the statute under consideration, the duty was imposed upon the controller to tax every corporation, joint stock company, or association doing business in the state except certain corporations and institutions among which were manufacturing corporations carrying on manufacturing within the state. If, in 1894, 1895, and 1896, the relator was actually engaged in carrying on a business within the state which was not that of manufacturing, and, consequently, did not fall within any exception in the statute, then it was the plain duty of the controller to assess it for a corporate tax as provided by statute, and the fact that, through misapprehension or otherwise a former controller had refused or neglected to discharge his duty as such taxing officer could not inter-

fere with or prevent a discharge of his duty by the present controller. In other words, this statute imposes upon the controller the duty of assessing upon corporations which are liable therefor the tax provided for by statute in each year during which they are liable to such assessment, independent of any action by a former controller. We are aware of no principle which would justify this court in holding that, because a former controller erroneously decided that the relator was not liable to be assessed for the years 1890, 1891, and 1892, the right to assess it for subsequent years was forfeited, or that the exercise of that right was in any way barred.

While it may be true that, where actions are brought involving a question as to the validity of a tax imposed under some particular statute, the determination of the question upon which its validity depends may become *res judicata* in a subsequent action, we think there is no ground for holding that the action of a mere assessing officer in determining that property is exempt from assessment for one year concludes the state as to the taxes imposed in subsequent years, and prevents other assessing officers from complying with the clear and plain requirements of the statute. We are of the opinion that the action of the controller, in 1893, in no way affected or estopped the controller, in 1897, from assessing a proper corporation tax upon the relator, and that the determination of the appellate division cannot be sustained upon that ground.

Another contention of the respondent is that the controller erred in the basis upon which this tax was assessed. That it was based upon the dividends of the relator is not denied. But the particular claim of the respondent is that its dividends were earned in its business transacted outside of the state of New York, that its business conducted in the state was without profit, and, consequently, that the dividends could form no proper basis for the assessment. The answer to that contention is that the statute declares the basis upon which the assessment is to be made, and makes no distinction as to the locality where the money was earned which was divided. We find nothing in the statute to justify the contention of the respondent.

We think the tax was properly assessed, that the basis adopted was the correct one, that the order of the Appellate Division was wrong, that it should be reversed, and that the determination of the controller should be affirmed.

All concur.

PEOPLE of the State of New York, *et rel.*
Michael BRODERICK, *Respt.*,

v.

Levi P. MORTON *et al.*, *Appts.*

(156 N. Y. 136.)

1. A mandamus will not issue to compel the performance of an act by the governor of the state.

NOTE.—For mandamus to governor, see also *State*, Charleston, C. & C. R. Co., v. Whitesides (S. C.) 31 L. R. A. 777, and note; *Hovey v. State*, Shuck (Ind.) 11 L. R. A. 768, and note; *Greenwood Cemetery* 41 L. R. A.

2. Mandamus to the lieutenant governor and speaker of the assembly may be issued when the legislature is not in session.

3. Mandamus to state officers whose terms expire pending the proceeding cannot be enforced against their successors unless they are substituted as parties, and this may be done under Code Civ. Proc. § 1930.

(O'Brien, J., and Parker, Ch. J., dissent.)

(June 7, 1898.)

APPEAL by defendants from an order of the Appellate Division of the Supreme Court, Third Department, reversing an order of the Special Term for Albany County refusing to award a writ of mandamus to compel defendants to restore relator to his position as an employee in the capitol building. *Reversed.*

The facts are stated in the opinion.

Messrs. T. E. HANCOCK, Attorney General, and G. D. B. HASBROUCK, for appellants:

The supreme court has no jurisdiction to coerce the executive department of the government into obeying its writ of mandamus.

The governor is mentioned in the public building law *eo nomine*, and the duties are placed upon him because they are confided to his superior wisdom and character, and where such is the case the duty is executive.

Rice v. Austin, 19 Minn. 103, 18 Am. Rep. 330.

There is no case which goes to the extent of holding that the discretionary powers of an executive can be controlled by the court, but there are some cases holding that where the function is purely ministerial it can be controlled.

Harpending v. Haight, 39 Cal. 189, 2 Am. Rep. 432; *Middleton v. Low*, 30 Cal. 596; *Tennessee & C. R. Co. v. Moore*, 86 Ala. 880; *Chumasco v. Potts*, 2 Mont. 242; *Cotten v. Ellis*, 52 N. C. (7 Jones L.) 545; *State, Whiteman, v. Chase*, 5 Ohio St. 528; *State, Loomis, v. Moffitt*, 5 Ohio, 362; *Magruder v. Swann*, 25 Md. 212; *Groome v. Guinn*, 43 Md. 572; *Chamberlain v. Sibley*, 4 Minn. 312.

Courts are without jurisdiction to control executive action.

People, Sutherland, v. The Governor, 29 Mich. 330, 18 Am. Rep. 89; *State, Bisbee, v. Drew*, 17 Fla. 67; *State, Low, v. Towns*, 8 Ga. 360; *People, Bacon, v. Cullom*, 100 Ill. 472; *People, Harless, v. Yates*, 40 Ill. 126; *People, Billings, v. Bissell*, 19 Ill. 229, 68 Am. Dec. 591; *State, Lockwood, v. Kirkwood*, 14 Iowa, 162; *State, Oliver, v. Warmoth*, 22 La. Ann. 1, 2 Am. Rep. 712; *State, Hope, v. Board of Liquidation*, 42 La. Ann. 647; *Dennett, Petitioner*, 32 Me. 508, 54 Am. Dec. 602; *State v. Stone*, 120 Mo. 428, 23 L. R. A. 194; citing 1 Cooley, Bl. Com. p. 242; *State, Gledhill, v. The Governor*, 25 N. J. L. 331; *Mauran v. Smith*, 8 R. I. 192, 5 Am. Rep. 564; *Bates v. Taylor*, 87 Tenn. 319, 8 L. R. A. 316; 85 Tex. 622; *Bledsoe v. International R. Co.* 40 Tex. 537; *Galveston, B. & C. Narrow-Gauge R. Co.*

Land Co. v. Routt (Colo.) 15 L. R. A. 369; *State, Cromellen, v. Boyd* (Neb.) 19 L. R. A. 227; and *State, Robb, v. Stone* (Mo.) 23 L. R. A. 194.

v. Gross, 47 Tex. 428; *Houston Tap. & B. R. Co. v. Randolph*, 24 Tex. 817; *Lawson, Rights, Rem. & Pr.* § 8784.

There is no distinct and separate public office—as trustee of public buildings; those words describe a function rather than officials, and the duties of trustees are *eo nomine* put upon the governor, and wherever duties by law are so devolved they are held to be on the executive and unenforceable by mandamus.

Rice v. Austin, 19 Minn. 108, 18 Am. Rep. 380; *Dennett, Petitioner*, 32 Me. 508, 54 Am. Dec. 602; *Mauran v. Smith*, 8 R. I. 192, 5 Am. Rep. 564; *State v. Stone*, 120 Mo. 428, 28 L. R. A. 194; *People, Sutherland, v. The Governor*, 29 Mich. 880, 18 Am. Rep. 89.

All jurisdiction implies superiority of power; authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible unless that court had power to command the execution of it.

1 Cooley, Bl. Com. p. 242; *State v. Stone*, 120 Mo. 428, 28 L. R. A. 194; *Kentucky v. Dennison*, 24 How. 97, 16 L. ed. 725.

The weight of authority is against the jurisdiction.

Mauran v. Smith, 8 R. I. 217, 5 Am. Rep. 564; 1 Sharswood's Bl. Com. p. 242; *State, Oliver, v. Warmoth*, 22 La. Ann. 1, 2 Am. Rep. 712.

The writ as granted can only stand upon the ground that it is allowable against all of the parties against whom it is directed.

People, Harless, v. Yates, 40 Ill. 127.

Those to whom the writ was directed were no longer in a condition to obey it, having passed out of office and been succeeded by others.

People, Wooster, v. Maher, 64 Hun, 408.

The cases in which it has been held by this court that an abatement takes place by the expiration of the term of office have been those of officers of the government, whose alleged delinquency was personal, and did not involve any charge against the government, whose officers they were.

Thompson v. United States, 108 U. S. 484, 26 L. ed. 528.

These trustees do not constitute a corporate body, having perpetual succession and the right to sue and be sued. Nor is the duty of approving appointments and removals a continuing duty. It lasts only, so far as they are concerned, while their terms of office continue. As to approvals or appointments and removals from office, they became *functus officio* with the expiration of their terms.

People, Guige, v. Reardon, 49 Hun, 425; *People, Bailey, v. Greene County Supers.* 12 Barb. 217.

The original parties to this mandamus proceeding have not the power to obey the writ, and that has always been held to be a sufficient reason for refusing to grant it.

People, Stevens, v. Huyt, 66 N. Y. 606; *People, Freer, v. Canal Appraisers*, 78 N. Y. 447.

A petition for a writ of mandamus to a public officer of the United States abates by his resignation of his office.

The Secretary v. McGarrahan, 9 Wall. 298, 813, 19 L. ed. 579, 583; *United States v. Boutwell*, 17 Wall. 604-609, 21 L. ed. 721, 722; 41 L. R. A.

Leavenworth County Comra. v. Sellow, 99 U. S. 624-626, 25 L. ed. 333, 335; *United States, McBride, v. Schurz*, 102 U. S. 878-408, 26 L. ed. 167-219; *Thompson v. United States*, 103 U. S. 480-484, 26 L. ed. 521-523; *United States, Warden, v. Chandler*, 123 U. S. Appx. 643; *United States, International Contracting Co., v. Lamont*, 155 U. S. 303-306, 39 L. ed. 160-163; *United States, Long, v. Lochren*, 164 U. S. 701.

Messrs. Wallace & Nolan, for relator:

The relator was removed from his position for other causes than "incompetency and conduct inconsistent with the position held," and was deprived of his rights under chapter 716 of the Laws of 1894.

People, Corrigan, v. Brooklyn, 149 N. Y. 225, and authorities cited; *People, Wardrop, v. Adams*, 51 Hun, 588.

Admitting all the defendants attempted to show, it only establishes that this particular elevator was closed temporarily, not that it was abolished.

This was no justifiable excuse for the absolute and permanent discharge of relator.

People, Fonda, v. Morton, 148 N. Y. 156.

Defendants retained many other men who were not veterans to do the same and similar work. They were bound to prefer relator.

McCloskey v. Willis, 15 App. Div. 594; *Re Sullivan*, 55 Hun, 289; *People, O'Connor, v. Adams*, 53 Hun, 141.

The board of trustees of public buildings may be mandamus under chapter 716, Laws of 1894.

High, Extr. Legal Rem. 4.

The relator does not ask too much in asking for damages in this proceeding.

Section 2088 of the Code of Civil Procedure provides for an award of such damages.

People, Deverell, v. Musical Mut. Protective Union, 118 N. Y. 101; *People, Goring, v. Wappingers Falls*, 151 N. Y. 886.

If in any respect relator has asked too much, the final writ may award what relief the facts warrant.

People, Keene, v. Queens County Supers. 142 N. Y. 271; Code Civ. Proc. § 2082.

Haight, J., delivered the opinion of the court:

For a number of years the relator had been employed in the capitol of the state as a laborer, engaged in the running of the senate elevator. On the 2d day of October, 1895, he claims he was discharged. After the expiration of about five months, he procured an alternative writ of mandamus to issue to the then trustees and superintendent of public buildings, requiring his reinstatement as laborer in the capitol, upon the ground that he was an honorably discharged Union sailor of the War of the Rebellion. To the alternative writ an answer was filed on behalf of the defendants, raising issue, which, upon the stipulation of the parties, was referred to a referee to hear, try, and determine. After taking the evidence submitted by the respective parties, the referee made his report, finding that the relator had been dropped from the pay rolls by reason of the shutting down of the senate elevators for repairs, and that he had not been removed. Thereupon the peremptory writ was refused by the special term. An appeal was then taken to

the appellate division, where the order of the special term was reversed and a peremptory writ was issued.

At the time the relator procured the alternative writ of mandamus Levi P. Morton was the governor of the state, Charles T. Saxton the lieutenant governor, and Hamilton Fish the speaker of the assembly.

The public building law of 1893, chap. 227, as amended, provides that "the governor, lieutenant governor, and speaker of the assembly shall be trustees of public buildings." As such they are authorized to appoint a superintendent who, "subject to the approval of the trustees, may appoint all persons necessary in the maintenance department of the public buildings and grounds under his charge, and suspend and remove any of them, and prepare rules and regulations for their government."

It will be observed that, under the provisions of the statute, the governor, lieutenant governor, and speaker become trustees by virtue of their offices, and that whatever duties devolve upon them as such pertain to their respective offices.

Chapter 312 of the Laws of 1884, as amended by chap. 716 of the Laws of 1894, provides that, "in every public department and upon all public works of the state of New York, and of the cities, towns, and villages thereof, and also in noncompetitive examination under the civil service rules, laws or regulations of the same, wherever they apply, honorably discharged Union soldiers and sailors shall be preferred for appointment and employment; age, loss of limb, or other physical impairment which does not, in fact, incapacitate, shall not be deemed to disqualify them, provided they possess the business capacity necessary to discharge the duties of the position involved. And, in all cases, the person having the power of employment or appointment, unless the statute provides for a definite term, shall have the power of removal only for incompetency and conduct inconsistent with the position held by the employee or appointee; and, in case of such removal, or such refusal to allow the preference provided for in this act of and for any such honorably discharged Union soldier, or sailor, or marine, for partisan, political, personal, or other cause, except incompetency, and conduct inconsistent with the position so held, such soldier, sailor, or marine, so wrongfully removed, or refused such preference, shall have a right of action in any court of competent jurisdiction for damages as for an act wrongfully done, in addition to the existing right of mandamus; the burden of proving such incompetency and inconsistent conduct, as a question of fact, shall be upon the defendant."

A failure on the part of the officials to comply with the terms of this act in letter and spirit, is made a misdemeanor. It is now contended that the appellate division had no jurisdiction to award a mandamus in this case. Much has already been written upon the subject. The courts of most of the states in the Union have had it under consideration, and, while they uniformly agree that the courts have no right nor power to interfere with the governor upon questions involving his judgment and discretion, yet they differ widely as

to the power to interfere with his ministerial action. We shall not attempt any extended digest of these cases. Among those tending to sustain the power of the court to compel the executive to perform a ministerial act are *Martin v. Ingham*, 38 Kan. 641; *Harpending v. Haight*, 89 Cal. 189, 2 Am. Rep. 432; *Middleton v. Low*, 30 Cal. 596; *Tennessee & O. R. Co. v. Moore*, 36 Ala. 380; *Ohumassero v. Potts*, 2 Mont. 242; *Cotten v. Ellis*, 52 N. C. (7 Jones L.) 545; *State, Whitman, v. Chase*, 5 Ohio St. 528; *State, Loomis, v. Moffitt*, 5 Ohio, 862; *Magruder v. Swann*, 25 Md. 212; *Chamberlain v. Sibley*, 4 Minn. 312.

Of the cases which support the contention that the courts are without jurisdiction to control executive action are the following: *People, Sutherland, v. The Governor*, 29 Mich. 320, 18 Am. Rep. 89; *State, Bibbee, v. Drew*, 17 Fla. 67; *State, Loo, v. Towns*, 8 Ga. 860; *People, Bacon, v. Cullom*, 100 Ill. 472; *People, Billings, v. Bisell*, 19 Ill. 229, 68 Am. Dec. 591; *State, Lockwood, v. Kirkwood*, 14 Iowa, 162; *State, Oliver, v. Warmoth*, 22 La. Ann. 1, 2 Am. Rep. 712; *Dennett, Petitioner*, 32 Me. 508, 54 Am. Dec. 602; *State v. Stone*, 120 Mo. 428, 23 L. R. A. 194; *State, Gledhill, v. The Governor*, 25 N. J. L. 331; *Mauran v. Smith*, 8 R. I. 192, 5 Am. Rep. 564; *Bates v. Taylor*, 87 Tenn. 319, 3 L. R. A. 316; 85 Tex. 632; *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60.

The ministerial duties which it has been held in different states may be compelled by mandamus are the commissioning of a clerk of a court, the issuance of a warrant for the attorney general's salary, the auditing of an officer's claim for expenses, the commissioning of officers chosen by the legislature, the issuance of state bonds to a railroad company, the authentication of a bill in the governor's possession as a statute, the issuance of a proclamation that a bank is authorized to begin business, and such duties imposed by statute upon the governor as might have been imposed upon another officer, when ministerial. On the other hand, in a large number of other states, it has been held that a mandamus will never issue against the governor, regardless of the duty imposed upon him by the Constitution or statute. In those cases it was considered to be against public policy and political necessity, and to be immaterial that the duty might have been imposed upon another person; that inasmuch as it was imposed upon the governor, his performance was an executive act, under the responsibility of his executive station, and under the sanctity of his official oath. Perhaps the leading case in support of the latter contention is that of *People, Sutherland, v. The Governor*, 29 Mich. 320, 18 Am. Rep. 89, in which the opinion was delivered by Judge Cooley. In that case the court was asked to compel the governor to perform the duty imposed upon him by statute, of certifying as to the completion of certain work. The judge says with reference thereto: "It is not claimed on the part of the relators that this court, or any other, has jurisdiction to require and compel the performance by the governor of his political duties, or the duties devolved upon him as a component part of the legislature. It is conceded that these, under the Constitution and laws, are to be exercised ac-

according to his own judgment and on his own sense of official responsibility, and that from his decision to act, or decline to act, there can be no appeal to the courts. Nor is it pretended that where any executive act whatsoever is manifestly submitted to the governor's judgment or discretion such judgment or discretion can be coerced by judicial writ. What is claimed is, that where the act is purely ministerial, and the right of the citizen to have it performed is absolute, the governor, no more than any other officer, is above the laws, and the obligation of the courts, on a proper application to require him to obey the laws, is the same that exists in any other case where an official ministerial duty is disregarded. . . . There is no very clear and palpable line of distinction between those duties of the governor which are political, and those which are to be considered ministerial merely, and, if we should undertake to draw one and to declare that in all cases falling on one side the line, the governor was subject to judicial process, and in all falling on the other, he was independent of it, we should open the doors to an endless train of litigation. . . . However desirable a power in the judiciary to interfere in such cases might seem from the standpoint of interested parties, it is manifest that harmony of action between the executive and judicial departments would be directly threatened, and that the exercise of such power could only be justified on most imperative reasons." Again he says: "When duties are imposed upon the governor, whatever be their grade, importance, or nature, we doubt the right of the courts to say that this or that duty might properly have been imposed upon a secretary of state, or a sheriff of a county, or other inferior officer, and that inasmuch as in case it had been so imposed, there would have been a judicial remedy for neglect to perform it, therefore there must be the like remedy when the governor himself is guilty of a similar neglect. The apportionment of power, authority, and duty to the governor is either made by the people in the Constitution, or by the legislature in making laws under it; and the courts, when the apportionment has been made, would be presumptuous if they should assume to declare that a particular duty assigned to the governor is not essentially executive, but is of such inferior grade and importance as properly to pertain to some inferior office, and, consequently, for the purposes of their jurisdiction, the courts may treat it precisely as if an inferior officer had been required to perform it. To do this would be, not only to question the wisdom of the Constitution or the law, but also to assert a right to make the governor the passive instrument of the judiciary in executing its mandates within the sphere of his own duties. Were the courts to go so far, they would break away from those checks and balances of government which were meant to be checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something at least of the power which the people, either directly or by the action of their representatives, decided to intrust to the other departments of the government."

In this state we have not found, nor has our
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attention been called to, any controlling authority upon the question. Under our Constitution the right of sovereignty rests in the people of the state, who, from time to time, delegate their power to rule to a government chosen by themselves, consisting of three departments, known as the executive, legislative, and judicial. In England the power of the King to govern was modified from time to time by various grants from him, and by Magna Charta under which the lawmaking power finally devolved upon Parliament, and the judicial power upon the courts created by law. This division of power was followed in the formation of our American governments. In our own state the common law was continued in force, except in so far as it has been altered by the Constitution or the legislature.

Under our Constitution the executive power of the state answers to that of the King, and devolves upon the governor during the term for which he is elected. The legislative power is vested in the senate and assembly, which take the place of Parliament, and the judicial power in the courts established in accordance with the provisions of the Constitution. The three great branches of government are separate and distinct, but are co equal and co-ordinate; their powers have been carefully apportioned; one makes the laws, another construes and adjudges as to the rights of persons to life, liberty, and property thereunder, and the third executes the laws enacted and the judgments decreed. While each department, in its sphere, is in a sense independent, each operates as a check or restraint upon the other. The acts of the legislature have to be presented to the executive for his approval. The courts may then construe the acts and determine their validity under the Constitution; and the executive may, in criminal cases, modify the actions of the courts by the interposition of his pardoning power. But in every case in which one department controls, modifies, or influences the action of another, it acts strictly within its own sphere, thus giving no occasion for conflict, and thus preserving the purpose of the original scheme of a division of power among the three co-ordinate branches of government, each operating as a restraint upon the other, but still in harmony.

As we have seen, the power of the King has been divided,—a portion delegated to Parliament and another portion to the judiciary,—but except as delegated to the legislative and judicial branches of the government, his common-law powers remain unchanged; and in our government have been transmitted to the executive.

Under the common law a writ of mandamus issued in the King's name to inferior courts, officers, corporations, or persons, requiring them to do a particular thing specified. It being issued in the King's name, did not run to himself, to Parliament, nor to the judiciary, except such inferior courts as the higher courts had the power to review. Under our Code the writ issues out of the court as an order of the court; but we have attempted by no provision of the statute to change the force and effect of the common law writ, nor its object and purpose. It therefore follows that the writ never issues to the executive or legislative branches

of the government, nor to the judicial branch having general and final jurisdiction.

Again, it is the well-settled practice of the court not to determine abstract questions not involved in the litigation; or in regard to which it has no power to enforce its judgments and decrees.

The only way in which a mandamus can be enforced is by the commitment of the party who refuses to obey its commands as for a contempt. But the courts have no power to commit the governor for a contempt. They have no power over his person. He may be impeached, but there is no other way in which he may be deprived of his executive office. It is said, however, that it is not to be supposed that the governor will refuse obedience to the law; but the application in this case for the mandamus shows that he already has refused to do the act sought to be compelled by this writ.

But again, it is contended that in this case the executive is one of a board of officers, and that the board may be compelled to act by mandamus. Conceding him to be one of a board of public officers, the duty is one that devolves upon him by virtue of his office. If the courts have not power over his person to enforce its decrees in one case, they have not in the other.

We have already referred to the discussion of Judge Cooley in the *Sutherland Case*, with reference to the grade of duties imposed upon the executive, including ministerial acts, together with those involving executive judgment and discretion; and without repeating his argument here, it seems to us that his reasoning is unanswerable and his conclusions correct.

While we are of the opinion that a mandamus will not issue to the governor to compel performance of an act by him, we see no reason for its not running, during the recess of the legislature, to the lieutenant governor and speaker of the assembly. During the session of the legislature, they, as members thereof, are not subject to arrest; and it may be that the courts, during that time, would not have the power to enforce their mandates against them; but, after the adjournment of the legislature, and the time has elapsed, given by the statute in which they are exempted, we think their obedience to the writ might be compelled by the courts. True, under the provisions of the Constitution, they in turn may succeed to executive power, upon the happening of certain events; but until they respectively become vested with the powers of the governor, they form no part of the co ordinate branches of the government, except, as we have already stated, when the legislature is in session.

There is another reason which must control our action in this case. As we have seen, the alternative writ of mandamus was issued during the administration of Governor Morton, when Saxton was lieutenant governor and Fish was speaker. The special term denied the writ, but, upon appeal, the appellate division reversed the order of the special term, and ordered the writ to issue to the governor, lieutenant governor and speaker then in office, who were the successors of those in office at the time the alternative writ was issued. This was done without notice to the new officials, and without

bringing them in or making them parties to the proceeding. The act charged against the former officials was a misdemeanor, and punishable as such, and they were liable individually in damages to the party aggrieved. The delinquency charged is personal, and does not involve a charge against the state. It is not a claim prosecuted against the state in which it alone is interested, as where a mandamus is issued to a treasurer or controller of the state, to compel the payment of a claim against it, which is litigated by the officer for and in behalf of the state in which the courts have permitted the mandamus to issue to the successor in office. In cases in which the delinquency charge is personal, the petition for a writ of mandamus abates upon the death, resignation, or termination of office of the official charged, unless it is preserved by statute. *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 81, 41 L. ed. 621, 622, and cases there cited.

Under the provisions of our Code of Civil Procedure, § 755, a special proceeding does not abate by any event, if the right to the relief sought in such proceeding survives or continues; but this provision only applies to cases where the party dies after this act takes effect. There has been no death of a party in this case. Certain of the parties proceeded against have gone out of office, and it may therefore be doubted whether this section keeps the proceeding alive. But assuming for the purpose of this case that it does, and that the relator still has the right to prosecute his proceeding for his restoration, against whom must such proceeding continue? It cannot be continued against the old officers, for they no longer have power to restore him. It must, of necessity, therefore, be prosecuted against the new officers, for they alone have the power to reinstate him. It may be that the provisions of the Code fail to point out the precise practice that should be adopted by the relator in this case. But there is no apparent reason why the provisions of the Code controlling actions and special proceedings against county, town, and municipal officers, should not apply as well to state officers. The practice therein provided for is simple, and affords ample protection to all parties. Section 1930 provides: "In such an action or special proceeding, the court must, in a proper case, substitute a successor in office, in place of a person made a party in his official capacity, who has died or ceased to hold office; but such a successor shall not be substituted as a defendant, without his consent, unless at least fourteen days' notice of the application for the substitution, has been personally served upon him." As we have seen, no substitution has been made in this case.

The order of the Appellate Division should be reversed, and that of the Special Term affirmed, with costs.

Gray, Bartlett, and Martin, JJ., concur.

Vann, J., concurring:

I am of the opinion that a writ of mandamus cannot be issued against either the governor or lieutenant governor, because the imprisonment of either, which might follow a failure to obey the writ, would disturb the constitutional balance of power between the three great depart-

ments of government. As to the governor this is obvious, but the same reason applies to the lieutenant governor also, because at any moment by the death, resignation, inability, or absence of the governor the powers and duties of the office devolve upon the lieutenant governor. Whatever would interfere with his freedom of action when it became his duty to act as governor would interfere with the executive office itself, and might leave the state with no executive head able to act at a time of the greatest need. But while the Constitution as well as the courtesy due from one department of government to another, forbid the courts to command the governor to do this, or to refrain from doing that, it is still their duty to announce the law, but, under the circumstances, to withhold the command and leave the responsibility of complying with the law, as laid down by the courts, with the chief magistrate. It seems to me, therefore, that we should decide the appeal upon its merits, subject to the limitation suggested as to the form of the judgment to be pronounced.

Upon examining the record I think the relator was removed in violation of chapter 716 of the Laws of 1894, for the reasons given by the appellate division in its opinion (24 App. Div. 568).

The judgment appealed from should therefore be so modified as to simply adjudge that the relator was improperly removed and that he is entitled to immediate reinstatement without costs to either party as against the other.

O'Brien, J., dissenting:

The decision in this case, as expressed in the prevailing opinion, practically abrogates the statute which exempts veteran soldiers in the civil service from removal without legal cause. The defendants are the trustees of the state capitol under § 2 of chapter 227 of the Laws of 1893, and the superintendent of public buildings appointed by them, who has power, subject to the control of the trustees, to appoint, remove, or suspend persons in the employ of the state who are or may be engaged on the capitol force, or in the care of any of the public buildings. By chapter 716 of the Laws of 1894, honorably discharged Union soldiers must be preferred by the trustees and superintendent in making such appointments, and it is provided that removals of such discharged soldiers, after appointment, shall be made only for incompetency. In case a veteran is removed without such cause, or for partisan or political reasons, or refused a preference in making appointments, the statute gives a right of action to him for damages as for a wrongful act; in addition to the existing right of mandamus to enforce the commands of the statute.

In January, 1887, the relator, who is a veteran of the late war, was appointed an orderly upon the capitol. He was not appointed for a definite or limited time, and, therefore, under the statute, could not be removed except for incompetency. He was removed, however, in the month of October, 1895, in defiance of the statute, without legal cause or hearing. He applied to the court for a mandamus to correct the wrong and to assert the rights secured to

him by law. In his application for the writ the relator alleged upon oath the following facts: (1) That he was an honorably discharged Union soldier. (2) That he was appointed an orderly on the capitol on January 8, 1887, and continued in that position till October 2, 1895, when he was discharged, as he alleges, for partisan, political, or other reasons than those allowed by the statute. (3) That the defendants have kept the relator out of his position ever since, and have refused to reinstate him. (4) That during all the time while so employed, he faithfully discharged his duties and was not incompetent, and did nothing inconsistent with his position. (5) That he was never notified of any cause for his removal or called on to answer any charge, and none was made. The only affidavit made in opposition to this application was by the superintendent, and he failed to deny any fact which the relator had stated. The other defendants did not answer at all. Consequently, there was no issue of fact before the court, but what was equivalent to a demurrer to the facts alleged by the relator. *People, Superintendents of Poor, v. St. Lawrence County Supers., etc.*, 103 N. Y. 541; *People, Port Chester Sav. Bank, v. Cromwell*, 102 N. Y. 477; *Haebler v. New York Produce Exchange*, 149 N. Y. 414; *People, Corrigan, v. Brooklyn*, 149 N. Y. 215. He was, therefore, entitled to a peremptory writ, but as he had claimed, not only to be reinstated, but damages for his removal as well, an alternative writ was awarded.

The cause was then referred and tried by a referee. The issues were matters of law, really, though it was supposed that there was some question of fact, but just what question was not very clear. The referee found the following facts: (1) That the relator was a veteran. (2) That he was employed running an elevator at the capitol from February 1, 1887, to October 2, 1895. (3) That he was then dropped from the pay roll. Therefore, every material fact in the case was not only admitted by the pleadings but found by the referee.

But the learned referee held, as a conclusion of law, that although he had been dropped from the pay roll, he had not been removed, and he dismissed the writ with costs. The appellate division has reversed this judgment and directed that the relator be reinstated, in his position, without prejudice to his right to recover damages. This seems to me to be a very just and correct decision, and it ought not to be set aside by this court on any trivial ground.

My brethren, however, think the appellate division was wrong and the referee was right. The reasoning process by which this conclusion is reached does not impress me as sound in law or correct in morals; and, since it practically abrogates the statute by denying to the relator any right which it confers, I am constrained to dissent from the judgment and from every ground upon which it is placed. In my view the reasons stated for a reversal in this court of the decision of the court below are utterly untenable, and hence a brief discussion or review of them may not be out of place here.

(1) The first proposition, though really foreign to the case, is somewhat startling. The principle that a mandamus will not lie against the governor as a member of the board of

trustees of public buildings created by the statute is announced as law in this state, I think, for the first time. It is broadly asserted that the courts have no power to compel the governor, when acting as a member of this board in appointing or discharging the necessary help in and about the capitol, to obey the statute. It is admitted that every member of the board is bound to obey it; but if the governor neglects or refuses to do his duty, or if he should disregard the statute, the courts, it is said, are powerless to protect the relator's rights by mandamus. This proposition is based upon the notion that there is something about the office of governor that places the occupant of the office for the time being above and beyond the law, or at least beyond the power of the courts to compel him by mandamus to obey the plain mandate of the statute in the appointment and removal of veteran soldiers. I take it to be an indisputable legal proposition that when the governor of this state accepts a legislative appointment as a member of a board of trustees with duties prescribed by statute, as the duties of this board clearly are, he is amenable to legal process at the suit of a private citizen, whose rights are affected by the action of the board, in the same way and to the same extent as any other member of the board. The principle has been so often asserted by the courts of the highest authority that it must disturb our confidence in the stability of law to find any doubt expressed about it.

In the famous case of *Marbury v. Madison*, 1 Cranch, 170, 2 L. ed. 71, Chief Justice Marshall stated the principle in a single sentence when he said: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety or impropriety of issuing a mandamus is to be determined." In *Kendall v. United States, Stokes*, 12 Pet. 595, 9 L. ed. 1209, the Attorney General of the United States, representing the government, stated the rule of law on this subject in the following language: "And, as the ordinary character of an officer's functions would not always determine the true nature of a particular duty imposed by law, he further agreed that if an executive officer, the head of a department, or even the President himself were required by law to perform an act merely ministerial, and necessary to the completion or enjoyment of the rights of individuals, he should be regarded, *quoad hoc*, not as an executive, but as a merely ministerial officer, and therefore liable to be directed and compelled to the performance of the act by mandamus if Congress saw fit to give the jurisdiction." The court, in its opinion in this case, said: "But it would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper which is not repugnant to any rights secured and protected by the Constitution; and in such cases the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case where the duty enjoined is of a mere ministerial character." In *Louisiana Bd. of Liquidation v. McComb*, 92 U. S. 531, 28 L. ed. 623, the court awarded a mandamus against a board of which the governor of the state was a member, and, referring to the power to do that

stated the rule as follows: "But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance." (p. 541, 28 L. ed. 628). This rule has been strictly adhered to by that court in a great variety of cases where the writ was applied for against executive officers of the government. *United States Miller, v. Black*, 128 U. S. 40, 32 L. ed. 354; *United States, Boynton, v. Blaine*, 139 U. S. 816, 35 L. ed. 186. The power of the courts to compel ministerial officers to perform official acts upon which the rights of individuals may depend is well settled in England. In the case of *Ferguson v. Kinnoull*, decided in the House of Lords the distinction between a judicial and ministerial act was clearly recognized. In that case, Lord Brougham, after denying that the judicial officers of courts of general jurisdiction were answerable for acts done within the limits of their jurisdiction for errors of judgment, used the following language: "But where the law neither confers judicial power, nor any discretion at all, but requires certain things to be done, everybody, whatever be its name, and whatever other functions of a judicial or of a discretionary nature it may have, is bound to obey; and, with the exception of the legislative branches, everybody is liable for the consequences of disobedience." 9 Clark & F. 251. In *State, Whiteman, v. Chase*, 5 Ohio St. 535, there was an application for a mandamus against the governor, in which eminent counsel were engaged. The power of the courts in that regard was there elaborately discussed and decided. It was held that the writ would lie against him at the suit of a private individual interested in the performance of the official act. The court was unanimous, and the result was summed up in the following language, which I conceive to be applicable to the case at bar: "The constitutional provision declaring that 'the supreme executive power of this state shall be vested in the governor,' clothes the governor with important political powers, in the exercise of which he uses his own judgment or discretion, and in regard to which his determinations are conclusive. But there is nothing in the nature of the chief executive office of this state which prevents the performance of some duties merely ministerial being enjoined on the governor. While the authority of the governor is supreme in the exercise of his political and executive functions which depend on the exercise of his own judgment or discretion, the authority of the judiciary of the state is supreme in the determination or all legal questions involved in any matter judicially brought before it. Although the state cannot be sued, there is nothing in the nature of the office of governor which prevents the prosecution of a suit against the person engaged in discharging its duties. . . . However, therefore, the governor, in the exercise of the supreme executive power of the state, may, from the inherent nature of the authority in regard to many of his duties, have a discretion which places him beyond the control of the judicial power, yet, in regard to a mere ministerial duty enjoined on him by statute, which

might have been devolved upon another officer of the state, and affecting any specific private right, he may be made amenable to the compulsory process of this court by mandamus. The official act of the governor in question, in regard to issuing the proclamation asked for, is a duty prescribed by statute, not necessarily connected with the supreme executive power of the state, ministerial in its nature, and a duty which might have been enjoined on some other officer."

It would be quite sufficient to rest the question, I think, on our own decisions. In *People, Fonda, v. Morton*, 148 N. Y. 156, we reviewed the action of this very board of trustees, and no one then doubted our power. It is said that the point was not raised in that case; but the very fact that neither court nor counsel supposed that it contained such a question, or that there was anything in this point, goes far now to prove that it is but little more than an attractive novelty. It may, I think, be safely asserted that no respectable authority can be found to sustain the proposition that the courts are without power to enforce by mandamus the performance by the governor of an official act, ministerial in character, and not resting in discretion.

That the powers and duties of the governor as a member of the board of trustees of public buildings are purely ministerial is a proposition too plain for doubt. The four individuals composing the board had each one vote, and no member had any more power than the other. They were all doing precisely the same thing,—that is to say consulting, voting, and deliberating together. It is inconceivable that anyone can suppose that three of these were acting ministerially, while the acts of the other were executive. But here again it may be necessary to cite authorities.

In *Gray v. State, Coghlen*, 72 Ind. 568, it was held that a writ of mandamus will lie against the governor of the state to enforce the performance of a ministerial duty not resting in his discretion; that a ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done.

Concerning the nature of the governor's act while serving upon such a board, the court defined it in the following very clear and concise language: "Any power or authority vested by legislation in the governor, together with other officers or persons, in which they are to have an equal voice with him, cannot be executive, as he alone is vested with the executive power of the state. Any duty which he is by law required to perform, in connection with others, in which they have an equal voice with him, can in no sense be said to be an executive duty. The governor and the other officers named in the act may well be regarded as constituting a board, organized by the legislature for the performance of certain duties, and a mandate will lie against them to enforce the performance." (Id. p. 578.)

I have said that there was no authority worthy of the name in favor of the contention that the executive of a state is beyond the power of the courts to compel the performance of an

official act of a ministerial nature. I do not, of course, refer to cases which may be found where the writ was refused in the exercise of discretion. The case of *State, Lou, v. Towns*, 8 Ga. 370, is a leading case of that character. The court in an able opinion demonstrated its power to grant the writ against the governor, but refused to exercise the power for political reasons and as matter of discretion. The cases cited in the prevailing opinion to sustain the reversal are all cases of that character.

This court cannot deal with matters of discretion. The court below has exhausted the discretion which courts have in mandamus cases. It has exercised the discretion and granted the writ, and the only question that we can review is whether it had power in that respect. That it had, is to my mind a proposition so clear that I will forbear to discuss it further. I have called attention to a few leading cases, not desiring to enlarge the discussion by reference to numerous others of the highest authority, all holding the same way.

I am not willing to indorse the principle that the maxim which tells us that the King is the fountain of justice and mercy, and can do no wrong, has any application to the elected servants of the people of this state. It originated when Kings were supposed to rule by divine right, but anyone who believes for a moment that it implied the immunity of persons in high seats of power from obedience to the laws, has failed to read correctly the history of the people from whom the maxim has been borrowed. On the contrary, the courts of that country have for ages announced and enforced the principle that no one was so high as to be above the power of the law, or so low as to be beneath its protection. This principle has been transmitted to us, and in the administration of justice it has superseded the ancient maxim that the King can do no wrong.

Nor can I admit for a moment that the judicial power of this state is so feeble as to be unable to reach with its process, in the enforcement of its lawful judgments and decrees, every citizen within its territory, from the governor to the humblest workman, and one as well as the other. The notion that the rights of a citizen cannot be declared and enforced against a ministerial board of which the executive happens to be a member, because he may call out the military and naval forces of the state to resist the judgment of the court, is too trivial for serious consideration. It is the duty of the court to declare what the law is, without fear or favor, and let consequences take care of themselves. Courts cannot with any self-respect frame their judgments upon the view that some power may refuse to submit to the mandate of the law or may resist it. The sheriff has the power of the county behind him, and the mayor of a great city the police force, but no one ever supposed that their power to resist a mandamus was any reason for refusing it to a party otherwise entitled to it. A legal principle resting on the assumption that the executive will refuse to obey the courts, must necessarily be unsound. It implies a want of that freedom of action on the part of the judiciary which is always necessary for its efficiency. If the courts may be deterred from deciding what the law is to

such cases, upon some remote possibility that the executive power will resist the execution of the judgment, it would follow that a mandamus should never go against anyone possessing the physical or political power to resist its commands, but should be confined to those who are too weak to defy it. Such vague or imaginary fears have no proper place in the discussion of questions upon which legal rights depend. I doubt very much that this state ever had an executive that would agree with my brethren with respect to this immunity from judicial authority, and it is to be hoped that it never will have. The proposition that there is or may be one man in the state so far above his fellow citizens that the courts cannot reach him, in a case like this, where there is no discretion, sounds very much like a voice from the middle ages, or the decree of the Roman senate in its declining days, when it declared the Emperor above the laws.

It is only a short time since the courts fined all the members of a board composed of all the state officers for disobeying a mandamus, and this court affirmed their action. *People, Platt, v. Rice*, 144 N. Y. 249. If it so happened that the governor had been a member of that board, then, according to the prevailing opinion, the courts would be powerless, since all the other members could shelter themselves behind the executive prerogatives. The court below was not able to sanction such sophistry, and I am bound to say that the rugged good sense of their decision ought to receive at least some commendation from this court.

(2) But even if the governor was beyond the power of the courts, there are still three other members of the board, constituting a working majority, that no one claims to be exempt from control by mandamus. They have the power, and it is their duty, to execute and obey the statute with respect to veterans, and to give to the relator his rights under the law. What reason can this court give for reversing the judgment as to them? Absolutely none that, in my opinion, has the slightest force or weight in law, and this can be made quite clear by a brief review of the grounds upon which the decision of the court below is to be reversed. That ground, as will be seen, consists of questions of practice, and questions of discretion, with none of which this court has anything to do. Combined in such a way as to produce what is supposed to be a legal error, it is only necessary to separate the constitutional elements upon which the decision rests in such a way that each proposition may be reviewed by itself, and on its own merits. It will then be seen how feeble the argument is upon which the relator is defeated in the assertion of his just rights under the law.

It is suggested that as three members of the present board were not parties to the original proceeding, but came into office afterwards, the writ was improperly awarded against them. There are several conclusive answers to this point. (1) A party who has proceeded by mandamus against a continuing board or public body for the assertion of a right is not compelled to revive it whenever the *personnel* of the board is changed by resignation or expiration of official term of the members, or any of them. The relief is to be awarded against the

board as an official body, and the fact that the individuals composing it are also named is of no consequence. The proceedings do not abate upon every change of membership, but when, as in this case, there is a continuing duty, irrespective of the incumbent, the writ is properly directed to the board as then constituted, and who have the power to redress the wrong. Any other rule would be, as the courts have often said, sacrificing substance to form, so that the final process of the court was properly directed to the members of the board in office when the decision was made. *People, Case, v. Collins*, 19 Wend. 56; *People, Shaut, v. Champion*, 16 Johns. 61; *People, Heiser, v. Gilon*, 121 N. Y. 551; *Thompson v. United States*, 103 U. S. 480, 483, 26 L. ed. 521, 523; *State v. Madison*, 15 Wis. 90, 87; *State, Bushnell, v. Gates*, 23 Wis. 210, 214; High, Extr. Legal Rem. § 88. (2) If the relator in entering the judgment directed the process against the wrong persons or against persons not parties to the action, that is no ground of appeal to this court. It was simply a misuse of the writ, to be corrected by motion in the court from which the process issued. This court might as well entertain an appeal from a judgment on the ground that the execution was issued against the wrong party. It can deal only with questions of law. The writ should certainly go against either Governor Morton and his associates or Governor Black and his fellow members of the board. That is a question of practice with which this court has nothing to do. Certainly not upon an appeal from this judgment. (3) The case comes here now with the present members of the board named as defendants. It does not concern this court how they came into the case. Presumptively they came in in the proper way. They came into the case after the issues were tried and decided. For aught we can know they were substituted in open court on the consent of counsel. If their names were improperly used in the writ they could have moved to correct the papers. No one ever claimed that, or claims it now. Just how an error of law, reviewable in this court upon appeal from the judgment, can be evolved from the fact that the relator or his attorney inserted in the writ the names of the present members of the board who are in office, in place of the former members who are not in office, is quite difficult to perceive. The present members have appealed from the judgment, and if they have never in fact or in law been made parties to the record they have no right to appeal. (4) When the reasons for reversing this judgment are fairly analyzed it will be seen that they may be summed up in two propositions: (1) The governor being a member of the board and exempt from direction by mandamus the other three members are exempt also. The immunity of the governor from the duty of obedience to the law is imparted, in some incomprehensible way, to his associates, and the result is that the law is powerless to grant the relator any relief, although he has clearly shown that his rights have been disregarded. Of course, if this proposition be sound, the judicial power to compel boards or ministerial bodies to obey the law may be always paralyzed as to all such

bodies in the state by making the governor a member *ex officio*, or otherwise. This is rather an alarming principle, and I am quite sure that it has no sanction in reason or law, and equally clear that no respectable authority can be found to sustain it. (2) The other point is that the present members of the board have not been substituted on notice. I have already answered that, but it may not be amiss to refer to it again. How do we know that they were not regularly and properly substituted? We find their names in the writ, and that is all we know, or can know, about it. An order substituting parties in an action, with or without notice, is not reviewable in this court, since it is a mere practice order, and if not, then by what process of reasoning can some real or imaginary irregularity in that respect be made a ground for reversing a judgment? If anything in that respect was done in the court below irregularly, the obvious remedy is to move to correct it in that court. It has nothing

whatever to do with the legal merits of the questions decided by that court, and which alone we have the power to review. All the court below decided was that the relator, being a veteran, was removed in defiance of the statute, and was entitled to be restored to his place. It is to be regretted that this court should feel bound to reverse a judgment so obviously correct upon mere points of practice or procedure having no proper relation to the real controversy, and with which this court, in my opinion, has nothing whatever to do.

I am, therefore, in favor of affirming the judgment below.

Parker, Ch. J., agrees with **Haight, J.**, that mandamus should not issue against the governor, but concurs with **O'Brien, J.**, that it was properly issued against the other defendants, and advises that the order be modified accordingly, and as so modified affirmed.

NORTH CAROLINA SUPREME COURT.

B. H. GRIFFIN et al.

GOLDSBORO WATER COMPANY, Appt.

(.....N. C.....)

1. **Discrimination in rates charged to consumers** by a water company is unlawful, as the business is affected with a public use.
2. **A schedule of maximum rates in a contract by a city with a water company** does not bind consumers to the payment of such maximum rates, if they are unreasonable.

(May 24, 1898.)

A PPEAL by defendant from an order of the Superior Court for Wayne County continuing to the hearing an order restraining defendant from cutting off a supply of water to complainants for refusal to comply with certain requirements of the company. *Affirmed.*

The facts are stated in the opinion.

Mr. John W. Hinsdale, for appellant:

Competition may fairly control the fixing of water rates.

Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 145, 42 L. ed. 414.

A water company has the right, at common law, to discriminate in its charges, provided none are unreasonable.

A water company is under no higher responsibility than a common carrier.

Great Western R. Co. v. Sutton, L. R. 4 H. L. 226; *Bazendale v. Eastern Counties R. Co.* 4 C. B. N. S. 78; *Branley v. South Eastern R. Co.* 12 C. B. N. S. 74; *Garion v. Bristol & E. R. Co.* 1 Best & S. 112; *Ransome v. Eastern*

Counties R. Co. 1 C. B. N. S. 487; *Fitchburg R. Co. v. Gage*, 12 Gray, 398; *Ragan v. Aiken*, 9 Lea, 609, 42 Am. Rep. 684; *Houston & T. O. R. Co. v. Rust*, 58 Tex. 98; *Ex parte Benson*, 18 S. C. 88, 44 Am. Rep. 564; *Sargent v. Boston & L. R. Corp.* 115 Mass. 416; *Spofford v. Boston & M. R. Co.* 128 Mass. 326; *Eclipse Tow-boat Co. v. Pontchartrain R. Co.* 24 La. Ann. 1; *McNees v. Missouri P. R. Co.* 22 Mo. App. 224; *Johnson v. Pensacola & P. R. Co.* 16 Fla. 628, 26 Am. Rep. 731; *Menacho v. Ward*, 27 Fed. Rep. 529; *Avinger v. South Carolina R. Co.* 29 S. C. 265; *Cowden v. Pacific Coast S. S. Co.* 94 Cal. 470, 18 L. R. A. 221.

All the consignor can demand of the common carrier is that his goods shall be carried at a reasonable rate, not necessarily at an equal rate with all others. But when the reduced rate is either intended to or has a natural tendency to injure the plaintiff in his business and destroy the trade, then a necessary exception is engrafted on the more general rule, and the plaintiff has then the right to insist that rates to all be made the same for goods shipped "under like circumstances."

It is doubtful whether a water company is bound to serve all of its customers at uniform rates.

29 Am. & Eng. Enc. Law, p. 19, says: "The acceptance by a water company of its franchise carries with it the duty of supplying all persons along the lines of its mains, without discrimination, with the commodity which it was organized to furnish. All persons are entitled to have the same service on equal terms and at uniform rates," citing—

Haugen v. Albina Light & W. Co. 21 Or. 411, 14 L. R. A. 424; *Olmsted v. Proprietors of Morris*

NOTE.—For legislative power to fix rates, see note to *Winchester & L. Turnp. Road Co. v. Croxton* (Ky.) 33 L. R. A. 177.

The present case seems to be decided on general principles without the aid of any statute.

For the rule as to discrimination by carriers be-
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tween shippers, see *Louisville, E. & St. L. Consol. R. Co. v. Wilson* (Ind.) 18 L. R. A. 105, and note; also *Cowden v. Pacific Coast S. S. Co.* (Cal.) 18 L. R. A. 221, and *Lough v. Outerbridge* (N. Y.) 25 L. R. A. 674.

Aqueduct, 47 N. J. L. 311; *Spring Valley Water-works v. Schottler*, 110 U. S. 347, 28 L. ed. 178; *Price v. Riverside Land & Irrig. Co.* 56 Cal. 431; *McCrory v. Beaudry*, 67 Cal. 120.

These authorities do not support the text.

A water company has the right to shut off the water supply from one who wastes or refuses to pay.

Shiras v. Ewing, 48 Kan. 170; *Tacoma Hotel Co. v. Tacoma Land & Water Co.* 8 Wash. 816, 14 L. R. A. 669; *People, Kennedy, v. Manhattan Gaslight Co.* 45 Barb. 136.

The plaintiffs have not made out a case of irreparable damage, and are not entitled to a restraining order.

Frink v. Stewart, 94 N. C. 484; *Crouch v. London & N. W. R. Co.* 2 Car. & K. 789; *Parker v. Great Western R. Co.* 7 Mann. & G. 253; *Garlon v. Bristol & E. R. Co.* 1 Best & S. 112; *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 425; *Heiserman v. Burlington, C. R. & N. R. Co.* 63 Iowa, 732; *Louisville, E. & St. L. Consol. R. Co. v. Wilson*, 132 Ind. 517, 18 L. R. A. 105.

The payment of an overcharge of freight to a railroad company engaged as a common carrier of goods is not a voluntary payment within the ordinary meaning of that term, and a shipper has the right to sue upon his contract and recover back the excess of freight paid over the contract rate.

Louisville, E. & St. L. Consol. R. Co. v. Wilson, 132 Ind. 517, 18 L. R. A. 105, following *Heiserman v. Burlington, C. R. & N. R. Co.* 63 Iowa, 732; *Chicago & A. R. Co. v. Chicago, F. & W. Coal Co.* 79 Ill. 121; *Mobile & M. R. Co. v. Steiner*, 61 Ala. 559; *West Virginia Transp. Co. v. Sweetzer*, 25 W. Va. 484.

The court will not continue the restraining order unless there is such serious issue and a probability that the merits are with the plaintiff, or at least a grave doubt about the matter.

Cragroff v. Morehead, 67 N. C. 422; *Woodfin v. Beach*, 70 N. C. 455; *Ponton v. McAdoo*, 71 N. C. 101; *Mitchell v. Craven County Comrs.* 74 N. C. 487; *McCorkle v. Brem.* 76 N. C. 407; *Morris v. Willard*, 84 N. C. 293; *Tillery v. Wrenn*, 86 N. C. 217; *Marshall v. Stanley County Comrs.* 89 N. C. 108; *Bridgers v. Morris*, 90 N. C. 82; *Ellett v. Newman*, 92 N. C. 519; *Goode v. Vaughan*, 92 N. C. 610; *Turner v. Cuthrell*, 94 N. C. 239; *Blackwell Durham Tobacco Co. v. McIlwhee*, 94 N. C. 425; *Whitaker v. Hill*, 96 N. C. 2; *Frank v. Robinson*, 96 N. C. 28; *Evans v. Winton & W. R. Co.* 106 N. C. 45; *McDowell v. Massachusetts & S. Constr. Co.* 96 N. C. 514; *Caldwell v. Stirewalt*, 100 N. C. 205; *Durham v. Richmond & D. R. Co.* 104 N. C. 261; *East v. Lassiter*, 105 N. C. 490; *Roanoke Nav. Co. v. Emry*, 108 N. C. 133; *Nimocks v. Cape Fear Shingle Co.* 110 N. C. 230; *Davis v. Lassiter*, 112 N. C. 130; *Harrison v. Bray*, 93 N. C. 488; *Preis v. Cohen*, 112 N. C. 278; *Meroney v. Atlanta Nat. Bldg. & L. Assn.* 112 N. C. 843; *Faison v. Hardy*, 114 N. C. 58; *Jones v. Jones*, 115 N. C. 209; *McClell v. Meekins*, 117 N. C. 34.

Messrs. Allen & Dortch, for appellees:

Property used for the purpose of supplying water to a municipality and its inhabitants is used for a public purpose, or, as some of the 41 L. R. A.

authorities say, "is affected with a public interest."

Lumbard v. Stearns, 4 Cush. 62; 2 Beach, Priv. Corp. § 898.

Being used for a public purpose the owner cannot act capriciously or oppressively, but must supply water upon fair and reasonable terms.

Lumbard v. Stearns, 4 Cush. 62; 2 Beach, Priv. Corp. § 834; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; 29 Am. & Eng. Enc. Law, p. 19.

It must act with equal justice to all, and for the same service give a uniform rate.

29 Am. & Eng. Enc. Law, p. 19.

Being property dedicated to a public use the legislature has the right to regulate its use, and to say, within certain limitations not material here, what is a reasonable charge, and in the absence of legislative action this power belongs to the courts.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

Clark, J., delivered the opinion of the court:

The defendant corporation is the owner of a plant which supplies water to Goldsboro and its inhabitants, under a franchise granted by the city. It has no competition. The complaint alleges that, to prevent competition, the defendant reduced its rates largely to certain parties, who threatened to establish a rival company, but not only did not make a corresponding reduction to the plaintiffs and other customers, but proposes to put in meters whereby the rates to plaintiff and others will be greatly increased, and threatens to cut off the water supply of the plaintiffs if they do not pay the increased rates, which will be to their great injury; that the rates charged by the corporation are not uniform, and those charged the plaintiffs are unjust and unreasonable. The defendant denies, as a matter of fact, that the rates charged the plaintiffs are unreasonable, and contends, as a proposition of law, that the company's rates are not required to be uniform, and that it can discriminate in the rates it shall charge. It also relies upon the schedule of rates contained in the contract with the city, and avers that the charges to the plaintiffs do not exceed the rates therein permitted.

The defendant corporation operates under the franchise from the city, which permits it to lay its pipes in the public streets, and otherwise take benefit of the right of eminent domain. Besides, from the very nature of its functions, it is "affected with a public use." In *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, which was a case in regard to regulating the charges of grain elevators, it was held that in England from time immemorial, and in this country from its first colonization, it was customary to regulate ferries, common carriers, hackmen, bakers, millers, public wharfingers, auctioneers, innkeepers, and many other matters of like nature, and where the owner of property devotes it to a use in which the public has an interest, he, in effect, grants to the public an interest in such use, and must to the extent of that interest submit to be controlled by the public. Probably the most familiar

instances with us are the public mills, whose tolls are fixed by statute, and railroad, telegraph, and telephone companies, for the regulation of whose conduct and charges there is a state commission, established by law. There have been reiterated decisions in the United States Supreme Court, and in the several states affirming the doctrine laid down in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, and as to every class of interest affected with a public use; among others, water companies. *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 178. The right of fixing rates is a legislative function, which the courts cannot exercise; but it is competent for the courts, certainly in the absence of legislative regulation, to protect the public against the exaction of oppressive and unreasonable charges and discrimination. "The franchise of laying pipes through city streets and selling water to the inhabitants thereof, being in the nature of a public use or natural monopoly, . . . [the company cannot act capriciously or oppressively, but must] supply water to all impartially and at reasonable rates. . . . And an injunction may be issued to prevent it from cutting off its water supply where the consumer has offered to pay a reasonable rate, and the company demands an unreasonable one." 2 Beach, Priv. Corp. § 834c; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Lumbar v. Stearns*, 4 Cush. 60. In 29 Am. & Eng. Enc. Law, 19, it is said: "The acceptance by a water company of its franchises carries with it the duty of supplying all persons along the lines of its mains, without discrimination, with the commodity which it was organized to furnish. All persons are entitled to have the same service on equal terms and at uniform rates." If this were not so, and if corporations existing by the grant of public franchises, and supplying the great conveniences and necessities of modern city life, as water, gas, electric light, street cars, and the like, could charge any rates, however unreasonable, and could at will favor certain individuals with low rates, and charge others exorbitantly high, or refuse service altogether, the business interests and the domestic comfort of every man would be at their mercy. They could kill the business of one, and make alive that of another; and, instead of being a public agency created to promote the public comfort and welfare, these corporations would be the masters of the cities they were established to serve. A few wealthy men might combine, and, by threatening to establish competition, procure very low rates, which the company might recoup by raising the price to others not financially able to resist,—the very class which most needs the protection of the law; and that very condition is averred in this complaint. The law will not and cannot tolerate discrimination in the charges of these quasi public corporations. There must be equality of rights to all, and special privileges to none; and if this is violated, or unreasonable rates are charged, the humblest citizen has the right to invoke

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the protection of the laws equally with any other.

While the defendant cannot charge more than the rates stipulated in the ordinance granting it the franchise, because granted upon that condition, those rates are not binding upon consumers who have a right to the protection of the courts against unreasonable charges. Since the Constitution of 1868 (art. 8, § 1), if the rates had been prescribed in a charter granted by the legislature, they would be subject to revocation, and, indeed, independently of that constitutional provision. *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636; *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 33 L. ed. 267; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970; *Georgia R. & Bkg. Co. v. Smith*, 70 Ga. 694; *Winchester & L. Turnp. Road Co. v. Croxton*, 98 Ky. 739, 33 L. R. A. 177. Still less can these rates bind consumers if unreasonable or discriminating, since the town had authority to grant the franchise, but not to stipulate for rates binding upon the citizens. The legislature did not confer that power. The rates are binding upon the company as a maximum simply, because, acting for itself, it had the power to accept the franchise upon those conditions. Singularly enough, it appears incidentally in the evidence furnished by the defendant that, in the towns in North Carolina which do not own their waterworks, the maximum rates charged consumers are from 50 to 800 per cent more than the maximum rates charged consumers in Wilson and Asheville, the only towns which own their waterworks.

The allegations of fact that the rates are unreasonable and oppressive are denied. That they are not uniform is not denied, and the defendant contended that it had the right to discriminate, which cannot be sustained. On the final hearing, the cost and value of the property will be material in determining as to the reasonableness of the rates charged. *Smythe v. Ames* (known as the "*Nebraska Case*,") U. S. 1898, 169 U. S. 466, 42 L. ed. 819. The evidence offered on that point on the hearing below is not satisfactory, the mere amount of mortgage bonds issued on the property being no reliable guide to the courts as to the true value of the investment. It may be, as sometimes happens, that the bonds and stocks are watered. Nor is the evidence of the cost of construction and operation conclusive, as has often been held, for it may be that the work was extravagantly constructed, or is operated under inefficient management, and the public are not called on to pay interest upon such expenditures, in the shape of unreasonable or extortionate rates. *Missouri P. R. Co. v. Smith*, 60 Ark. 221, 5 Inters. Com. Rep 348; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L. ed. 176; *Covington & L. Turnp. Road Co. v. Sanford*, 164 U. S. 578, 41 L. ed. 560.

The court below properly continued the cause to the hearing.

No error.

BINGHAM SCHOOL, *Appl.*,

v.

Preston Lewis GRAY *et al.*

(.....N. C.....)

1. A break in the operation of a school after it has been carried on for many years at a certain place by persons belonging to one family does not forfeit the right of the proper representative of the family to revive the school at the same place, as against another member of the family who has, during the cessation of the school at that place, opened a school in another part of the state which he claims to be the successor of the original school.
2. The incorporation of a school under the name of the proprietor does not confer the exclusive right to use that name for a school, or prohibit other persons bearing the same name from using it in connection with other schools which they may establish.
3. The goodwill of a school which belongs to one of the persons forming a corporation to conduct it under his name becomes the exclusive property of his estate on the expiration of the corporation.
4. The use of the name "William Bingham School," by the widow and children of William Bingham, does not give cause for complaint to one who conducts a school called the "Bingham School" in another part of the same state.

(May 17, 1896.)

APPEAL by plaintiff from a judgment of the Superior Court for Buncombe County in favor of defendants in a suit to enjoin the use of a name in alleged conflict with plaintiff's rights. *Affirmed.*

The facts are stated in the opinion.

Messrs. Merrimon & Merrimon, John W. Graham, and R. W. Bingham, for appellant:

It was perfectly competent for William Bingham, in 1872, when he withdrew from the school, to verbally turn over all interests he had in it and in the corporation to Robert Bingham and William B. Lynch.

Menendez v. Holt, 128 U. S. 514, 521, 522, 32 L. ed. 526, 527, 528.

Even if William Bingham did not verbally turn over all his interests in the school and corporation, there cannot be any doubt of the fact that he withdrew from the school in 1872, and never took any active part in it after that time, and that the school and all its corporate rights and franchises were, after that time to the present time, in the actual, open, notorious, exclusive, uninterrupted, and unequivocal possession of Robert Bingham and William B. Lynch until Lynch withdrew, and then of Robert Bingham until the present time.

There was no property belonging to the school; its value consisted in its name and its goodwill. The name belonged to the corporation and not to William Bingham, for he had voluntarily procured the legislature to confer it upon the corporation. The goodwill necessarily remained with the corporation.

NOTE.—For name as part of goodwill of business, see *Vonderbank v. Schmitt (La.)* 15 L. R. A. 462, and note; also *Snyder Mfg. Co. v. Snyder (Ohio)* 51 L. R. A. 657.
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See also 44 L. R. A. 841.

Metropolitan Nat. Bank v. St. Louis Despatch Co. 149 U. S. 438, 446, 37 L. ed. 799, 802.

A corporation will be protected in the use of its name.

1 Thomp. Corp. § 296.

William Bingham gave all his property of every sort and description to his wife during her natural life or widowhood.

If this will conveyed any interest in the school or in the name of the school, or in the goodwill, such interest was personal property, and conferred upon the widow the absolute title.

There can be no remainder after a life estate in personal property.

Morrow v. Williams, 14 N. C. (8 Dev. L.) 263; *Dail v. Jones*, 85 N. C. 224; *Lance v. Lance*, 50 N. C. (5 Jones, L.) 418, 72 Am. Dec. 555; *Wilson v. Leary*, 120 N. C. 90, 38 L. R. A. 240.

If the widow had an interest, the moment Robert Bingham took exclusive possession and control a right of action accrued to her, and this right of action was barred in three years.

Whether the defendants have any interest in the school or not, considering the name and goodwill as property of the corporation, and the defendants as representing their father entitled to be considered as incorporators, still the corporation is entitled to the relief asked for in this suit.

Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 462, 27 L. R. A. 42; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. Rep. 94.

The property of the corporation, no matter what it consisted of, belonged to the corporation, not to any stockholder.

Listman Mill Co. v. William Listman Mill Co. 88 Wis. 334.

The legislature had the right to grant an exclusive right in the name with the consent of the possessor of the name, at least so far as the person giving his consent was concerned.

Holmes, B. & H. v. Holmes, B. & A. Mfg. Co. 37 Conn. 278, 9 Am. Rep. 324.

On the general question of the power and jurisdiction of the court over the questions involved in this case, see—

Chattanooga Medicine Co. v. Thedford, 30 U. S. App. 85, 66 Fed. Rep. 544, 14 C. C. A. 106; *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 199, 41 L. ed. 130; *Woodward v. Lazar*, 21 Cal. 448, 81 Am. Dec. 751; *Partridge v. Menck*, 2 Barb. Ch. 101, 47 Am. Dec. 281, and note 284; *Pillsbury v. Pillsbury-Washburn Flour Mills Co.* 24 U. S. App. 395, 64 Fed. Rep. 841, 12 C. C. A. 432.

Messrs. R. O. Burton and R. T. Gray, for appellees:

This is not a case of trademark, but of alleged unfair competition in trade or business.

In such cases the fraudulent intent must be conclusively shown. It is not enough that the public are deceived or liable to be deceived. The court must be satisfied the deception is continued and intended.

Meriden Britannia Co. v. Parker, 39 Conn. 450, 12 Am. Rep. 414, note.

Relief in such cases is granted only where the defendant, by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff, thus palming off his

goods for those of a different manufacture, to the injury of the plaintiff.

Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co. 128 U. S. 598, 32 L. ed. 535; *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 829, and note; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* 188 U. S. 537, 34 L. ed. 997, and note; *Conits v. Merrick Thread Co.* 149 U. S. 62, 565, 567, 569, 573, 87 L. ed. 847, 849, 850, 851, 852.

Under the act of 1864, the Bingham school was either a partnership or a corporation. If a corporation, William Bingham was one of the corporators, if not the only one. He never disposed of his interest. This interest passed to his next of kin and wife. If only a partnership, the name was merely a tradename—part of the goodwill; and upon dissolution each of the parties had a right to use it. This right passed to his wife.

Note *Meriden Britannia Co. v. Parker* (Conn.) 12 Am. Rep. 411; *Burgess v. Burgess*, 17 Eng. L. & Eq. 257; *Coddington, Trademarks*, §§ 785, 786, 789, 796-798; *Browne, Trademarks*, § 524.

One cannot have a trademark right in his own name as against another person of the same name, unless such other person adopt a stamp or label so like that of the other as to represent that the goods of the former are of the latter's manufacture.

McLean v. Fleming, 96 U. S. 245, 24 L. ed. 829, and note; *Meriden Britannia Co. v. Parker*, 39 Conn. 450, 12 Am. Rep. 411 *et seq.*; *Browne, Trademarks*, §§ 392, 423, 438; *Brown Chemical Co. v. Meyer*, 189 U. S. 540, 35 L. ed. 247; *Columbin Mill Co. v. Alcorn*, 150 U. S. 463, 37 L. ed. 1146; *Singer Mfg. Co. v. June Mfg. Co.* 168 U. S. 169, 187, 191, 192, 41 L. ed. 116, 125, 127.

Defendant has a right to use Bingham, or William Bingham name in good faith, with consent of Mrs. Bingham and her children, whether or not it was the same as that of plaintiff.

Hallett v. Cumston, 110 Mass. 29; 26 Am. & Eng. Enc. Law, 268; *Emerson v. Badger*, 101 Mass. 82.

The claimant of a trademark must be first to appropriate it.

Columbia Mill Co. v. Alcorn, 150 U. S. 463, 37 L. ed. 1146; *Tarrant & Co. v. Johann Hoff*, 45 U. S. App. 148, 76 Fed. Rep. 959, 22 C. C. A. 644, 71 Fed. Rep. 163; *Duryea v. National Starch Mfg. Co.* 45 U. S. App. 649, 79 Fed. Rep. 651; *Corbin v. Gould*, 133 U. S. 303, 33 L. ed. 611.

The names are not calculated to deceive.

Blackwell v. Wright, 73 N. C. 810; *Coddington, Trademarks*, §§ 905, 906.

There has been no abandonment, nor have any rights been lost by nonuser.

Menendez v. Holt, 128 U. S. 514, 32 L. ed. 526; *McLean v. Fleming*, 96 U. S. 246, 24 L. ed. 828; *Thornburgh v. Martin*, 93 N. C. 258; *Cox v. Brouer*, 114 N. C. 422.

Robert Bingham cannot be a corporation, as he has never associated anyone with him or had any organization.

See 1 Morawitz, *Priv. Corp.* §§ 23, 24, 26, 34, 42, 46.

A corporate name is protected exactly on the principles applicable to trademarks, and if a 41 L. R. A.

man cannot make a trademark of the family name to the exclusion of others of the same name, no more can he do so in the guise of a corporation.

High, Inj. § 1081; *Browne, Trademarks*, § 822; *Thomp. Corp.* §§ 296, 297; *Ottoman Cahrey Co. v. Dane*, 95 Ill. 203; *Nebraska Loan & T. Co. v. Nine*, 27 Neb. 507; *Russia Cement Co. v. Le Page*, 147 Mass. 206.

Even if it were conceded that plaintiff's evidence leaves the rights of the parties in doubt, no injunction should be granted till the final hearing.

American Cereal Co. v. Eli Pettijohn Cereal Co. 46 U. S. App. 188, 76 Fed. Rep. 372, 22 C. C. A. 236, affirming 73 Fed. Rep. 903.

Mr. F. S. Blair also for appellees.

Clark, J., delivered the opinion of the court:

The court below found as facts: Rev. William Bingham established a classical school at Wilmington, North Carolina, in 1793, which he subsequently removed to Chatham county, and thence to Orange county, North Carolina, where said school was conducted by him up to his death, in 1835. It was then continued by his oldest son, William J. Bingham, till 1857, when he associated with him his two sons William Bingham and Robert Bingham, till 1861, when the latter entered the Confederate army, and shared its fortunes until the end came, in 1865. In 1864, William J. Bingham, on account of ill health, gave up teaching, and his son William Bingham procured the school to be incorporated by the legislature as the "Bingham School." "William Bingham and those who may be associated with him" being named as the incorporators in said charter. In the articles of agreement made between William Bingham and William B. Lynch and Stuart White, whom he "associated with him" under the above charter provision, it is stipulated: "Nothing herein contained shall prejudice the original and ultimate right of property in the name of said school pertaining to William Bingham, as the representative of the name and reputation of the school." In 1865, Stuart White retired from the school, selling out his interest to William Bingham, and Robert Bingham assumed his place as teacher and member of the corporation. The school was removed to Mebane, North Carolina, and conducted by the two Bingham and Lynch till 1872, when William Bingham withdrew from actual participation in the school work, and died in 1873. In 1879, Lynch sold out to Robert Bingham, who conducted the school under his sole management, the widow of William Bingham conducting the boarding department, till 1891, when Robert Bingham removed the school to Asheville, North Carolina, and has conducted it there till the present time. The charter expiring, Robert Bingham had the school again incorporated by act of the legislature in 1895. On the death of William J. Bingham, in 1866, he left his school property to his two sons; and on the death of William Bingham, in 1873, he left all his property to his widow for life, and after her death to his children. Robert Bingham qualified as executor under the will of his brother, William Bingham, and settled up the estate, but

did not account to the estate or the legatees thereof for any interest they might have in the goodwill or name of the Bingham School. The defendants are the widow and children of William Bingham, and are conducting a school at Mebane, North Carolina, on the site of the old school, and under the style of the "William Bingham School," and in their catalogues and advertisements claim that the school was organized in 1793, and they assert that the school is one of the rightful successors of the name and reputation of the school founded and conducted by the Bingham family since 1793, and maintain that they have the right to style themselves the "Bingham School," should they so desire.

Upon the above facts, the court below properly adjudged that "neither the plaintiff corporation nor Robert Bingham is the sole and exclusive owner of the name and reputation of the school organized by William Bingham in 1793, and conducted by that family continually till 1864; that defendants, acting under the authority of the widow and children of William Bingham, deceased, have a rightful share in the name and reputation of said school, and are of right entitled to use the name of 'William Bingham School of Orange County, North Carolina,' and to claim that their school is one of the successors of the school established in 1793;" and dissolved the restraining order which had been previously granted at the instance of the plaintiff.

As the defendants are the widow and children of William Bingham (or those acting under their authority), who are conducting the school on the old site at Mebane, we see no ground upon which the plaintiff can ask that they be prohibited from styling the school, if they wish, the "Bingham School," and most certainly no reason why the plaintiff should enjoin their using the present style, the "William Bingham School," to which the plaintiff can lay no claim, and which is sufficiently distinctive from the plaintiff's title. That the plaintiff is incorporated as the "Bingham School" does not give it the exclusive right to that name. Another corporation might be created by and operated under the same title, when not in the same locality, in the absence of proof of an intent to injure the first-named corporation, or to avail itself fraudulently of the other's good name and reputation. Where there was a Fulton National Bank in New York, and a Fulton National Bank was subsequently opened in Brooklyn, the former could not enjoin the latter. *Farmers' Loan & T. Co. v. Farmers' Loan & T. Co.* 21 Abb. N. C. 104.

As a rule, a trademark cannot be taken in a surname, and anyone named "Bingham" could start a school called the "Bingham School," in the absence of proof of intent to injure or fraudulently attract the benefit of the good name and reputation acquired by a previously existing "Bingham School" (*Brown Chemical Co. v. Meyer*, 139 U. S. 540, 35 L. ed. 247; 2 Beach, 119, § 763); and certainly there could be no confusion between a Bingham School at Asheville and a school even of the identically same name at Mebane, N. C. (*Investor Pub. Co. v. Dobinson*, 82 Fed. Rep. 56). But in truth the doctrine of trademark can have no

application, except reasoning by analogy, which is often deceptive. This is a case of the right to goodwill. The corporation running the school recognized in 1864 that the goodwill was the individual property of one incorporator, William Bingham. Being a corporation, and not a partnership, that goodwill did not pass to the other corporators. The doctrine as to the passing of goodwill to the remaining partners on the retirement of one has no application, as in *Menendez v. Holt*, 128 U. S. 514, 32 L. ed. 526. On the expiration of the corporation, in 1894, this goodwill was still the property of the widow of William Bingham, to whom all his property went by his will. She could use it by putting it in a new corporation, or by joining in a school without incorporating it. In like manner, in the well-known instance of the Blackwell Manufacturing Company, the right to the brand was the individual property of one of the stockholders. All the realty and buildings used in connection with the Bingham School, from its removal to Mebane, in 1864, down to the removal of Robert Bingham to Asheville, in 1891, were the property of William Bingham till his death, and then of his widow and children, except about 8 acres sold to Robert Bingham by them in 1875, with a covenant in the deed that the land so conveyed should be used solely to erect thereon a residence for himself and academic buildings (the latter to be used by the Bingham School at a reasonable rent), and for no other purposes, with provision that the grantors should have the refusal should Robert Bingham at any time desire to sell said realty.

The right of Robert Bingham to operate a "Bingham School" is because of his bearing the name, and also because of an act incorporating the school by that name. He has no title to the goodwill of the former Bingham School, and his claim that the school at Asheville is the sole successor of the Bingham School established in 1793 cannot be sustained. His claim that his school is one of the successors thereof will not be restrained because the defendants have not asked it, and perhaps, even if asked, the courts would not enjoin it, as the damage is intangible, since it could not be shown that its use at that distant locality has perceptibly damaged the goodwill of the school at Mebane, which passed to the defendants. The incorporation of the Bingham School at Asheville, North Carolina, has only the usual effect of a charter, *i. e.* to confer the corporate rights of perpetual succession, suing and being sued, exemption from personal liability of stockholders, and the like. It did not have the effect of creating a trademark of the Bingham name, and of conferring the exclusive right to use it, in connection with school purposes, upon that corporation, nor is it a prohibition upon all others named Bingham, whether of that family or of any other of the same name, using it in connection with any school they might establish. Such an idea was foreign to the legislative mind, and it is beyond the scope of the powers of the state legislature to establish a monopoly in the family name or to confer a patent right in its use.

As to the right to claim to be a successor of the school "established in 1793," it belongs to

the defendants, to say the least, fully as much as to the plaintiff. Up to 1864 there had been unbroken succession in the school taught by the Bingham, and in that year the sole right as successor appears by the agreement among those then teaching to have devolved upon William Bingham, the husband of one of the defendants and father of the other defendants, Robert Bingham having left the school in 1861. This right exclusively in William Bingham in 1864 was recognized by Robert Bingham entering the corporation subject to that agreement. It was not sold by him as executor of William Bingham, and is not shown to have passed by sale or otherwise, in William Bingham's life, to Robert Bingham. The incorporation of 1895, as we have seen, conferred, and could confer, no such right of transfer. That act was purely for incorporation,—nothing more. If, since 1865, Robert Bingham has continuously taught in the school, and since 1872 as its head, he has the benefit of that, but that does not make him the sole heir to the name and reputation acquired from 1793 to 1872. There was a break in his own connection with the school from 1861 to 1865, and there was a decided break in the continuity of the school by the removal of it to a distant point in 1891, and he fails to show any acquisition by him of the exclusive right held by William Bingham from 1864 to his death. This presumably went to the widow of William Bingham, under his will. The break in the operation of the Bingham School at Mebane, after 1891, was not a forfeiture of the right to revive the school there as a successor of the school founded by the same family in 1793. Still less did it transfer the exclusive right to use the name of "Bingham School" upon Robert Bingham (or the corporation), operating a school at Asheville. There can be a generous rivalry between the two schools, respectively, at Asheville and at Mebane, to show, by superior teaching, which is a successor, in the truest sense, to the celebrated "Bingham School," which has been so long an honor and a service to our state. There is room for good service by both. Neither can restrain the other in the use of the name (2 High, Inj. § 1070), and each may claim a nominal successorship to the school originally founded in 1793.

No error.

STATE of North Carolina

v.

SOUTHERN RAILWAY COMPANY *et al.*,
Appls.

(.....N. C.....)

1. Circumstances and conditions which surround two persons are not dissimilar so as to relieve a railroad company from the prohibition of Acts 1891, chap. 320, § 4, against discriminating in rates between persons under substantially similar circumstances and conditions, merely because one is a high official,

or a larger shipper, or a politician of power, whose influence may be of service to the company, and the other is not.

2. An intention to violate the law prohibiting free transportation of favored passengers is not essential to constitute a violation of Acts 1891, chap. 320.

3. The intent with which an act is done is immaterial, when the act is denounced as unlawful by statute.

4. The clearly expressed prohibition of free transportation of favored passengers in Acts 1891, chap. 320, cannot be modified by any practical construction put upon the law by the carrier and officials who have received passes.

(Douglas, J., dissents.)

(May 24, 1898.)

A PPEAL by defendants from a judgment of the Superior Court for Wake County convicting them of unlawful discrimination in the transportation of passengers. *Affirmed.*

The facts are stated in the opinion.

Mr. F. H. Busbee for appellant.

Mr. W. C. Douglass, for the State:

The offense under § 2, Interstate Commerce Act, of giving free transportation to an individual, consists in charging, demanding, collecting, or receiving by the carrier from some other person or persons a compensation for a like service when none is contemporaneously charged or received from the person thus transported free.

Griffes v. Burlington & M. River R. Co. 2 Inters. Com. Rep. 194.

Free transportation issued in the form of an annual pass to a person not in the regular and stated service of the carrier, nor receiving any wages or salary under a contract of employment, but requested by him as compensation for throwing in its way what business he conveniently could, is held to be illegal.

Slater v. Northern P. R. Co. 2 Inters. Com. Rep. 248; *Re Boston & M. R. Co.* 3 Inters. Com. Rep. 717.

When an act forbidden by law is intentionally done, the intent to do the act is the criminal intent which imparts to it the character of an offense.

State v. McLean, 121 N. C. 589; *State v. Gibson*, 121 N. C. 680; *State v. Voight*, 90 N. C. 741; *State v. Smith*, 98 N. C. 516; *United States v. Tozer*, 87 Fed. Rep. 635, 2 L. R. A. 444. 2 Inters. Com. Rep. 423.

Messrs. Cook & Green also for the State.

Montgomery, J., delivered the opinion of the court:

The defendant company was indicted for an unlawful discrimination in the transportation of passengers, under § 4 of chapter 320 of the Acts of 1891,—the railroad commission act. Section 4 of that act is in the following words: "That if any common carrier subject to the provisions of this act shall directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from

NOTE.—As to the right of a carrier at common law to discriminate between passengers or shippers, see note to *Louisville, E. & St. L. Consol. R. Co. v. Wilson* (Ind.) 18 L. R. A. 105. See also *Cowden v. Pacific Coast S. S. Co.* (Cal.) 18 L. R. A. 221; *Hoover v. Pennsylvania R. Co.* (Pa.) 22 L. R. A. 263; and *Lough v. Outerbridge* (N. Y.) 25 L. R. A. 674.

den v. Pacific Coast S. S. Co. (Cal.) 18 L. R. A. 221; *Hoover v. Pennsylvania R. Co.* (Pa.) 22 L. R. A. 263; and *Lough v. Outerbridge* (N. Y.) 25 L. R. A. 674.

any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of this act than it charges, demands, or collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." Section 25 of the act is written as follows: "That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, state, or municipal governments, or for charitable purposes, or to or from fairs and exhibitions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies and the necessary agents employed in such transportation [or the free transportation of persons traveling in the interest of orphan asylums or any department thereof], or the issuance of mileage, excursion or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of national homes or state homes for disabled volunteer soldiers and of soldiers' and sailors' orphan homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers or employees."

The bill of indictment was in form as follows: "The jurors for the state upon their oath do present that on the 1st day of July, in the year of our Lord 1897, the Southern Railway Company was a corporation operating a line of railway from Goldsboro to Charlotte, in said state, and doing the business of a common carrier in the state of North Carolina subject to the provisions of chapter 320 of the Public Laws of 1891, and that the said Southern Railway Company required and received of persons traveling over its line of railway a regular first-class passenger fare of three and one quarter (3¼) cents per mile for each passenger. And the jurors aforesaid do further present that the said Southern Railway Company on the day and year aforesaid, and at and in the county aforesaid, unlawfully and wilfully did collect and receive from one H. L. Grant a less compensation for the transportation of said H. L. Grant from the city of Raleigh to the town of Goldsboro, in said state, than it collected, demanded, and received for the transportation of other passengers from the city of Raleigh to the said town of Goldsboro, for a like and contemporaneous service in the transportation of passengers in its first class carriages, under substantially similar circumstances and conditions. And the jurors aforesaid, on their oath aforesaid, do say that the said Southern Railway Company did then and there wilfully and un-

lawfully and unjustly discriminate in the collection of passenger fares in favor of the aforesaid H. L. Grant, and against other persons to whom like and contemporaneous service was rendered, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state. And the jurors aforesaid, on their oath aforesaid, do further present that on the 1st day of July, in the year of our Lord 1897, the Southern Railway Company was a corporation operating a line of railway from Goldsboro to Charlotte, in said state, and doing business of a common carrier in the state of North Carolina, subject to the provisions of chapter 320 of the Public Laws of 1891, and that said Southern Railway Company demanded and received a regular passenger fare of three and one quarter (3¼) cents a mile for passengers traveling in its first class carriages over its line of railway. And the jurors aforesaid do further present that the said Southern Railway Company on the day and year aforesaid, and at and in the county aforesaid, wilfully and unlawfully did make and give undue and unreasonable preference and advantage to one H. L. Grant, by then and there carrying the said H. L. Grant as a passenger free of charge over its line of railway from the city of Raleigh to the town of Goldsboro, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state." The jury rendered a special verdict, in which they found the following facts: "That the defendant is a corporation carrying on the business of a common carrier in the state of North Carolina, and operates a railroad, part of which line lies between the cities of Raleigh and Goldsboro, in said state; that during the year 1897 the defendant, through its vice president, issued to one Hiram L. Grant, who was a member of the general assembly of North Carolina, an annual free pass, which was accepted as valid for transportation in the state of North Carolina; that on the 1st day of July, 1897, the said Hiram L. Grant was, on the presentation of this annual pass to defendant's conductor, transported free by the defendant between the cities of Raleigh and Goldsboro, in said state; that upon the train there were persons who paid for their transportation at the rate of 8½ cents per mile for first-class passengers; that during the greater part of the year 1897 passes of substantially like character were issued to the chief executive, and to the state officers and to members of the railroad commission, as they had been for many years previously, and were accepted and used by them in the same manner as by the said Grant; that the members of the railroad commission are charged with the duties as set forth in chapter 320 of the Acts of 1891; that the officer of defendant who issued the annual pass was advised by counsel and by members of the railroad commission that he was not violating the law of the state; there was no actual intent to violate the law upon the part of the officer of defendant issuing the pass." Judgment was pronounced on the special verdict against the defendant, and the minimum penalty was imposed.

The question presented for our decision is, Does the act prohibit and make indictable the giving of free transportation to passengers by

common carriers? Upon its face, clearly, it does not in all cases, because in § 25 the giving of such free transportation, or transportation at reduced rates, to certain classes of persons, therein particularly specified, is allowed; but the person who received free transportation in this case did not come within either of the exceptions of the statute. In the argument here the counsel of the defendant company contended that the defendant had not violated the provisions of the statute: First, because there was no intention on its part to violate the law; second, that the statute does not in express terms forbid the giving of free transportation to passengers, and that, if the general assembly had intended such prohibition, that body ought to have made known its purposes in clear and unmistakable language; third that the giving of free transportation to a particular person, while it charged (for like and contemporaneous service) another person the prescribed rate of fare, is not an unjust discrimination, and that thereby no injustice is done to the person who pays his fare, for he has only paid what the law declares a fair price for the service rendered; fourth, that the deadhead and the paying passenger do not necessarily stand "under substantially similar circumstances and conditions," as contemplated in the statute; and, last, that the act itself has received an almost universal and practical construction in accordance with the foregoing views, by the habit of railroad companies generally giving free passes since the enactment of the law, just as they did before, to "gentlemen long eminent in the public service, higher officers of the state, members of the legislature, members of the railroad commission," etc.

The crucial point in the case is centered around the defendant's contention and assumption that the "like and contemporaneous service" in the transportation of two individuals (one carried free, and the other for the prescribed tariff rate) is not necessarily "under substantially similar circumstances and conditions;" that is that the company can take into consideration, as to whether it will give free transportation to a passenger, the circumstances and conditions which surround two persons, and if one is a "higher official" or a large shipper, or a politician of power whose influence may be of service to the company, or one of social distinction, and the other a laborer, then the conditions and circumstances are not the same, and therefore the statute does not apply. Of course, if this contention of the defendant is sound, this case is at an end, and the free transportation of passengers is therefore in no case unlawful. So we will examine that position of the defendant, first in order: What, then, in respect to the transportation of passengers in connection with the statute, is meant by the words "substantially similar circumstances and conditions?" It cannot be doubted that if each of two persons desired to ship 1,000 pounds of freight, of like kind, over a railroad, between the same points, and at the same time, the company must render the same service at the same rate to both, whether one of the shippers was a politician with a "pull," or a "higher official," or a member of the legis-

lature or of Congress, or a laborer. Beyond question, that would be a like and contemporaneous service in the transportation of a like kind of traffic, under "substantially similar circumstances and conditions." In our opinion, § 4 of the act in plain words prohibits the making of a greater charge against one person than against another for a like and contemporaneous service under substantially similar circumstances and conditions, applicable to the carriage of both passengers and property. The language is so clear "that he may read who runs." In contemplation of § 4 of the statute, the only possible difference between two individuals is that in relation to the size of their bodies; but this can have no bearing upon the matter of transportation, as the difference in size or weight of persons (over a certain age) has not yet been regarded, in the business "of hauling passengers," as ground for making difference in passenger rates. Boiled down, the contention of the defendant on this point is just this: If one person should be the governor of the state, a member of Congress, or of the general assembly, or a leader in what is called the business or the social world, and the other is an ordinary toiler for his bread, a case of substantially dissimilar circumstances and conditions exists, and the company may give the favored ones free transportation for their influence, and charge and receive from the other full fare, because he has no influence. Can it be supposed for a moment that the general assembly of North Carolina would enact a law—a law purporting to protect the great body of the people against inequality and unjust discrimination on the part of railroad companies—based on such class distinctions? This contention of the defendant, if it could be maintained, would simply divide the people of the state, not into the sheep and the goats, the good and the bad, and reward or punish them by giving to one and withholding from the others free passes, but into those whose influence is considered valuable to the corporation, on the one part, and the remainder of the people, on the other, and then giving to the first-named class the privilege of using the public franchise free, while it extorts from the latter the full rates allowed by law; the extortion consisting in making those least able to bear it pay the cost of transporting the well-to-do and influential. That position of the defendant cannot be maintained.

We will now consider the other positions of the defendant:

It was insisted that the company was ignorant of the provisions of the law in respect to the prohibition of the free transportation of passengers, and that it had no intention to commit the offense with which it is charged; and counsel dwelt especially upon that finding in the special verdict in which the jury said: "There was no actual intent to violate the law upon the part of the officer of defendant issuing the pass." Who was the officer of the company who issued the pass, and who put into the hands of the dead-head passenger the piece of paper which secured his free transportation, that his intention should be inquired into? Probably some local *attaché*. What notice does the law take of his intentions or purposes in the matter be-

fore us? The thing which was denounced by the statute, and for which the defendant is indicted, is not the act of giving the free pass,—the mere handing to the passenger the piece of paper on which was written a privilege of riding free,—but the act of transporting the favored passenger without charge or the payment of fare. The law would be violated if no pass was actually issued, if the passenger was carried free. The favored passenger might be known personally to the conductor, or be made known to him by preconceived signs, or mileage books distributed gratis or sold at reduced rates; and in other ways the law might be violated. But we leave the matter of the handing over by the officer of the free pass to the passenger, and his intention in so doing, as it has no bearing in the case; and we will take up the question of the intent of the acting, working, planning corporation in its giving the free transportation.

If there is anything well settled by the decisions of this court, it is that, wherever an act is denounced as unlawful by statute, the doing of that act constitutes the offense, and the intent with which the act is done is immaterial; and this has been settled law for a long period of time. In the case of *State v. King*, 86 N. O. 603, the court said: "When an act forbidden by law is intentionally done, the intent to do the act is the criminal intent which imparts to it the character of an offense; and no one who violates the law, which he is conclusively presumed to know, can be heard to say that he had no criminal intent in doing the forbidden act." In *State v. McBrayer*, 98 N. C. 619, it is held that when the statute plainly forbids an act to be done, and it is done by some person, the law implies conclusively the guilty intent, although the offender was honestly mistaken as to the meaning of the law he violates. In *State v. Voight*, 90 N. C. 741, the court said: "The criminal intent is inseparably involved in the intent to do the act which the law pronounces criminal." To the like effect are the decisions in *State v. Kittelle*, 110 N. C. 560, 15 L. R. A. 694; *State v. Downs*, 116 N. C. 1064; *State v. Chisenhall*, 106 N. C. 676; *State v. Scoggins*, 107 N. C. 959, 10 L. R. A. 542; *State v. McLean*, 121 N. C. 589. It is to be observed that, in the section of the act under which this defendant was indicted, neither the word "intent," nor any word synonymous with the word "intent," was used. The act simply denounced the unjust discrimination. And, besides, § 25 of the act excepts from the provisions of § 4 certain carefully specified classes of persons and such explicit enumeration of the excepted classes absolutely and necessarily excludes all other persons. It is true that in the bill of indictment the word "willfully" was used in connection with the discrimination, and it was insisted for the defendant that a vicious or covinous intent on its part was necessary to be proved. But that did not follow, even if such intent had been alleged in the indictment. It would have been surplusage. *State v. Edwards*, 90 N. C. 710; *State v. Keen*, 95 N. C. 647. "It is only where the statute makes the particular intent an essential element of the crime that it need be charged and proved." *State v. Mc-*

Carter, 98 N. C. 637. As to the plea of ignorance of the statute in reference to unjust discrimination between passengers, it is only necessary to cite some of the numerous decisions of this court on that point. In *State v. Downs*, 116 N. C. 1064, the court said: "Ignorance of the law excuses no one, and the vicarious ignorance of counsel has no greater value." *State v. Boyett*, 32 N. C. (10 Ired. L.) 386. The law does not encourage ignorance in either. *State v. Dickens*, 3 N. C. (1 Hayw.) 406. If ignorance of counsel would excuse violations of the criminal law, the more ignorant counsel could manage to be, the more valuable and sought for, in many cases, would be his advice. But, how is it possible to seriously consider that the defendant acted in this matter in ignorance of the law. It is not too much to say, in a judicial opinion, that the defendant is represented in its legal department by many of the best equipped lawyers in the country; and it would be a most violent presumption to say, or even to think, that they were not thoroughly posted as to the laws, state and Federal, concerning the interests and liabilities of their clients under this statute. Through their counsel, the defendant must have been acquainted with the act of Congress concerning interstate commerce, and the rulings of the Commission (interstate) upon the act; and that act, in § 2, is in the very words of the fourth section of the act of our general assembly (Acts 1891, chap. 320),—the law under which the defendant is indicted. The defendant could hardly be ignorant, in fact, of the decided cases reported by the Interstate Commerce Commission on the matters about which the defendant is before the court. In the case of *Grieffe v. Burlington & M. River R. Co.* in Nebraska, before that commission (2 Inters. Com. Com. 301) [2 Inters. Com. Rep. 194],—the report and opinion filed nearly ten years ago,—it was held, in effect, that free transportation to a passenger was in contravention of § 2 of the Act (United States) to Regulate Commerce; that section being, as we have said, identical with § 4 of the act of our general assembly of 1891. In the same volume (page 359 [2 Inters. Com. Rep. 243]) in the case of *Saler v. Northern P. R. Co.* it was declared that free transportation, furnished on an annual pass, to a person not embraced in one of the excepted classes, was illegal. In that case, it was further said by the Commission: "Carriers can reward persons, not in their stated and regular employment, for occasional services, or for benefits indirectly received, in other and better ways than by furnishing them with free transportation. . . . It may be said that a pass costs the carrier little or nothing, and that, when the goodwill and occasional good words of a person who is able to influence the direction of traffic can be obtained so cheaply, it is a hardship to prevent the carrier from making use of the opportunity; but the evils in the unrestricted employment of free passes by common carriers had grown so great, and had become so apparent, both to the public and to the carriers themselves, that it was deemed by Congress to be absolutely necessary to eradicate the whole system from interstate commerce, in order to put an end to the abuses which had grown beyond the limits of any other regula-

tion or control. The law was framed, accordingly, prohibiting the giving of free transportation to passengers carried under substantially similar circumstances and conditions, as an unjust discrimination under the general terms employed; with only the exceptions made in § 22. . . ." In the Third Annual Report of the Interstate Commerce Commission (vol. 3, p. 300 [2 Inters. Com. Rep. 667] filed November 30, 1889), it is stated that "the statute [Interstate Commerce Act] undoubtedly was framed to prohibit passes or free transportation of persons, as one of the forms of unjust discrimination, favoritism, and misuse of corporate powers that had grown into an abuse of large proportions, and become demoralizing in its influence, and detrimental to railroads, both in loss of revenue and in provoking public hostility. One of the minor and meaner phases of this abuse is the distinctive preference shown in various ways by employees, both in service and civility, to holders of passes, as if discrimination by free carriage includes discrimination in treatment of passengers. It is well known that persons who were carried free were, to a large extent, precisely the persons who had no claim whatever to such favors. They were officials and others, from whom free passes might be expected to secure reciprocal favors, and men of wealth and prominence, who rode at the expense of others less able to pay, or the passes were given to influence business. In nearly all cases not specially exempted by the act, the motive in demanding or in giving them was one deserving of no favor. . . . The principle of equality under like conditions for the traveling public had been grossly violated by the railroads. Favored persons or classes of persons had been furnished free transportation at the expense of the general public by higher general charges to reimburse for gratuitous carriage." It is of interest to observe that it appears from that report that the returns of the railroad companies embraced therein show the largest number of interstate free passes issued were designated as "complimentary." The next most numerous class embraced steamship and transportation lines, officers (Federal, state, and municipal), palace car companies, and newspapers. Of state free passes, the largest number were issued to members of legislatures; drovers with "complimentaries," next; and United States, state, and municipal officers, newspapers, and shippers, next in numbers. In the investigation of this subject, as it affected the Boston & M. R. Co. (5 Inters. Com. Com. 69 [3 Inters. Com. Rep. 717], Dec. 1891), it was decided by the Commission that the giving of free passes to others than those embraced in the exceptions was illegal. The opinion of the Commission was in the following words: "The construction we give to § 2 of the Act to Regulate Commerce is that, where the service by the carrier subject to the act is 'like and contemporaneous' for different passengers, the charge to one of a greater or less compensation than to another constitutes unjust discrimination, and is unlawful, unless the charge of such greater or less compensation is allowed under the exceptions provided in § 22, and that, where the traffic is 'under substantially similar circumstances and conditions' in other respects, it is

not rendered dissimilar, within the meaning of the statute, by the fact that such passengers hold unlike, or, as sometimes termed, unequal, official, social, or business positions, or belong to different classes, as they ordinarily exist in a community, or are arbitrarily created by the carrier. Under this construction of the act, the practice of the defendant in giving free transportation, such as it concedes was issued to 'gentlemen long eminent in the public service,' 'higher officers of states, and prominent officials of the United States,' 'members of legislative railroad committees,' 'persons whose goodwill is important to the corporation,' is unwarranted, unless the favored person also comes under some exception specified in § 22 of the Act to Regulate Commerce." In this matter it was that Mr. Richard Olney (afterwards attorney general under Mr. Cleveland), who represented the Boston & Maine Railroad Company, stated in his brief that Mr. Chandler, who brought the proceeding for the People, was inspired to make the charges in the complaint by "personal spite and political considerations." The report goes on, however, to say that Mr. Chandler made a reply not without interest or point. In the same decision the Commission said further: "Other utterances and decisions of the commission to the same legal effect have been made every year since its organization, and its construction of the act has been indicated by its repeated recommendations to Congress to add other classes of persons to the exceptions (as they were always regarded by the Commission) contained in § 22. We find not only these views held by the Commission from its organization, but by the Federal courts, when the question has arisen." The case of *Harrey v. Louisville & N. R. Co.* reported in 5 Inters. Com. Com. 153 [3 Inters. Com. Rep. 793], closes with the following declaration: "The fundamental and pervading purpose of the law is equality of treatment. It assumes that the railroads are engaged in a public service, and requires that service to be impartially rendered. It asserts the right of every citizen to use the agencies which the carrier provides on equal terms with all his fellows, and finds an invasion of that right in every unauthorized exemption from charges commonly imposed. No form of favoritism and no species of partiality seem more odious or indefensible, than that which accords to personal influence or public station privileges not enjoyed by the community at large. The free carriage of certain persons merely because they occupy official positions or have acquired some measure of distinction, offends the rudest conception of equality, and contravenes alike the policy and the provisions of the statute."

As to the last position of the defendant (that is, the alleged practical construction which the common carriers and the favored passengers have put upon the statute,—the first giving and the last receiving free transportation just as they did before the enactment of the statute, and assuming that the general community have adopted that as the proper construction of the law), we have nothing to say, except that it would seem to all reasonable minds that such a construction could not be the proper one, and that the law, as often construed by the Inter-

state Commerce Commission, which construction seems true to us, is a just and wholesome law. In the face of the clearly expressed provisions of the law, and in the face of the repeated constructions of that part of the Federal statutes regulating interstate commerce, which is in precisely the same words in which our statute is framed upon the point now before us, the defendant took its chances. It has, in doing so, violated the criminal law of the state and must abide the consequences, as all others ought to do who break the laws. It must be presumed that common carriers know well what they are doing in this matter. They are not, and neither do they wish to be considered, charitable institutions. They are corporations formed for profit and gain. And whenever they grant a thing of value,—free transportation to a passenger not embraced in the excepted classes specified in the act,—they must be acting, as they think, on business principles, expecting a return upon their investments. If in pursuing their business interests they violate the law, they must abide the result.

There is no error, and *the judgment is affirmed.*

Douglas, J., dissenting:

I feel compelled to dissent from the judgment of the court, but in doing so I wish to express my unqualified concurrence in the able opinion of Justice Montgomery, except in so far as it necessarily conflicts with what is said herein. That free transportation, under whatever device it may be given, is prohibited by the act of 1891, unless covered by the statutory exceptions, is unquestionable, and I am glad that it has now been settled by a unanimous court. Such a construction is in strict accordance with the settled rules of judicial interpretation and with the highest principles of public policy. It is currently reported that 100,000 passes were issued in the state of North Carolina within the year 1897. Of our three leading railroad systems, one reported over 15,000 passes issued, while another reported 80,000. The defendant herein, the largest system of all and having a direct pecuniary interest of vital importance before the legislature, refused to make any report, relying upon its legal exemption from compulsory self crimination. Taking the estimate of 100,000 passes as correct, as it is 397 miles from Raleigh to Murphy, on the west, and still further to Elizabeth City, on the east, it is fair to assume that each pass would represent at least 100 miles of travel, equal to \$8 25 in fare. This would represent the equivalent of \$825,000 a year given to somebody, but to whom we do not know, and for what purpose we need not inquire. These figures may not be correct, but they are the best obtainable under the circumstances. It is needless to suppose that transportation of such great pecuniary value would be given without some return, either present or prospective; and, in any aspect its continuance would be unjust to the public interest, and dangerous to the public welfare. Free transportation to so large an amount would necessarily place an additional burden upon the travelling public to make up the deficiency, while its irresponsible distribution would be a serious menace to public morality. So far, I fully concur in the opinion of

41 L. R. A.

the court; but, to convict a person charged with crime, it is requisite not only to determine that a crime is committed, but also that the defendant is guilty of the crime. The defendant here admits the free transportation, but pleads want of intent. Ordinarily the admission of the forbidden act would be conclusive evidence of guilt; as in misdemeanors at least, the intent to commit the act is the criminal intent, unless the statute itself constitutes the intent the gravamen of the offense. In this action, however, there seem to me so many peculiar circumstances that have never happened before, and may never happen again, as to take the case out of the usual rules of construction, and force us to regard it *avi generis*. If the act itself forbade the issuing of passes in express terms, it would be an end of the question. But it does so only by implication, as is shown in the opinion of the court. It is true, it seems to us a clear and necessary implication; but it evidently did not seem so to the higher officers of state and members of the legislature who accepted these passes. We can scarcely ask a clearer insight into the law, and a nicer sense of propriety from the soulless corporation than we do from those who make and enforce the law. This act was ratified March 5, 1891,—more than seven years ago. Since then we have had four different legislatures, three governors, and seven different railroad commissioners, as well as two complete sets of solicitors. I do not mean to impute any improper motive to these men, many of whom I personally know, and whose names and characters are too well known to need any vindication from me; but is it not possible that the defendant may have been honestly misled in issuing passes to them, from the mere fact that they would receive them? The giving of a pass is only *malum prohibitum*, and not *malum in se*, and is neither as to the one that receives it. There is nothing innately wrong in it, further than that it is prohibited by law, and may lead to dangerous abuses. Moreover, § 5 of the act under consideration provides that the railroad commissioners "shall make such just and reasonable rules and regulations as may be necessary for preventing unjust discrimination in the transportation of freight and passengers on the railroads in the state." It was the imperative duty of the commission, without any outside suggestion, to make all just rules necessary for carrying out all the provisions of the act, the proper enforcement of which was the sole object of their official existence. We have held, in *State, Caldwell, v. Wilson*, 121 N. C. 425, 472, that the commission is an administrative, and not a judicial court; and this view is still more strongly expressed by the Supreme Court of the United States in *Rengan v. Farmers' Loan & T. Co.* 154 U. S. 362, 394, 88 L. ed. 1014, 1023, 4 Inters. Com. Rep. 560, 568, where it says: "Such a commission is merely an administrative board created by the state for carrying into effect the will of the state as expressed by its legislation." It is their duty to actively enforce the law, and to prevent, and, if necessary, prosecute, all violations thereof that may come to their knowledge in any manner. They are the active instruments of its enforcement, and are not merely required to construe it upon a sworn

complaint. For the purposes of their creative act they are the grand inquest of the state, and should diligently inquire, and true presentment make, of all its violations. Any other construction of their powers and duties would destroy their usefulness, and make the Commission a mere excrescence upon the judicial system of the state. As a court, their powers are very limited; but as a commission they are charged with grave and responsible duties of the greatest importance to the state, and are clothed with ample powers for their performance. While they may be compelled to appeal to the courts for the ultimate enforcement of their decisions, they possess powers beyond the jurisdiction of any court, and which, if properly exercised, may be made of inestimable value to the people. The mere fact of thorough investigation, and consequent publicity, of existing abuses, will strongly tend to their correction. The jury find in their special verdict "that the officer of defendant who issued the annual pass was advised by counsel and by members of the railroad commission that he was not violating the law of the state;" "that there was no actual intent to violate the law upon the part of the officer of defendant issuing the pass." They further find that during the year 1897 passes were issued to members of the railroad commission, which, using the plural, must mean a majority of the commission, of whom there are only three. In a case of doubt, where the act was not expressly prohibited in words by the statute, to whom better could the defendant have gone than to those charged in express terms with its enforcement? What more positive answer could it have received than the answer of a majority of the commission that it was not unlawful, coupled with

the personal acceptance of a pass? I do not question the integrity of the commissioners. They were doubtless honestly mistaken,—misled, perhaps, by the universal custom throughout the United States; but so, also, may have been the defendant. Is it not fair to say that it was innocently misled? The possible results of an adverse decision to the defendant are practically beyond calculation. If it has issued 50,000 passes a year for the two years within the statute, it is not probable that over 40,000 were issued to the excepted classes, leaving at least 60,000 violations of law. This would subject it to penalties of which the minimum would be \$60,000,000 and the maximum \$300,000,000. It is true this may not be the result. Solicitors may not prosecute. The executive may pardon, or the legislature may condone. But with this I have nothing to do. Upon the special verdict rendered in this case, and in view of the exceptional circumstances that force themselves upon our attention, I think that the defendant should be held not guilty, purely upon the ground of intent. This would end the matter, as hereafter there would be no honest mistake. As this court has now held that free transportation outside of the excepted classes is a violation of the act, no matter under what form or device it may be given, the mere performance of the act will hereafter be deemed conclusive evidence of its guilty intent. I am aware that in arriving at my conclusions I have been forced to ignore some of the general rules of judicial construction, but under the exceptional circumstances, appealing so strongly to my judgment, I do not feel that we should permit the bar sinister of an ironclad rule of interpretation to lie in cold obstruction across the conscience of the court.

NORTH DAKOTA SUPREME COURT.

WELLS-STONE MERCANTILE COMPANY, *Appt.*,

v.

G. A. GROVER *et al.*, *Respts.*

(7 N. D. 460.)

***1. An insolvent debtor made a deed of trust, in which his creditors joined.** By the terms of the deed, the trustee was to continue the business of the debtor as long as he should deem it for the interests of the creditors so to do. The entire management and control of the business were intrusted to him. Whenever the trustee deemed it best to discontinue the business, the property was to be sold, and the claims of all the creditors signing the deed were to be paid from the proceeds; the surplus, if any, to go to the debtor. *Held*, that the creditors signing the deed did not thereby render themselves the real proprietors of the business, and, therefore, that they were not liable to creditors of whom the trustee had purchased goods in the prosecution of such business. The relation created by the

instrument was that of trustee and beneficiary, and not that of principal and agent.

2. Ordinarily a trustee is himself personally liable on all contracts made by him as trustee.

3. In exceptional cases he may, by express contract, prevent his becoming personally responsible; charging the liability on the trust fund itself.

4. Even when this has not been done the creditor may, under peculiar circumstances, proceed against the trust property, either in the hands of the trustee, or of the beneficiary himself.

(May 10, 1898.)

A PPEAL by plaintiff from a judgment of the District Court for Cass County in favor of defendants in a proceeding brought to recover the purchase price of goods sold to a trustee who was carrying on business for the benefit of defendants. *Affirmed.*

The facts are stated in the opinion.

Messrs. Newman, Spalding, & Stambaugh, for appellant:

Every contract by which the possession of

*Headnotes by CORLISS, Ch. J.

NOTE.—The important question cited in the above case seems to be a novel one in this country.
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personal property is transferred as security only is to be deemed a pledge.

Rev. Codes, § 4745.

These goods were purchased for the purpose of resale, for the purpose of carrying on a general merchandising business at retail for profit, the profits to inure to the benefit of Grover and his creditors.

Grover and his creditors became partners, and Jones became the agent of the partnership.

Gleason v. McKay, 134 Mass. 419; *Phillips v. Blatchford*, 187 Mass. 510.

Messrs. Morrill & Engerud, Newton & Smith, and *John E. Greene* for respondents.

Corliss, Ch. J., delivered the opinion of the court:

The defendants are sought to be held liable for goods sold to the trustee under an instrument creating a trust. The theory of plaintiff's counsel is that in the purchase of such goods the trustee was the mere agent of the defendants, who themselves were the real traders on whose behalf the business was being carried on. It is therefore obvious that the decision on this appeal will turn upon the construction of the writing in which such trust is expressed. G. A. Grover, a merchant doing business in this state, becoming embarrassed, transferred to Albert E. Jones, as trustee, all his property, for the benefit of his creditors, to be converted by such trustee into cash, for the purpose of paying his debts. All his creditors executed the trust instrument, they being named therein as parties. The trustee was authorized by the writing to make new purchases, and carry on the business, should he deem this course wise. It is on this portion of the instrument that plaintiff rests its claim that in making such purchases the trustee acted as agent for the creditors. This action is against such creditors, to recover the value of goods purchased of the plaintiff by the trustee in the exercise of the discretion vested in him by the trust deed to continue the business. As it is indispensable to the correct understanding of the case, we quote in full that part of the instrument which relates to the future prosecution of the business by the trustee: "The said party of the second part shall have power to continue said general merchandise business, and to sell the stock of general merchandise at private sale and in the usual course of trade, and to replenish said stock of merchandise with such articles of staple goods as may be necessary to successfully continue business; and such power shall continue so long as said party of the second part shall be of the opinion that the interests of said creditors will be best subserved by that method of executing said trust. Said parties of the third part, in consideration of said provisions herein made for the payment of their respective demands against said party of the first part, have agreed to, and do hereby, grant to him an extension of eighteen months' time, from the date hereof, within which to pay his debts; and no attempt shall be made by them, or either of them, to enforce payment of any of said debts by any legal proceedings during the period of such extension. And the said above-mentioned 'secured creditors' hereby agree, immediately

upon the execution and delivery of this deed of trust, to surrender to said party of the second part all securities which they hold for their said claims; and such of said 'secured creditors' as have liens upon the real or personal property of said party of the first part by virtue of any mortgages or execution levies thereon agree to forthwith, and upon the delivery of this deed of trust, release their liens and the levies of their executions upon said property. Said party of the first part shall and will do all he reasonably can to assist said trustee in realizing the amount of said debts as fast as practicable; provided, however, that all things done by said party of the first part with reference to said business and the management thereof shall be under the supervision and direction of said trustee, and that for such services as said first party shall render with reference thereto he shall make no charge, other than for actual necessary living expenses. Said trustee shall operate and manage said business in the ordinary way of retail trade, unless and until he shall become satisfied that the interests of said creditors will be best subserved by closing out said business, and by disposing of said property, both real and personal, at forced sale. If at any time said trustee shall conclude that more money can be realized from said property, or from any portion or class thereof, by public sale, than by sales in the ordinary way of retail trade, then and in that event he is hereby authorized and empowered to, and may, close out said trust in the manner usual under the ordinary assignment for the benefit of the creditors under the laws of the state of North Dakota."

At the outset we desire to answer the argument of counsel for plaintiff, that unless this action will lie the plaintiff is without redress. We are of the contrary opinion. If the trust is valid,—and that point does not seem to be controverted,—then the trustee became personally liable on every contract made by him in the discharge of the trust. He is to-day liable to the plaintiff for the value of the very goods, the value of which it is seeking to recover in this action. In dealing with the business world, a trustee cannot escape personal liability unless he lawfully restricts his liability in the contract itself. He is not in the position of a mere agent, and therefore knowledge on the part of the creditor that the trustee is acting only as such will not enable the latter to insist that such creditor shall look to only the trust estate for his pay. It is true that the trustee may claim reimbursement from the funds in his hands for any proper expenditure made by him in the execution of the trust; and this equity is the foundation of the right of the creditor, under peculiar circumstances, to proceed directly against the trust property itself. See *Hewitt v. Phelps*, 105 U. S. 898, 26 L. ed. 1072; *Olopton v. Gholson*, 58 Miss. 466; *Norton v. Phelps*, 54 Miss. 471; *Re Johnson*, L. R. 15 Ch. Div. 548; *Doues v. Gorton*, L. R. 40 Ch. Div. 586; *Mason v. Pomeroy*, 151 Mass. 164, 167, 7 L. R. A. 771. That the trustee is himself personally liable is well settled; and the general rule is that the creditor cannot claim any lien on, or equitable right in, the trust estate, but must look entirely to the trustee and his individual property for his pay. *Hewitt v.*

Phelps, 105 U. S. 393, 26 L. ed. 1072; *Clopton v. Gholson*, 53 Miss. 466; *Norton v. Phelps*, 54 Miss. 471; *Kedian v. Hoyt*, 33 Hun, 145; *New v. Nicoll*, 73 N. Y. 127; *Austin v. Munro*, 47 N. Y. 360; *People, Wallace, v. Abbott*, 107 N. Y. 225; *Hackman v. Maguire*, 20 Mo. App. 286; *Mayo v. Moritz*, 151 Mass. 481; *Odd Fellows Hall Assn. v. McAllister*, 153 Mass. 292, 11 L. R. A. 172; *Mason v. Pomeroy*, 151 Mass. 164, 167, 7 L. R. A. 771; *Gill v. Carmine*, 55 Md. 339; *Burt v. Bull* [1895] 1 Q. B. 276. Of course, the parties may agree that the trustee shall not be held personally on the contract, but that only the trust estate itself shall be chargeable with the debt. In such a case, if the instrument creating the trust authorizes this to be done, or even when it does not give such authority, if the circumstances are peculiar, the trustee is not bound, but the fund is. *New v. Nicoll*, 73 N. Y. 127; *Gill v. Carmine*, 55 Md. 339, 342, 348. These considerations make it plain that plaintiff is not without remedy in case we hold that these defendants are not liable. As they have themselves consented that the property which otherwise would have gone to pay their demands should be left in the hands of the trustee for a season, subject to all the risks of trade, they cannot complain if the venture proves a failure, and, instead of resulting in an increase of their dividends, actually leads to the diminution, or even the total loss, thereof. They are not entitled to any portion of the property until all proper expenditures made by the trustee have been repaid to him. And if he should distribute the estate, leaving unpaid any of the debts incurred by him in the execution of the trust, we have no doubt that a court of chancery would subrogate the creditors to his equity, and allow them to follow, in the hands of those who had received the property, the portion of the assets which had been paid to them by the trustee. And even while the trust property is still in the hands of the trustee, those who had dealt with the trustee as such might, under special circumstances, obtain a decree impressing upon such property an equitable lien in their behalf. See cases first above cited.

We now turn to the crucial point in the case. What relation did the creditors who signed the trust deed thereafter sustain to the business carried on thereunder? Were they themselves the proprietors of such business? We think not. It is true that they had an interest therein. But such interest did not differ from the interest of any creditor in the successful prosecution of a business by his debtor. While this property was still under the control of the debtor all of these creditors were interested in its being so managed by such debtor as to produce profit. In this way the ability of the debtor to pay would be increased. But such interest would not make them liable as the proprietors of such business. Suppose these same creditors had refused to grant the debtor an extension of time except on condition of his giving them security that he would not transfer any of his property, or create any liens thereon, but would pay them from time to time the profits of his business, as dividends on their claims; and suppose that the debtor had given such security, and had been left in control of the business. Would

it be seriously urged that such an arrangement had rendered the creditors liable, as principal traders, on all the contracts of such debtor made in the prosecution of such business? We believe that it would not. What was done by all the parties was substantially the same thing. Instead of taking security in the form of a bond, they took it in the form of a trust. They were no more interested in the business under the management of the trustee than they would have been had it been left in the hands of the debtor himself. Their interest was neither greater nor different. It was in all respects precisely the same. They acquired, however, by the transfer made by the trustee, an equitable interest in the property so transferred. But they held this interest not as proprietors of the business. It was merely as security for the collection of their claims. Both parties had made the trustee the proprietor, with an ultimate obligation on his part to account to the creditors first, and then to the debtor, for any surplus remaining after all claims had been extinguished. Had the debtor sold the property to the creditors in payment of their demands, and had they, as owners of such property, intrusted it to the trustee to manage in their interest, it might well be claimed that they were themselves the proprietors of the business carried on by the trustee, and liable as such, on the theory that he was a mere agent in the prosecution thereof. Such a case, however, is not before us. In the supposed case the creditors would, as proprietors of the business, be entitled to all the profits thereof, without reference to the amounts of their several claims respectively. But in this case they have no such interest in the business at all. They have only the incidental interest which all creditors have in the profitable management of the affairs of their common debtor. They are interested indirectly, as creditors, and not directly, as proprietors. As the demands of these creditors were not extinguished by the transfer to the trustee, the person who was most directly interested in the business was the debtor himself. Every dollar of profit would go to him. True, he would, because of the trust, have to turn over such profits in payment of his debts, until they had all been satisfied; but they would be turned over as his property, and he would secure the full benefit thereof, and then, after all his obligations had been discharged, every dollar of profit would flow into his own pocket. Certain it is that none of the creditors who executed this trust deed ever deemed that they would become responsible for the debts contracted by the trustee in the operation of the business, in any other sense than that their dividends might be lessened, or even destroyed, by the failure of the venture. It would astonish any creditor holding a small claim to discover that he had become liable for all the debts incurred by the trustee in carrying on the business. This, of course, should not control us. But in settling a question of this character we should have some regard to the understanding and convenience of the business world. Jurisprudence should rest, not on mere logic, but on the actual condition of men in society, and their practical relations to each other in business life. Transactions of this

character are, we believe, quite common, and they are certainly very beneficial to both the debtor and his creditors. We should not, therefore, throw in the way of those who wish to enter into them such serious obstacles as will deter them from making such advantageous arrangements, unless we are compelled to do so by some settled legal principle, or some consideration of justice or policy. This argument was given much weight by Lord Cranworth in *Wheatcroft v. Hickman*, 9 C. B. N. S. 47,—a case which, as we shall see, is directly in point. He says at page 94: "I have on these grounds come to the conclusion that the creditors did not by executing this deed make themselves partners in the Stanton Iron Company, and I must add that a contrary decision would be much to be deprecated. Deeds of arrangement like that now before us are, I believe, of frequent occurrence; and it is impossible to imagine that creditors who execute them have any notion that by so doing they are making themselves liable as partners. This would be no reason for holding them not to be liable, if, on strict principles of mercantile law, they are so. But the very fact that such deeds are so common, and that no such liability is supposed to attach to them, affords some argument in favor of the appellant. The deed now before us was executed by above a hundred joint creditors, and a mere glance at their names is sufficient to show that there was no intention on their part of doing anything which should involve them in the obligations of a partnership. I do not rely on this, but at least it shows the general opinion of the mercantile world on the subject. I may remark that one of the creditors, I see, is the Midland Railway Company, who are creditors for a sum only of £39, and to suppose that they could imagine that they were making themselves partners is absurd."

All that the creditors intended by signing this trust deed was to consent to the continuance of the business by the trustee at his option; thus barring the right of anyone to assail the transfer as a fraud upon creditors, on the ground that it operated to hinder and delay them in the collection of their demands. In the absence of such consent by them, it is obvious that they could have attacked the deed as fraudulent. A debtor cannot divest himself of all interest in his property, and yet create a trust relating thereto, to continue indefinitely. If such a trust were valid, creditors could never reach the assigned estate, in the enforcement of their claims, unless the trustee, in the kindness of his heart, should see fit to wind up the trust and distribute the property among them. *Jones v. Syer*, 52 Md. 211; *Acme Lumber Co. v. Hoyt & Bros. Co.* 71 Miss. 106; *Att v. Wm. Knabe & Co. Mfg. Co.* 93 Va. 741; *Webb v. Armistead*, 26 Fed. Rep. 70; *Renton v. Kelly*, 49 Barb. 536; *Farmers' & T. Bank v. Martin*, 96 Tenn. 3; *De Wolf v. Sprague Mfg. Co.* 49 Conn. 326; *American Exch. Bank v. Inloes*, 7 Md. 380; *Gardner v. Commercial Nat. Bank*, 13 R. I. 155; *Gardner v. Commercial Nat. Bank*, 95 Ill. 298. But any reasonable authority given to the trustee to manage the business under the direction of the court, and subject to the right of creditors to control the discretion of the trustee, is not necessarily fraudulent as to creditors.

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Robbins v. Butcher, 104 N. Y. 575; *De Wolf v. Sprague Mfg. Co.* 49 Conn. 326; *Stoneburner v. Jeffreys*, 116 N. C. 78; *Ravines v. Alston*, 5 Ala. 297; *Woodward v. Marshall*, 22 Pick. 468; *De Forest v. Bacon*, 2 Conn. 683; *Kendall v. New England Carpet Co.* 13 Conn. 383; *Foster v. Saco Mfg. Co.* 12 Pick. 451; *Hitchcock v. Cadmus*, 2 Barb. 381; *Perry Ins. & T. Co. v. Foster*, 58 Ala. 502, 29 Am. Rep. 779. But the provision in the deed in question was of such a character that it vested such absolute power in the trustee, as to the continuance of the business, that the deed could not have been sustained, as against the creditors of the debtor, had it not been signed by them. This undoubtedly furnishes the explanation of their joining in the execution of the instrument. They intended to estop themselves by their signatures from claiming that the transfer was fraudulent as to them, so that no creditor would be in a position more advantageous than the others, but not to become themselves the actual owners of the property, and the real proprietors of the business carried on therewith.

The precise question before us has been elaborately discussed in England, in a very celebrated case,—*Wheatcroft v. Hickman*. The single question there involved was whether certain creditors, who had signed a similar trust deed, had thereby become the proprietors of the business which the trustees were authorized by the terms thereof to carry on, so that debts contracted by them in the conducting of such business were debts of the creditors, on the theory that the trustees were acting in the capacity of agents for them, as real owners, and not as trustees for them, as mere beneficiaries. The substance of the trust deed in that case, so far as its provisions bore upon the question before the court, is accurately stated by Lord Wensleydale as follows: "The deed is an arrangement by the Smiths, who had become insolvent, with their creditors who subscribe the deed, for assigning all their property to trustees, in trust to convert part, not necessary to conduct the business (and leaving £4,000 for that purpose), and divide the proceeds among the creditors, and then to continue to carry on, in the name of the Stanton Iron Company, the business lately carried on by the Smiths; and, for that purpose, to manage the works as they thought fit, with various powers,—to renew leases, insure, erect buildings and machinery, appoint managers and agents, enter into and execute all contracts and instruments in carrying on the business (and that provision would certainly authorize the making or accepting bills of exchange), and to divide the net income amongst the creditors in ratable proportions,—provided that, in distributing such income, it shall be deemed and taken to be the property of the Smiths; with power for the majority in value of the joint creditors, at a meeting, to alter the trusts, and make rules as to the discontinuance of the business and the management of it; and ultimately, after paying the debts incurred in the business so carried on to divide the residue of the moneys in ratable proportions amongst the creditors, with the same provision that the moneys are to be taken to be the property of the Smiths. The creditors are to receive the provisions of the deed in full discharge of their

debts. They covenant not to sue; and the deed is to be void unless executed by six sevenths of the creditors, in number and value" 9 C. B. N. S. 98. The case was tried before Jervis, Ch. J., and a verdict rendered for the defendants. Subsequently a rule to show cause why a verdict should not be entered for the plaintiff was made absolute by the common pleas (Jervis, Ch. J., and Willes and Williams, JJ.). The decision was founded upon prior decisions which the judges erroneously considered as controlling. 18 C. B. 617, 638. On appeal to the exchequer chamber the judges were equally divided; Watson, Bramwell, and Martin being in favor of reversal, and Coleridge, Erle, and Crompton, JJ., being in favor of affirmance. 3 C. B. N. S. 523. On appeal to the house of lords the judges were requested to give their opinions, and here again they were equally divided; Blackburn, Crompton, and Williams, JJ., agreeing that the defendants were liable, and Channell, B., Pollock, C. B., and Wightman, J., holding that there was no liability. The law lords (Lord Chancellor Campbell and Lords Brougham, Cranworth, Wensleydale, and Chelmsford) then proceeded to render final decision; and they were unanimous in the opinion that the judgments of the exchequer chamber and of the common pleas should be reversed. Out of nineteen judges, including the law lords, eight were in favor of the plaintiff's right to recover, and eleven were opposed to it. Of the eight who thought that the action would lie, only five placed their judgments on independent reasoning; all three of the judges in the common pleas having considered themselves bound by prior adjudications. The other five appear to have been much influenced by such adjudications, though confessedly not strictly in point. The eleven judges who were of opinion that the action would not lie discussed the question on principle, and their reasoning seems to us unanswerable. In the House of Lords there was no dissent at all. So that the decision in the case is the unanimous judgment of the highest tribunal known to English law. Were we at all in doubt as to the correct view of this matter, the opinion of such a tribunal, promulgated after such exhaustive consideration of the question by many great judges, would suffice to turn the scale. Lord Wensleydale said, at page 100 [9 C. B. N. S.]: "If a creditor were to agree with his debtor to give him time to pay his debt till he got money enough out of his trade to pay it, I think no one could reasonably contend that he thereby made him his agent to contract debts in the course of his trade; nor do I think that it would make any difference that he stipulated that the debtor would pay the debt out of the profits of the trade. The deed in this case is merely an arrangement by the Smiths to pay their debts, partly out of their existing funds, partly out of the profits of their trade; and all their effects are placed in the hands of the trustees, as middlemen between them and their creditors, to effect the object of the deed,—the payment of their debts. It is placed in the hands of the trustees, as the property of the Smiths, to be employed as the deed directs, and to be returned to them when the trusts are satisfied. I think it is impossible to say that the agreement to receive this debt

so secured, partly out of their existing assets, partly out of the trade, is such a participation in profits as to constitute the relation of principal and agent between the creditor and the trustees. The trustees are certainly liable, because they actually contract by their undoubted agent; but the creditors are not, because the trustees are not their agents." Lord Cranworth said at page 91: "I do not propose to consider in detail all the provisions of the deed. I think it sufficient to state them generally. In the first place, there is an assignment by Messrs. Smith, to certain trustees, of the mines, and all the engines and machinery used for working them together with all the stock in trade, and in fact all their property, upon trust to carry on the business, and, after paying its expenses, to divide the net income ratably amongst the creditors of Messrs. Smith as often as there shall be funds in hand sufficient to pay one shilling in the pound; and, after all the creditors are satisfied, then in trust for Messrs. Smith. Up to this point, the creditors, though they executed the deed, are merely passive; and the first question is, What would have been the consequence to them of their executing the deed, if the trusts had ended there? Would they have become partners in the concern carried on by the trustees merely because they passively assented to its being carried on upon the terms that the net income, *i. e.* the net profits, should be applied in discharge of their demands? I think not." Channell, B., said at page 70: "I think that no new trade or concern was carried on. It seems to me that it was the old concern though carried on under the management of trustees, and under a new name; that it was to be carried on by parties in whom the Smiths, on the one hand, and the general body of creditors on the other hand, placed confidence,—that is to say, by the trustees; but that it was the business of the Smiths; that the creditors who had rights against the Smiths, which they might have enforced by legal proceedings, in effect, in consideration of the arrangement that the trade for the future should be carried on by the trustees, and not under the management of the Smiths, agreed to forego their ordinary rights as creditors against their debtors, and to receive a sum equivalent to what was the amount of their debts, when the net profits (that is, as I understand, profits made after satisfying all new debts) should enable the trustees to pay the parties of the third part such equivalent sum. The business was, I think, the business of the Smiths, carried on with a view to their ultimate benefit; and the fact that the creditors had power to put an end to the management by the trustees, and to discontinue the business, and to require the property, the capital, to be sold and divided amongst them in satisfaction or part satisfaction of moneys which, according to my understanding of the deed, and by virtue of the deed of arrangement became a charge upon the property of Messrs. Smith, does not vary the case so as to constitute the creditors of the third part partners in the business. The creditors of the third part had no power, I think by virtue of the deed, to take upon themselves, the management of the business." Pollock, C. B., said at page 84: "If a firm were in

difficulties, and a person proposed to assist them by a loan of money, engaging to receive payment out of the profits only, and to make no claim in the event of there being no profits, but stipulating that one half of the profits should be applied as they arose in payment of his debt, and that he should have power to see that this was done,—would he thereby become a partner, and liable for all debts contracted subsequently to this arrangement? On this very simple state of facts there may possibly arise a difference of opinion; but I think a large majority of all lawyers and commercial men would decide at once that assistance so offered and so accepted would not make the lender of the money a partner as to third persons. . . . The effect of the deed appears to me to continue the old concern rather than to create a new one; but to put it under the management of the trustees, who are a sort of guaranty or security that the real contract shall be carried into effect; who are to protect the interests of Messrs. Smith, on the one hand, from whom all their authority emanates, and of the creditors, on the other, so that the creditors who give up their claim on the capital, provided they are paid out of the profits, shall have the profits so applied, if any there be. The debts of the creditors are not extinguished altogether; for if the concern is unprofitable, the creditors may require it to be given up, and the property to be sold and divided among them. The trustees act under a power of attorney from Messrs. Smith, and they are to continue to carry on the same business, to pay all rent and charges, but they are to apply the net income (of course, after satisfying all new creditors) in payment of the claims of the old creditors.”

See also *Owen v. Cronk* [1895] 1 Q. B. 285.

The judgment of the District Court is affirmed.

All concur.

A petition for rehearing having been filed, the following response was handed down on June 8, 1898:

Counsel for appellant call our attention to a fact not referred to on the argument of this case; *i. e.*, that the assignor himself is made a party defendant, and has demurred to the complaint. As the court below overruled the demurrer as to him also, we must, to sustain its action, hold that he, as well as his creditors, is not liable for the property sold the trustee while such trustee was administering the trust. Such is our view. The instrument created a trust which placed the control of the property and the business entirely beyond the assignor so long as the trust should continue. The trustee doubtless was accountable in equity for the faithful discharge of his duties as such trustee, and a court of equity might in a proper case interfere. But while the business was being managed by the trustee he was absolute master thereof,—as much as though he

himself had a beneficial interest therein. The assignor could not dictate how the trustee should conduct it, what purchases or sales he should make, or have the slightest voice in its affairs. It was the business of the trustee, so long as the trust continued; the assignor having only an indirect interest in the successful management thereof. He was not the proprietor of the business, and the trustee was not his agent. It is always the case that the trustee has no interest in the management of the affairs confided to him by the trust instrument, and that the *cestui que trust* is the only person beneficially interested therein. And yet it has never been held, or even supposed, that the beneficiary is liable for debts contracted by the trustee in so handling the trust property as to create an income for such beneficiary. The assignor by the trust deed parted with the ownership of the property, and all control over the business he had been carrying on. While that instrument remained in force he was in precisely the same position, with respect to the fund and the business which the trustee was conducting therewith, as if a third person had created the trust, and had provided that, after the trustee had paid thereout certain debts of the defendant, the trustee should transfer all the property to defendant. In the supposed case he would be interested in the success of the business, and yet it would not be his business. He would have no control over it, and therefore would not be liable for debts incurred in the prosecution thereof. There is no analogy between an instrument which establishes an agency and one which creates a trust. Where an agency exists, the principal may at any moment interfere; and at all times he is, in legal contemplation, in full control of the business. Not so when a party has parted with the title to his property, and has created a trust which vests in such trustee the right to manage the business as the proprietor thereof, he being accountable to the beneficiary, not as his principal, but as a mere *cestui que trust* under the terms of the trust instrument. There is no hardship in the doctrine that the beneficiary is not liable in such a case. The person with whom the creditor deals (*i. e.* the trustee) is himself personally liable. If such creditor is unwilling to trust him, such creditor can refuse to sell him on credit. And in a proper case the creditor may resort to the trust estate itself for his pay. It would indeed be an anomaly in the law if one could be held responsible for goods that he had not purchased or agreed to pay for, and which were not sold to his agent, but were purchased by a third person to use in a business carried on by such third person; the defendant having no control thereover. We hold that the assignor himself is not liable, and therefore the judgment heretofore rendered will not be disturbed.

Maria ARNEGAARD, *Appt.*,

v.

Knudt O. ARNEGAARD *et al.*, *Respts.*

(7 N. D. 475.)

***1. After engagement, and on the eve of his marriage to a second wife, the prospective husband deeded to his son by a former wife his homestead. The transfer was kept secret. The deed was not recorded, and the wife was ignorant thereof. The purpose of the grantor was to prevent the homestead right of the wife in the land from vesting in her on their marriage. As an inducement to the woman to marry him, he proposed to build on the homestead a substantial dwelling. Held, that the deed was fraudulent, in law and in fact, as to her homestead right, and therefore void as to it. But the deed is not void *in toto*.**

2. The fact that the husband could, after marriage, have destroyed her homestead right in the property by changing his place of residence is no reason for taking the case out of the rule that a secret antenuptial transfer by the husband is void as to the wife; for after marriage the husband's control over the homestead would have been, not absolute, but limited,—a husband having no power to divest the wife of her homestead right by deed or will, but only by removal from the premises. The consideration that the wife's homestead right is more fragile than that of her dower right at common law affords a strong reason why the courts should guard more jealously her interests, against the secret devices of her husband to defraud her of such right.

3. It is no answer to the charge of fraud that the transfer was only a reasonable provision for the son, as the husband, if he would, by making such a provision, strip his wife of all possible interest in his property (she having no fixed interest therein under the statute of distribution), must act openly, and inform his intended wife of such purpose before the marriage. The duty of honest disclosure of the fact to his future spouse is paramount to the duty of making provision for his offspring. The fact that the wife will receive a portion of her husband's personal estate does not render the fraudulent transfer valid, no matter how large a sum she may so receive.

4. Where a deed is delivered to a third person to be delivered to the grantee on the death of the grantor such delivery transfers the title to the grantee, subject to the life interest of the grantor in the land.

5. While an acceptance is an essential element in a delivery of a deed, yet if the grantee, after learning that a deed has been delivered to a stranger for his benefit, accepts the same, such acceptance relates back to the time of the original delivery, when the rights of third persons are not involved. When the deed is beneficial to the grantee, as when the land is given to him by the grantor, the acceptance of the grant is presumed.

6. To make the delivery of a deed to a third person, to be delivered to the

*Headnotes by CORLISS, Ch. J.

NOTE.—As to the antenuptial conveyance in fraud of wife's property rights, see *Dudley v. Dudley* (Wis.) 8 L. R. A. 814, and *note*. See also *Stroup v. Stroup* (Ind.) 27 L. R. A. 523, 41 L. R. A.

grantee on the death of the grantor, sufficient to transfer the title, it must appear that he intended then and there to part with all control over the deed, and to leave it with the third person as the agent of the grantee; otherwise the instrument will be testamentary in character, and therefore void as a deed. But, when it is once established that an absolute delivery was intended, the fact that the grantor acquired possession of the deed, or that he destroyed it, is immaterial. After such delivery, he has no more connection with the title to the land than one who never owned it. Acts and declarations of the grantor subsequent to the time of the alleged delivery, in hostility to the deed, are incompetent as against the grantee. But acts and declarations in support thereof are admissible, because they are adverse to the interests of the only person who at the time has any interest in overthrowing such deed.

7. Evidence reviewed, and held to sustain the finding of delivery.

8. A county court, acting as a probate court, has no jurisdiction to try a question of title to property, as between the personal representative of a decedent, and a person claiming in hostility to the estate. Accordingly, held that, where a proceeding which was instituted in such court to compel the administrator to place certain lands upon the inventory resulted in a judgment that such lands did not form part of the estate, such judgment constituted no bar to an action brought to have certain deeds of such lands set aside as not having been delivered by the decedent, although the grantees in such deeds were parties to the proceeding in the county court.

9. As the county court had no jurisdiction to try the question of title, the district court obtained none by an appeal from the order of the county court.

(May 11, 1898.)

A PPEAL by plaintiff from a judgment of the District Court for Traill County in favor of defendants in a proceeding brought to set aside a conveyance of real estate which was alleged to have been made in fraud of plaintiff's rights. *Modified.*

The facts are stated in the opinion.

Messrs. J. F. Selby and Swenson & Norman, for appellant:

The deed purported to have been executed by Ole O. Arnegaard, deceased, to Knudt O. Arnegaard, was never delivered to the grantee.

One of the essential requisites of the deed, in addition to that of signing or sealing, is its delivery by the grantor and its acceptance by the grantee.

5 Am. & Eng. Enc. Law, p. 445, and authorities cited; *Prutman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592; *Southerby v. Arden*, 1 Johns. Ch. 240; *Bank of Heidelberg v. Bailhache*, 65 Cal. 327; *Fitch v. Bunch*, 30 Cal. 208; *Fain v. Smith*, 14 Or. 82, 58 Am. Rep. 281; *Fisher v. Hall*, 41 N.Y. 416; *Hibberd v. Smith*, 67 Cal. 547, 56 Am. Rep. 726; *Jackson, Hopkins, v. Leek*, 12 Wend. 107; *Jackson, Eames, v. Phipps*, 12 Johns. 418; *Jackson, McCrea, v. Dunlap*, 1 Johns. Cas. 114; *Elsey v. Metcalf*, 1 Denio, 828; *Hathaway v. Payne*, 34 N.Y. 106; Rev. Codes 1895, § 3515; *Comer v. Baldwin*, 16 Minn. 172.

The deed must also be delivered during the lifetime of the grantor.

5 Am. & Eng. Enc. Law, p. 446: *Younge v. Guilbeau*, 3 Wall. 636, 18 L. ed. 262; *Jackson, Eames, v. Phipps* 12 Johns. 418; *Parmelee v. Simpson*, 5 Wall. 86, 18 L. ed. 543.

Placing a deed in the hands of a third person is not a good delivery unless the grantor parts with his dominion over the deed.

Baker v. Haskell, 47 N. H. 479, 93 Am. Dec. 455; *O'Connor v. O'Connor*, 100 Iowa, 476.

A deed takes effect only from its delivery, and there can be no delivery without acceptance, either express or implied, delivery and acceptance being necessarily simultaneous and correlative acts.

4 Cruise, Dig. 11; *Jackson, Ten Eyck, v. Richards*, 6 Cow. 617; *Church v. Gilman*, 15 Wend. 658, 30 Am. Dec. 82; *Hibberd v. Smith*, 67 Cal. 547, 56 Am. Rep. 726.

A grantor must part with all dominion and control over his deed, in order that it may be considered as delivered.

Baker v. Haskell, 47 N. H. 479, 93 Am. Dec. 455; *Porter v. Woodhouse*, 59 Conn. 568, 13 L. R. A. 64; *Weisinger v. Cock*, 67 Miss. 511; *Stinson v. Anderson*, 96 Ill. 378; *Wilson v. Wilson*, 158 Ill. 567; *Tyler v. Hall*, 106 Mo. 313; *Bury v. Young*, 98 Cal. 446; *Prutman v. Baker*, 80 Wis. 644, 11 Am. Rep. 592; *Fisher v. Hall*, 41 N. Y. 422; *Schuffert v. Grote*, 88 Mich. 650; *Borée v. Hinde*, 135 Ill. 187; *Pain v. Smith*, 14 Or. 82, 58 Am. Rep. 281; *Lang v. Smith*, 37 W. Va. 725.

A deed for land will not convey the legal title unless it is delivered by the grantor in his lifetime.

Parrott v. Avery, 159 Mass. 594, 22 L. R. A. 153; *Weisinger v. Cock*, 67 Miss. 511; *Reichart v. Wilhelm*, 83 Iowa, 510; *Hayes v. Boylan*, 141 Ill. 400; *Jones v. Jones*, 6 Conn. 111, 16 Am. Dec. 35; *Benneson v. Aiken*, 102 Ill. 284, 40 Am. Rep. 592; *Weber v. Christen*, 121 Ill. 91; *Otto v. Doty*, 61 Iowa, 23; *Taft v. Taft*, 59 Mich. 185, 60 Am. Rep. 291; *Porter v. Woodhouse*, 59 Conn. 568, 13 L. R. A. 64.

The mere execution of an undelivered deed, unaccompanied by any other acts or circumstances showing an intention to pass the title, will not be construed to be a delivery of the deed, especially where the grantor retains possession of the property.

Wood v. Ingraham, 3 Strobb. Eq. 105, 51 Am. Dec. 671; *Benneson v. Aiken*, 102 Ill. 284, 40 Am. Rep. 592; *Lang v. Smith*, 37 W. Va. 725; *Cazassa v. Cazassa*, 93 Tenn. 578, 20 L. R. A. 178; *Hayes v. Boylan*, 141 Ill. 400; *Porter v. Woodhouse*, 59 Conn. 568, 13 L. R. A. 64; *Stone v. French*, 37 Kan. 145.

If a person executes a deed, and puts it in the hands of a third person, to be delivered to the grantee upon the grantor's death, such third person holds it as agent of the grantor, and the grantor may revoke it at any time.

Hale v. Joslin, 134 Mass. 310; *Ball v. Foreman*, 37 Ohio St. 132; *Lang v. Smith*, 37 W. Va. 725; *Tyler v. Hall*, 106 Mo. 313.

The purported deed from Ole O. Arnegaard, deceased, to Knudt O. Arnegaard, was fraudulent and void as to the homestead rights of this plaintiff and the minor heirs of said deceased.

Thayer v. Thayer, 14 Vt. 107, 39 Am. Dec. 211; *Smith v. Smith*, 12 Cal. 216, 73 Am. Dec. 538; *Lord v. Hough*, 43 Cal. 581. 41 L. R. A.

A voluntary conveyance by a husband, of his real estate, to his children, executed after the agreement to marry, without the knowledge and consent of the intended wife, is fraudulent and void as to the wife.

Petty v. Petty, 4 B. Mon. 215, 39 Am. Dec. 501; *Swaine v. Perrine*, 5 Johns. Ch. 482, 9 Am. Dec. 318; *Cranson v. Cranson*, 4 Mich. 230, 66 Am. Dec. 534; *Pomeroy v. Pomeroy*, 54 How. Pr. 223; *Killing v. Reidenhauer*, 6 Serg. & R. 534; *Green v. Green*, 34 Kan. 740, 55 Am. Rep. 256.

The same is true of conveyance made by the wife on the eve of her marriage, without the knowledge and consent of her intended husband.

Hall v. Carmichael, 8 Baxt. 211, 35 Am. Rep. 696; *Freeman v. Hartman*, 45 Ill. 57, 92 Am. Dec. 193; *Poston v. Gillespie*, 58 N. C. (5 Jones, Eq.) 258, 75 Am. Dec. 437; *Tucker v. Andrews*, 18 Me. 124; *Baker v. Jordan*, 73 N. C. 145; *Ramsay v. Joyce*, M'Mull. Eq. 236, 37 Am. Dec. 550; *Manes v. Durant*, 2 Rich. Eq. 404, 46 Am. Dec. 65.

Messrs. Carmody & Leslie and Cochran & Feetham, for respondent:

The pendency of the proceeding in the county court, in which the plaintiff attempted to have the court direct that the real property in litigation in this action should be added to the inventory and distributed as a part of the estate, is conclusive of this proceeding.

When there are two proceedings pending between the same parties for the same cause of action, the proceeding first commenced is a bar to the last, and it matters not that the prior proceeding was not an action, but was instituted by petition of the party who sets up the bar.

Groshon v. Lyon, 16 Barb. 468; *Rogers v. King*, 8 Paige, 210; *Schuehle v. Reiman*, 86 N. Y. 278.

In every case where the deed has been declared invalid by reason of failure of delivery, it will be found that the grantor reserved some rights over the instrument.

Bury v. Young, 98 Cal. 446; *Wittenbrock v. Onas*, 110 Cal. 1; *Crabtree v. Crabtree*, 159 Ill. 342; *Brown v. Westersfield*, 47 Neb. 399; *Denzler v. Rieckhoff*, 97 Iowa, 75; *Trask v. Trask*, 90 Iowa, 318; *Gish v. Brown*, 171 Pa. 479; *Crooks v. Crooks*, 34 Ohio St. 610; *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67; *Wallace v. Horris*, 32 Mich. 401; *Hathaway v. Payne*, 34 N. Y. 92; *Brown v. Brown*, 1 Woodb. & M. 325.

If a deed had been duly delivered in the first instance, the subsequent custody of it by the grantor will not destroy the effect of the delivery.

Sourchey v. Arden, 1 Johns. Ch. 240; *Brown v. Westersfield*, 47 Neb. 399; *Cecil v. Beaver*, 28 Iowa, 246, 4 Am. Rep. 174; *Palmer v. Palmer*, 62 Iowa, 204; *Shader v. Bonker*, 65 Barb. 615; *Cecil v. Beaver*, 28 Iowa, 241, 4 Am. Rep. 176; *Squires v. Summers*, 85 Ind. 252; *Thatcher v. St. Andrew's Church*, 37 Mich. 264; *Wallace v. Berdell*, 97 N. Y. 13.

Where the reason for a rule falls, the rule itself ceases.

Under our law marriage involves neither the assumption of indebtedness nor the acquisition of property. Neither the title or possession or

actual fraud was shown to have existed, and some of the rulings are placed upon that ground. *Kelly v. McGrath*, 70 Ala. 75, 45 Am. Rep. 75; *Jones v. Jones*, 64 Wis. 301; *Brown v. Brownson*, 35 Mich. 415; *Smith v. Smith*, 6 N. J. Eq. 515; *Green v. Green*, 84 Kan. 740, 55 Am. Rep. 256; *Petty v. Petty*, 4 B. Mon. 215, 39 Am. Dec. 501; *Jenny v. Jenny*, 24 Vt. 324. But in the great majority of the cases the broad rule is enunciated that a man owes to the woman to whom he is betrothed the utmost good faith, and that he cannot, consistently with that sacred obligation, secretly divest himself of property in which she would by the marriage secure rights which would thereafter be beyond his control. On the proposition that a secret transfer of his real property is, except under special circumstances, fraudulent, as a matter of law, as to her dower right, we cite the following cases: *Davis v. Davis*, 5 Mo. 188; *Soutine v. Perine*, 5 Johns. Ch. 482, 9 Am. Dec. 318; *Chandler v. Hollingsworth*, 8 Del. Ch. 99; *Youngs v. Carter*, 50 How. Pr. 410, affirmed on appeal in 10 Hun, 194; *Cranston v. Cranston*, 4 Mich. 230, 66 Am. Dec. 584; *Pomeroy v. Pomeroy*, 54 How. Pr. 228. See *Gainor v. Gainor*, 26 Iowa, 337; *Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 211. Many of the cases which make an exception in favor of a reasonable provision for children treat of the transaction as fraudulent in all other cases without reference to the intention of the party who makes the transfer.

While the extension of the earlier rule to cases involving dower grew, in a measure, out of the peculiar regard which the common law paid to that right yet the foundation of these decisions is the violation of the husband's duty to act with the utmost good faith towards his prospective bride, in dealing with his property after the marriage engagement. It therefore follows that the fact that dower has been abolished in this state is not in itself decisive against the right of this plaintiff to assail as fraudulent the conveyance of the homestead to the defendant Knudt O. Arnegard. The inquiry still remains whether she, upon becoming the wife of the grantor, would have secured such an interest in the land, on which he lived and on which he continued to reside up to the time of his death, as should be protected against a secret transfer after engagement, and before marriage. If the statute did not give a surviving widow a homestead right in the land of her deceased husband which formed their homestead at the time of his death, we could not, on sound principle, hold that the secret transfer of this land would in any manner constitute a fraud upon the plaintiff. In this state dower and curtesy are abolished. Neither husband nor wife has any interest in the property of the other. Each has the absolute power of disposition, whether by transfer during life, or by will at death, subject only to the homestead right of the survivor. Were it not for such homestead right, the plaintiff would have no ground for complaint. Surely it would not be fraudulent for the husband to do secretly before marriage that which he could do either openly or secretly after marriage. Could he by deed or will divest himself of all his property after marriage without the consent of his wife, the law would not treat as fraudulent his dis-

position thereof before marriage, though done after engagement, and for the express purpose of preventing his prospective wife obtaining a share of his estate at the time of his death. The authorities are unanimous on this point. *Small v. Small*, 56 Kan. 1, 30 L. R. A. 243; *Padfield v. Padfield*, 78 Ill. 16; *Holmes v. Holmes*, 3 Paige, 363; *Dunnoch v. Dunnoch*, 3 Md. Ch. 140; *Cameron v. Cameron*, 10 Smedes & M. 894, 48 Am. Dec. 759; *Lightfoot v. Colgin*, 5 Munf. 42; *Lines v. Lines*, 142 Pa. 149; *Pringle v. Pringle*, 59 Pa. 281; *Smith v. Hines*, 10 Fla. 258; *Richards v. Richards*, 11 Humph. 429; *Sanborn v. Goodhue*, 28 N. H. 48, 59 Am. Dec. 398; *Ford v. Ford*, 4 Ala. 143, 146; *Williams v. Williams*, 40 Fed. Rep. 521; *Stone v. Stone*, 18 Mo. 390. Of course, the transfer must be actual, and not colorable. See *Rabbitt v. Gaither*, 67 Md. 94; *Smith v. Smith*, 22 Colo. 480, 34 L. R. A. 89.

The only ground, therefore, on which we can sustain the plaintiff's charge of legal fraud, is that she would have secured by marriage such a contingent right to a homestead interest in the land in question, had it not been deeded away before marriage, that the law will deem the disappointment, through the act of her husband, of her just expectation that she should enjoy such right, as a wrongful act on his part, which it will set aside as against those who are not innocent purchasers, to the extent necessary to protect her homestead interest. If the contingent interest were absolutely at the control of her husband, we would have no hesitation in saying that she could have no redress. Were it the law in this state that the husband, even after marriage, could divest the homestead right of the wife by transfer during his life, or by devise on his death, or by mere removal from the premises, we would be clear that the conveyance to the defendant was a perfectly legitimate transaction. The authorities are clear on this point. See cases last above cited. If, therefore, we decide against the legality of this deed in so far as it affects plaintiff's homestead interest, it must be on the ground that, although the husband can divest the wife's interest in the homestead by a bona fide change of residence, yet in the absence of such a change her homestead right is as much fixed by marriage as was the wife's right of dower at common law. So long as the premises continue to be the home of the parties, the husband is as powerless to affect his wife's right to hold them as a home after his death as he is powerless to cut off by deed or will her dower right in a state where dower still exists. Rev. Codes, §§ 8608, 8626.

We think that the fact the husband has a qualified right to defeat the wife's homestead interest does not take the case out of the category of rights which a court of equity will protect, as against a secret transfer before marriage to defeat the same. The husband may know in advance that it is his purpose to reside on that particular parcel of land for the remainder of his days. If this is his determination, it is obvious that he must know that after marriage he cannot defeat his wife's homestead right. With this thought in mind, and conscious of the fact that therefore he must make an antenuptial transfer if he would prevent the homestead interest of his prospective wife from attaching

beyond his power to control it, he secretly deeds away the land without valuable consideration. How can such an act be characterized, except as a fraud? What purpose could he have had, except the wrongful one to defeat his wife's just expectations by a secret device? From the standpoint occupied by him, the case is in no manner different from what it would have been had he possessed no power, even by change of residence, to defeat the wife's homestead rights. That it was in the mind of the grantor at the time he made this transfer that his home would remain upon this land until his death, is evidenced by the fact that, as an inducement to the plaintiff to marry him, he promised to erect thereon a substantial dwelling, in place of the old building in which he was living. This structure was in fact built, and he continued to reside therein with plaintiff up to the day of his death. Not only had he decided to make that his home, but the plaintiff was fully justified in the belief, which she doubtless entertained, that this was to be their homestead, and that after his death she could continue to live there, under the law, as his widow. There was considerable disparity in their ages; he being forty-six, and she only twenty-three, at the time of their engagement and marriage. She could not have failed to anticipate that in all probability she would survive him. She must have inferred, from his promise to build a new house, in which they were to dwell, on his homestead, that he was to continue the owner of the property, and thus give to her the homestead rights of a wife and a widow. He must have known that she looked forward to the possibility of outliving him. He could not help realizing that she would infer from his promise to build a new dwelling that he would in good faith give her such a home there as the law would entitle her, as widow, to hold for life after his death. The fact that he kept from her all knowledge of this conveyance to his son, not only before marriage, but thereafter as well, is convincing proof that he well knew that she was counting on having this homestead, should she outlive him. He undoubtedly feared, and well might fear, that she would not marry him if she knew that at the end of their married life, herself perhaps a woman advanced in years, she might be turned out upon the world without a home. Considering the difference in their ages, we may well believe that it was not so much sentiment and affection, as a desire to secure for herself a home for life, that prompted her to become his wife; and he could not have failed to realize that such a motive, if not the sole, was yet the controlling, motive which influenced her course. The undisputed evidence in the case—evidence which comes from one of defendants' own witnesses (the evidence of a son of the grantor, who narrates a conversation with the father)—shows that the very purpose of making this secret conveyance was to defraud the woman he was about to marry of her homestead right. The testimony referred to is as follows:

Q. Did you at any time hear your father make any statements with reference to his sister, Mrs. Ingebretson, and her marriage?

A. Yes.

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Q. In that connection did you at any time hear your father make any statements as to what provision he had made for his children prior to his marriage; and, if so, what statements, and when were they made?

A. He referred to that affair very often, occasionally when he got to talking about the disposition of the estate; and he thought it was too bad that Mr. Ingebretson didn't know enough to dispose of some of his property before he married the second wife, because, under the law, she would own the homestead, etc.; and he expressed the opinion that it was very foolish for a person to do such things, and not fix up some things when they remarried the second time."

We are not without express authority in support of our view that the case is not taken out of the rule by the fact that the right of the wife in the property would not have been entirely beyond the husband's control had the antenuptial conveyance not been made. In *Thayer v. Thayer*, 14 Vt. 107, 39 Am Dec. 211, it appeared that the wife's right of dower could be barred by the husband's transfer during life. At common law this, of course, was not the rule. But in that state a statute had introduced a change placing the wife's dower right at the mercy of the husband, provided he saw fit to convey the land during life. The deed was made to a child of the husband just before his death, but subsequently to the marriage. The court held that it was fraudulent and void as to the dower interest of the wife. At page 122 [14 Vt.] the court said: "The chancellor supposes that the wife and the children, both stand upon the same ground, and that neither have any such rights, in the lifetime of the ancestor, as to be the subject of fraud. But there is a manifest difference. The ancestor may, by will, exclude entirely the children from all participation in his estate; not so the wife." To same effect are *Davis v. Davis*, 5 Mo. 183; *Smith v. Smith*, 22 Colo. 490, 34 L. R. A. 89; *Munick v. Beard*, 85 Ky. 20. There is reasoning to be found in some of the cases, which, on a casual reading, appears to militate against the doctrine that a secret transfer is fraudulent. But, when these decisions are examined, it will be found that the law of the jurisdiction where the question arose gave the husband an unfettered control over his property, conferring upon him the right to select the time and mode of the transfer thereof, free from all claims of his wife thereon; giving her no interest therein, save as successor or distributee in case of intestacy. The opinion of Judge Brewer in *Butler v. Butler*, 21 Kan. 521, 30 Am. Rep. 441, proceeds on the basis of such a state of the law. Mr. Pomeroy has in mind such a condition of the law when he declares that, in view of the state of the law in some sections of this country, the old doctrine of equity jurisprudence is there obsolete. See 2 Pom. Eq. Jur. § 920, and 3 Pom. Eq. Jur. § 1118.

We now come to another branch of the question under consideration. It is urged that the transfer is valid because it is no more than a reasonable provision in favor of the husband's own child by a former marriage, and that at the time it was made the husband retained the title to 320 acres of land, and was the owner.

of personal property of the value of about \$40,000. At the time of his death this personal estate was inventoried at something over \$48,000. As he left no will, the widow will receive one third of this property after paying expenses of administration. But we are not to judge of the legality of this transaction by the sequel. If originally fraudulent, it cannot be validated by the fact that her husband has failed to bequeath away from her, or give away in his lifetime, his personal property. He might have done so, and, in determining whether the deed in question was valid, we must take this fact into consideration. The only ground, therefore, on which counsel for defendants can sustain the conveyance, is that it was a reasonable provision for his son, the grantee, and that a secret transfer can be made, even when it seriously affects the wife, provided the object of the husband's bounty is a child, and the gift is not extravagant, considering his estate. The husband had living, at the time he conveyed the land in question to the defendant, nine children by his former wife. Some of these were of age, and some were not. He deeded four farms of land, aggregating 550 acres, to those of his children who had attained their majority: one of these conveyances being that which is here assailed. It is established that his object was that all his children should share in this property conveyed; he trusting to the honor of the grantees to see that their younger brothers and sisters received fair treatment. In view of the number of children, and the large amount of real and personal property which he still retained, we cannot say that the provision which he made for his offspring by his former marriage was unreasonable. But it is not enough to take the sting out of a secret transfer on the eve of marriage that it was for the benefit of worthy objects of the husband's bounty, when the effect of such transfer is seriously to prejudice the rights of the prospective wife. Can the husband, who owns real and personal property, secretly deed all the land to his children, and then claim that the transaction was not a fraud upon the wife's right of dower, because the property conveyed constituted only a reasonable provision for his own progeny? In discharging his duty to his children, he must not be recreant to his equally binding duty to his future bride. He should select property in which she will have no right, and not take the only property in which the law gives her any interest. He cannot deed away the homestead, and then shelter himself under the plea that he has honestly performed a duty to his own blood. If he wishes to give his child the homestead, then he must apprise his prospective wife of the fact, and let her decide whether, under such circumstances, she desires to marry him or not. In *England v. Downs*, 2 Beav. 522, Lord Langdale said: "In the execution of this settlement, so far as it made provision for her children, she was performing a moral duty. In the circumstances in which she was placed, it was clearly her duty, before she placed herself and her property in the power of her second husband, to secure a provision for her children by her first husband, from whom her property was derived; but in performing a duty towards her children, she had no right to act fraudulently towards

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her second husband." And again he says: "It is not doubted that proof of direct misrepresentations or of wilful concealment with intent to deceive the husband, would entitle him to relief; but it is said that mere concealment is not in such a case any evidence of fraud, and that if a man, without making any inquiry as to a woman's affairs and property, thinks fit to marry her, he must take her and her property as he finds them, and has no right to complain, if, in the absence of any care on his part, she has taken care of herself and her children without his knowledge. This proposition, however, cannot be admitted as stated; and clearly a woman, in such circumstances, can only reconcile all her moral duties by making a proper settlement on herself and her children with the knowledge of her intended husband." In *Williams v. Carle*, 10 N. J. Eq. 543, the court said: "The counsel of the defendants further insisted that, the disposition which is alleged to have been made of the property being for the benefit of the children of the proposed marriage, the trust was a meritorious one, and such as a court of equity will not disturb. The cases of *Hunt v. Matthews*, 1 Vern. 408, and of *King v. Cotton*, 2 P. Wms. 674, were cited as sustaining the rule, that a settlement by a widow upon her children by a former marriage, even if made during the treaty for a second marriage, without the consent or knowledge of her intended husband, is valid. It was argued that a settlement for the benefit of children of the contemplated marriage is equally meritorious. But I cannot understand upon what just principle a trust in either case can be declared valid by a court of equity. In *Hunt v. Matthews*, the court is reported to have said, or rather thought,—for that is the word used,—that a widow might, with a good conscience, before she put herself under the power of a second husband, provide for the children she had by the first. Now there may be no difference of opinion as to the propriety of her making such a provision for her children, and in some cases she would be conscientiously and morally bound to do so; but the question remains, Could she conscientiously do it without the knowledge of her husband? Could she contract with him upon the assumption that upon its execution the property was to be his, and yet clandestinely place the property beyond his control? The settlement, though a meritorious one, would not be less a fraud upon the husband, and the court interferes with it because it is done in a manner which makes it a fraud upon his marital rights." We do not mean to say that under no circumstances could the husband or wife make a secret conveyance which would be valid. The question has always been whether the transfer was reasonable in view of all the surrounding facts. When the husband was by the marriage rendered liable for his wife's debts, there was much force in the rule which precluded the wife from making any secret antenuptial disposition of property, although her children by a former marriage were the objects of her bounty. His rights might well be deemed superior to theirs because he was, in effect, a purchaser of all her estate for a valuable consideration; i. e., the liability he incurred for her debts. But the wife's claim to dower

stood upon a somewhat different footing. And the decisions are quite numerous that she cannot complain where, in good faith, only a reasonable provision is made for children, although she is ignorant of the transaction, and the effect of it is to decrease the value of the dower right she secures by the marriage. *Murray v. Murray*, 90 Ky. 1, 8 L. R. A. 95; *Dudley v. Dudley*, 76 Wis. 537, 8 L. R. A. 814; *Goodman v. Malcom*, 5 Kan. App. 285; *Hamilton v. Smith*, 57 Iowa, 15, 42 Am. Rep. 89; *Alkire v. Alkire*, 184 Ind. 850. See also *Butler v. Butler*, 21 Kan. 521, 30 Am. Rep. 441; *Tucker v. Andrews*, 18 Me. 124, 128; 2 Kent, Com. 175; *Story*, Eq. Jur. § 273; *Gregory v. Winston*, 23 Gratt. 102, 123; *Chandler v. Hollingsworth*, 8 Del. Ch. 99, 110, 113.

But these decisions are not opposed to our ruling in this case. They all recognize the principle that the effect of the transaction must not be utterly to keep from the wife all the interest in his property which would after marriage be beyond her husband's absolute control. To give his children a portion of his real property, leaving other real estate still standing in his name, is widely different from the transfer of all his lands to them, thus precluding the possibility of any dower right vesting in the wife. In the case before us the secret conveyance related to the only property in which the wife could expect to secure by her marriage any interest beyond the full control of her husband after marriage. If such a transaction can be sustained on the ground that a reasonable provision was thereby made for children, it is obvious that nothing is left in this jurisdiction of the rule so widely recognized, and founded in sound policy as well as upon principle of natural justice. Of course, the husband, acting in good faith, can, after marriage, destroy his wife's interest in the homestead, by changing his place of residence. She is bound to know that her expectation that he will not do so may be disappointed. But she certainly is justified in assuming that, if he does not in this manner divest her of her homestead interest in the land, she shall not be surprised at his death by a secret antenuptial conveyance of the homestead, made to defeat her rights. The very fact that the homestead right is less secure than that of dower at common law is of itself a strong reason why the courts should be even more watchful to protect it against destruction by the secret devices of one who is bound in morals to divulge to his betrothed any transaction which will affect her rights as his wife. We hold that the deed in question was fraudulent and void, as to plaintiff, both because the transaction was fraudulent in law, and because the purpose of the husband was secretly to deprive her of her homestead right. The conveyance will not, however, be set aside, except as to her homestead interest, unless we find that it was never in fact delivered by the grantor. That the deed is not entirely void as to the wife is too clear to admit of doubt. See *Chandler v. Hollingsworth*, 8 Del. Ch. 99; *Dudley v. Dudley*, 76 Wis. 567, 8 L. R. A. 814. In none of the cases has she been protected, except as to the right which after marriage the husband could not fully control. The husband of the plaintiff had a perfect

right to prevent her succeeding to any of his real property as heir, and, in so far as the deed to the son defeats her claim upon this land as heir, it must stand, unless we find that the deed was never in fact delivered.

This brings us to the second branch of the case. The deed was not delivered by the grantor to the defendant, but was handed to a third person, on the condition that it was not to be delivered to the grantee until the grantor's death. If, however, there was in fact a delivery of the deed to such third person, it is immaterial that the ultimate delivery to the grantee was not to take place until the death of the grantor. However open to criticism from the standpoint of legal principles the doctrine may be, it is now a thoroughly established rule that, if the grantor parts with all control over the deed at the time of its delivery to the third person, the delivery is good, and the title passes to the grantee, although the delivery to him is not to take place until after the grantor's death. The transaction does not vest in the grantee a fee in possession, but only a fee in remainder after the life estate of the grantor, which by implication is carved out of the fee, has terminated. Some of the cases proceed on the theory that the fee does not pass to the grantee until the delivery of the deed to him, and that then his title relates back to the original delivery. But the better rule is that the deed is immediately operative as against the grantor, and that the condition that the delivery to the grantee shall not be made until after the grantor's death is equivalent to the reservation of a life estate in his favor in the land itself. The distinction, however, is not important for the purposes of this case. The grantor has died, and the deed has been delivered. The cases holding that a deed delivered to take effect on the death of the grantor is valid are collected by Mr. Jones in his work on Real Property. See volume 2, § 1284, and cases cited. To same effect are *Bury v. Young*, 98 Cal. 446; *Wittenbrook v. Cass*, 110 Cal. 1; *Baker v. Baker*, 159 Ill. 894; *Brown v. Westerfield*, 47 Neb. 899; *Denzler v. Rieckhoff*, 97 Iowa, 75; *Haeg v. Haeg*, 53 Minn. 33.

There are authorities which uphold such transfers even though the grantor reserves a right to recall the deed at any time before his death, provided he does not do so. But we regard these adjudications as indefensible on principle. Such a transaction is nothing more than a testamentary disposition of property. Unless, therefore, we are able to discover from this record that the grantor absolutely parted with all control over the deed, and intended it to operate as a present conveyance, subject to his life interest, we must adjudge the instrument void for want of delivery. See 2 Jones, Real Prop. § 1236. The learned district judge found in favor of an actual delivery, and as he had before him the witnesses on whose testimony his finding is based, we will not disturb it unless it appears to be clearly erroneous. The deed was delivered to a Mr. Hyde. His evidence relating to the delivery is as follows:

I was formerly cashier of the Hillsboro Banking Company, of Hillsboro. I severed my connection with the Hillsboro Banking Company, and went to Fargo, in January,

1896. While cashier of the Hillsboro Banking Company, I was acquainted with Ole Arnegaard, deceased. I had known him since 1881. Exhibit A is in my handwriting. I remember the occasion of drawing that deed. It was drawn, at the request of Ole O. Arnegaard, at the date it appears to be dated at the top. It was afterwards signed and acknowledged in my presence by Mr. Arnegaard, before me as notary public, on the day that the acknowledgment appears dated. The instrument was prepared prior to the actual acknowledgment of it.

Q. On the day that you prepared this deed for Mr. Arnegaard, will you state what his instructions were to you, or what conversation was between you with reference to it?

A. We had considerable talk about this matter before I prepared the paper for him. Mr. Arnegaard came into the bank, and asked me if I would draw up some deeds for him, and I told him I would. I had been in the habit of making papers for him from time to time as he needed them, and he said that he wanted to deed this property that is mentioned in this deed to his son, and gave me the description, which I noted down on paper. The matter of consideration came up, and I advised Mr. Arnegaard to insert in the deed \$1 and other valuable consideration. He told me that he preferred to have the consideration written as it appears in the deed. He said that he desired the boys to have this property, and he wished to deed it to them. In the conversation, I asked him why he didn't make a will; and he told me he didn't know anything about wills, but he did know something about deeds and mortgages, and he preferred to have it deeded. I prepared this instrument, and, I think, two others; and they were signed by him, as shown. He delivered them over to me, requesting me to take these instruments, and hold them, and, in case of his death, to put them on record, and requested me to say nothing to any parties about his having deeded this property.

When Mr. Hyde removed from Hillsboro to the city of Fargo, he failed to take with him these deeds. They were left in the bank vault at Hillsboro. It appears that thereafter the grantor called at the bank for some papers. Whether he asked for these deeds, including the deed to the defendant, or for some other papers belonging to him, is not settled by the evidence. The only witness who can testify to this fact is in doubt about it. But it is undisputed that, along with other papers of his, these deeds were handed to him, and that he kept them in his possession until his death. We do not attach much importance to this fact, considering the circumstances. Indeed, if the deeds were once delivered to Hyde for the benefit of the grantees, it was beyond the power of the grantor to divest the title of the grantees by regaining possession thereof, or even by destruction of the same. A delivery passes title, and such title is thereafter as much beyond the control of the grantor as though he had never owned the land. *Connard v. Colgan*, 55 Iowa, 538; *Seibel v. Rapp*, 85 Va. 28; *Douglas v. West*, 140 Ill. 455. For this reason it has been held that the declarations of the

grantor subsequent to an alleged delivery are not competent to impeach it. If he has in fact transferred the title, he cannot, by his unsworn declarations made in his own interest, in effect lay the foundation for securing a restoration of the title without the act or even consent of the grantee. See *Bury v. Young*, 98 Cal. 448; *Blight v. Schenck*, 10 Pa. 285, 51 Am. Dec. 481; *Squires v. Summers*, 85 Ind. 253; *Souterbye v. Arden*, 1 Johns. Ch. 240. Without setting forth in detail all the evidence, we find much in the case to confirm the theory that the grantor intended to part with all control over the deed. We think that the motive which prompted the execution of these conveyances is strong evidence that he intended to divest himself of the title at once. It is apparent that his object was to prevent the interest of his second wife attaching to the land. He was, of course, wrong in supposing that any other than a homestead interest would vest in her on their marriage; but, in determining what he thought, we must treat him as a layman, and not as a skilled lawyer. He evidently believed that, if he owned this land when the second marriage took place, the plaintiff could obtain some control over his future disposition of the property. Such being his thought, and it being apparent that he wished to preclude the possibility of such control, we are impelled to the conclusion that he meant that the deed should immediately transfer his title, subject only to the condition that the enjoyment of the possession was to be postponed. We must not lose sight of the fact that the conveyance was to his own children; and courts have gone very far in sustaining such transactions,—sometimes apparently holding that in such cases no delivery is necessary. *Souterbye v. Arden*, 1 Johns. Ch. 240; *Wallace v. Berdell*, 97 N. Y. 13; 2 Jones, Real Prop. § 1277; *Scrugham v. Wood*, 15 Wend. 545, 30 Am. Dec. 75. That the declarations of the grantor himself, though subsequent to the alleged delivery, are competent evidence of intent in support of the deed, is well settled. Such declarations are against the interest of the only party who is interested in defeating the deed at the time they are made. The defendant was sworn as a witness in the case, and testified as follows with reference to a conversation had with his father: "He spoke to me several times. One time he spoke to me about the deeds. He told me that he had deeded the east quarter (what they usually called it) to Martin, and that he wished me to tell Martin that he expected him to come home soon and take that quarter, and he would move the schoolhouse over there and fix it up, and he could farm it. That is the only time he used the word 'deed.' He several times spoke to me about disposing of the land, and he always used the word 'papers.'" It is true that this evidence does not relate to the deed in question, but all these deeds were executed and delivered at the same time, and, if the grantor intended to deliver any of them, he intended to deliver them all. There was only a single transaction with reference to them. There is evidence equally strong, but the great length of this opinion forbids a more specific reference to it.

The question of acceptance remains. Ac-

ceptance by the grantee is an essential part of a delivery. But it is well settled that the grantee may, in case of delivery to a stranger, on subsequently learning of such delivery accept the conveyance, and such acceptance relates back to the time of such delivery. "If a deed be delivered absolutely, and beyond the grantor's control and right of dominion, for the grantee's use, to a person not at the time authorized by him to receive it, and the grantee afterwards accepts it, or authorizes the custodian to accept it, the deed is effectual from the time it was placed in the hands of such person." 2 Jones, Real Prop. § 1241. Our statute embodies this rule. Rev. Codes, § 3520. The acceptance by the grantee has been shown. But it was not necessary to prove such acceptance, the grant being beneficial to the grantee, *i. e.* an unconditional gift to him. The law presumes an acceptance "The fact that a conveyance is beneficial to the grantee, and imposes no burdens on him, is in numerous cases the ground for asserting the general proposition that an acceptance of such a deed may always be inferred. The rule is stated to be that if a deed is delivered to a third person for the grantee, neither the presence of the grantee, nor his previous authority, nor his subsequent express assent, is necessary to make the delivery valid. If the deed is beneficial to the grantee, his assent will be presumed, in the absence of proof of his dissent." 2 Jones, Real Prop. § 1282. It is true that there appears to be a division of authority on the point, but our statute clearly recognizes the doctrine we have stated. A delivery is declared to be good when made to a stranger, not only on showing the assent of the grantee, but also when his assent may be presumed. Rev. Codes, § 3520. There is evidence in the case from which an acceptance by the grantee during the life of the grantor may be inferred. He appears to have known of the deed, and did not refuse to accept its highly-beneficial provisions. The case of *Hibberd v. Smith*, 67 Cal. 547, 56 Am. Rep. 726, is not in point, for here no rights of third persons intervened between the delivery and acceptance, as in that case. The court there expressly recognized the principle of relation as between the parties, saying: "As between grantor and grantee, or those claiming under them, when the right of a third person is not involved, it may be rightly held that an acceptance or assent by the grantee to a deed delivered to a stranger for the use of the grantee, made after such tradition to a stranger, constitutes a full and complete delivery. It may be so held under the doctrine of relation. The subsequent assent or acceptance relates back to the time of such delivery to the stranger and makes such acts contemporaneous, *i. e.* makes such tradition to a stranger, and the subsequent assent, contemporaneous." From a careful examination of the record, we are thoroughly satisfied that there was a delivery of the deed by the grantor; and such deed must therefore stand, except in so far as it affects plaintiff's homestead right. Had the purpose of the grantor been to leave these deeds with Hyde, to take effect only on his death, the grantor reserving to himself control thereof, they would have been testamentary in character, and therefore void as deeds, for want of deliv-

ery during the grantor's life. Every fact in the case indicates that this was not his purpose. He delivered them without reserving any control thereafter. He expressly refused to make the disposition by will, though this was suggested to him by Hyde. His purpose was to divest himself of ownership before the marriage which was soon to take place, that his second wife should not acquire any interest in the land. He repeatedly said that he had deeded the land to the boys. To sustain them is to give effect to them as deeds. To refuse to sustain them is to construe them as wills, in the face of the fact that they do not purport to be testamentary in character. And, finally, to uphold them is to do that which courts have gone to great lengths to accomplish, namely, sustain a provision made by the parent in his lifetime for his children.

We have hitherto refrained from referring to a point made by counsel for defendants. In view of the disposition made of the case, we might, perhaps, ignore it; but we have decided to pass upon it, as it goes to our right to investigate at all the question of delivery. Counsel for defendants contends that all the questions here raised were settled adversely to the widow by the order of the county court of Trill county, which on appeal to the district court was affirmed. Such prior adjudication is set up in the answer, and there is evidence in the case supporting such alleged defense. It appears that in a proceeding instituted by the widow in the county court having jurisdiction of the estate of Knudt O. Arnegaard, to compel the administrator to place upon the inventory the real estate here involved, the judgment of such court was that the land did not belong to the estate of Knudt O. Arnegaard; and on appeal to the district court this judgment was affirmed. But we are clear that such adjudication can have no effect upon the question of title of one claiming in hostility to the estate. The county court has no power to try the question of title, as between the representative and persons claiming adversely to the estate. If the decedent has in fact conveyed his land before his death, that court cannot, by any order or judgment it may make, settle one way or the other the question whether the decedent owned the land at the time of his death. The fact that the grantee in such a conveyance may happen to be a person interested in the estate does not alter the rule. As to such property, he is in the same position as an entire stranger. The court in which the estates of deceased persons are administered has no jurisdiction of a proceeding to determine whether the decedent has or has not transferred the property to another. Such a controversy must be settled in the district court, and it can make no difference that the question is fully contested in the county court, for the parties cannot by consent confer jurisdiction over the subject-matter. Had the decision in the county court relied on by counsel for defendants been in favor of the widow, she could not have availed herself of it in this action, because that court had no power to determine whether the grantees in these deeds were or were not the owners of this land. And for the same reason an adverse decision can work her no prejudice. As the county court had no

power to try the question of title, it follows that the district court, on appeal from the order of the county court, had no such power. The questions here discussed are all treated in *Stewart v. Lohr*, 1 Wash. 841, which is an express authority in support of our ruling on this branch of the case. The county court may undoubtedly determine in a tentative way what property should be placed on the inventory as the property of the decedent. But any decision made by it would be controlled by the final result of an action brought in a proper court to try the question of title. Should the administrator be ordered to place certain lands upon his inventory, and should it subsequently be decided, in a proper action, that the property in fact belonged to another, the administrator would not be chargeable therewith. The

object of the proceeding to compel an administrator to place particular property upon the inventory is not to settle any question of title, as between those interested in the estate and persons who claim in hostility thereto. Nor has the county court any jurisdiction to adjudicate upon such title. We therefore hold that the judgment set forth in the answer does not constitute a former adjudication of the question of the title of this defendant to the land in controversy, or of the widow's right to a homestead.

The judgment will be modified by the District Court in accordance with the views herein expressed, the appellant recovering costs in both courts.

All concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

H. N. SLATER

v.

John GUNN *et al.*

(170 Mass. 509.)

1. An injunction against a trespass may be granted for the inadequacy of the re-

NOTE.—Public right of access to water.

The public has no right of way across private property to reach a public body of water, although there is no other means of access. The only exception to this rule appears to have been in case of wreck. For it was held that the King has a right of way over any man's ground for his wreck, and the same privilege goes to the grantee thereof. Anonymous, 6 Mod. 149.

So, where the state has established a method of caring for wrecked property and selling it for the owner there will be reserved from a grant of land on the shore a right of way by necessity to and from the wreck for the purpose of taking away the goods. *Hetfield v. Baum*, 85 N. C. (13 Ired. L.) 894, 57 Am. Dec. 563.

No right for fishing.

Hall, Sea Shores, 178, says that the law will compel fishermen to take the usual and public road down to the seashore if there is one within reasonable and convenient distance, although he argues for a right to go along the coast from the end of the public road to the place where the fishery is located or to the boat.

There must be no trespass on private property in exercising the right of fishing. *Coolidge v. Williams*, 4 Mass. 140.

In 2 Dane, Abr. 702, it is said that a right to pass over another's land to fish can be only by usage, time out of mind, or by grant, or by way of necessity, and the case of *White v. Whittier* is cited as involving the question.

Fish taken in navigable water where the tide ebbs and flows cannot be carried over private land adjoining. *Bickel v. Polk*, 5 Harr. (Del.) 825.

By the Massachusetts colonial ordinance anyone had a right to go to a great pond on foot through uninclosed woodlands for the purpose of taking fish. But he could not trespass on corn or meadow, tillage or grass land. *Barrows v. McDermott*, 73 Me. 441.
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lief at law, where an action at law has been brought but the insolvency of the defendant makes it impossible to collect a judgment against him for damages.

2. The use, for more than 100 years, of a well-known and well-defined roadway from a public road to a great pond, by hunters, fishermen, picnic parties, celebrators, n

A statute attempting to give a right to cross lands to reach public waters for the purpose of fishing is an unconstitutional taking of property without compensation. *New England Trout & S. Club v. Mather*, 68 Vt. 338, 33 L. R. A. 569. The court says the legislature could as well pass a law that any private property might be crossed against the will of the owner for the purpose of reaching a highway by land, as to pass one that it may thus be crossed for the purpose of reaching public waters for the purpose of taking fish therefrom.

No right for general purposes.

The right of the public to navigate streams capable of navigation does not give them the right to approach the streams over the land of a riparian proprietor against his consent. *The Magnolia v. Marshall*, 39 Miss. 110. The court says all public rivers, whether technically navigable or navigable in fact, must remain free and open subject to the *jus publicum*; but the absolute right of approach on each side can only be on public and general ways; consequently, if an individual have land adjoining a river, he may reasonably refuse permission to any person to go over it to approach the river unless there be a public way over it.

In *West Roxbury v. Stoddard*, 7 Allen, 153, it is said that fishing, boating, etc., upon great ponds are lawful and free to all persons whose own lands adjoining them or can obtain access to them without trespassing.

And that is quoted with approval in *Paine v. Woods*, 103 Mass. 173; *Bowell v. Doyle*, 131 Mass. 474.

In *Stetson v. Bangor*, 60 Me. 313, where the question was as to the amount to be awarded for extending a street from high-water mark over flats to the water's edge, the court said that the stream was navigable, and that the public had a right to pass and repass upon it, but they would have no right to land and use the upland as a way or road to transport their

public occasions, and by whomsoever chose, without objection and without obstruction, does not establish a way by prescription or dedication, where it does not appear that such use was not with the express or implied permission of the owners of the land.

3. Acceptance by public authorities is necessary to create a public way by dedication.

4. The right to cross the unimproved land of another person bordering on a great pond, for the purpose of cutting and carrying away ice from the pond, is not conferred by the ordinance of 1841-42, adopted by the Massachusetts Bay Colony, making it "free for any man to fish and fowl there," and to "pass and repass on foot through any man's propriety for that end, so they trespass not on any man's corn or meadow."

(March 28, 1898.)

REPORT by the Superior Court for Worcester County of exceptions by defendants to a master's report in favor of plaintiff in a suit in equity to enjoin defendants from trespassing on plaintiff's property. *Exceptions overruled.*

The facts are stated in the opinion.

Mr. John Sewell Gould, for defendants:

Highways are public roads which every citizen has a right to use.

Stackpole v. Healy, 16 Mass. 33, 8 Am. Dec. 121.

waterborne goods without the authority of the owner of the land.

In reaching a great pond for the purpose of cutting ice, there must be no trespassing upon the land of riparian proprietors. *Brastow v. Rockport Ice Co.* 77 Me. 100.

If right of way to a river is dedicated for the purpose of facilitating commerce on the river it will cease when the commerce on the river is entirely abandoned. *Freedom v. Norris*, 128 Ind. 377.

In *Turner v. Hebron*, 61 Conn. 175, the right of the public to a highway to a pond across private land was denied upon the ground that all the rights in the pond were in the owner of the land surrounding it and that the highway was not of common convenience and necessity.

If the right to erect wharves below low water mark is given to riparian owners the public have no right to use them; but their only mode of access to the water is by highways. *Wetmore v. Atlantic White Lead Co.* 37 Barb. 70.

Parliament may grant a right to erect a wharf at the end of a public street which will cut off the public right of access to the water. *Yarmouth v. Simmonds*, L. R. 10 Ch. Div. 518, 47 L. J. Ch. N. S. 702, 38 L. T. N. S. 881, 26 Week. Rep. 802.

A grant by statute to a railroad company of a right of way along the shore below high-water mark without reserving a right to the public to cross the tracks will cut off the access of the public to the water, although a street runs to high-water mark. *Vancouver v. Canada P. R. Co.* 23 Can. S. C. 1.

If a highway is laid out to a river the owner of the soil cannot by filling out in front of the street, obstruct the public right of way to the river. *Newark Lime & C. Mfg. Co. v. Newark*, 15 N. J. Eq. 64; *People v. Lamber*, 5 Denio, 9, 47 Am. Dec. 273; *Jersey City v. Morris Canal & Bkg. Co.* 12 N. J. Eq. 548; *Hoboken Land & I. Co. v. Hoboken*, 36 N. J. L. 540.

But in *Hoboken v. Pennsylvania R. Co.* 124 U. S. 656, 31 L. ed. 543, it was held that a grant by the state to a corporation for the purpose

"If a way lead to a market, and were a way for all travelers, and did communicate with a great road, etc., it is a highway; but if it lead only to a church, to a private house, or village, or to fields, there 'tis a private way. But it is a matter of fact, and much depends upon common reputation."

Austin's Case, 1 Vent. 189; *Thrower's Case*, 1 Vent. 208.

If the owner of the soil throws open a passage, and neither marks, by any visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public. Although the passage in question was originally intended only for private convenience, the public are not now to be excluded from it after being allowed to use it so long without any interruption.

Rez v. Lloyd, 1 Campb. 260; *Rugby Char-ity v. Merryweather*, 11 East, 375, note; *Wood-ger v. Hadden*, 5 Taunt. 125; *Wood v. Veal*, 5 Barn. & Ald. 454.

A passageway leading from a public street up to a court, which consisted of a dozen or more houses through which court there could be no passing, was held to be a public highway.

Bateman v. Bluck, 14 Eng. L. & Eq. 69.

of improving the water front would cut off the public right of access along the street which had been dedicated to the public by a riparian owner, since his right to dedicate extended only to high-water mark, and the state might cut off all rights beyond that by a grant to other persons.

There is no common right to pass over the shore between high and low water mark which belongs to a private individual for the purpose of bathing in the sea, although access to high-water mark has been rightfully obtained. *Blundell v. Catterall*, 5 Barn. & Ald. 268. *Holroyd* says for the purpose of the King's subjects getting upon the sea and upon the navigable rivers to exercise their unquestionable rights of commercial intercourse and fishing, there are, not only the ports of the Kingdom, but also public places of embarking and landing themselves and their goods.

In case there is no public road within convenient distance, it would seem better to take proper proceedings to have one laid out than to sanction a right of way over private property to reach the water.

In *Knight v. Woore*, 5 Dowl. P. C. 201, 8 Bing. N. C. 3, 3 Scott, 326, the jury found the existence of a right of way in favor of the inhabitants of Monmouth to pass and repass for the purpose of drawing water from the river Wye, but negatived a right to carry goods.

In *Richards v. Richards*, 1 Johns. V. C. (Eng.) 255, a right of way was given by act of Parliament to enable the owner of a mine to reach a canal so as to get the product of the mine to market.

And the same is true of *Bishop v. North*, 11 Mees & W. 418, 3 Railw. Cas. 459, 12 L. J. Exch. N. S. 362.

Any part of a highway the fee of which is in the adjoining owner may be used by the public for approaching a stream which it crosses without being liable to an action by him for trespass. *Parsons v. Clark*, 76 Me. 476.

H. P. F.

There may be a highway without a thoroughfare, or, in other words, a mere *cul de sac* may be a highway.

State v. Bartlett, cited in *State v. Nudd*, 23 N. H. 881; *Galatian v. Gardner*, 7 Johns. 106; *Schate v. Pfeil*, 56 Wis. 429; *Saunders v. Townsend*, 26 Hun. 308; *Wiggins v. Tallmadge*, 11 Barb. 457; *Holdane v. Cold Spring*, 21 N. Y. 474; *People, Williams, v. Kingman*, 24 N. Y. 559; *Danforth v. Durell*, 8 Allen, 242; *Tyler v. Sturdy*, 108 Mass. 196.

In Massachusetts a great pond is public property, and the public may lawfully resort thereto.

Kean v. Stetson, 5 Pick. 492.

It would be just as reasonable to declare Park street, which connects two of the principal thoroughfares of Boston, a *cul de sac*, as it would, under the circumstances of this case, to declare this way, which connects two equally important rural thoroughfares, a *cul de sac*.

Veale v. Boston, 185 Mass. 187.

The doctrine of dedication of rights for the use of the public has been recognized.

Cincinnati v. White, 6 Pet. 431, 8 L. ed. 432; *Hobbs v. Lowell*, 19 Pick. 405, 81 Am. Dec. 145; *Valentine v. Boston*, 22 Pick. 75, 83 Am. Dec. 711; *Jennings v. Tisbury*, 5 Gray, 74.

The common-law principle of dedication is made up of several distinct elements.

An intention on the part of the owner of the fee to dedicate must be shown.

State v. Trask, 6 Vt. 855, 27 Am. Dec. 554; *Indianapolis & B. R. Co. v. Indianapolis*, 12 Ind. 620; *Godfrey v. Alton*, 12 Ill. 29, 52 Am. Dec. 476; *Morgan v. Chicago & A. R. Co.* 96 U. S. 716, 24 L. ed. 743.

The intention to dedicate may be presumed from the owner's acquiescence in those conditions which in law are evidence of dedication.

Columbus v. Dahn, 36 Ind. 330; *Smith v. State*, 23 N. J. L. 712.

An acceptance by the public of the use dedicated must be shown.

Hobbs v. Lowell, 19 Pick. 405, 81 Am. Dec. 145; 2 Dill. Mun. Corp. chap. 17, cases cited in notes.

The acceptance by the public may be by use.

Hemphill v. Boston, 8 Cush. 195, 54 Am. Dec. 749; *Pomfrey v. Saratoga Springs*, 34 Hun. 607; *Cincinnati v. White*, 6 Pet. 431, 8 L. ed. 432; *Guthrie v. New Haren*, 31 Conn. 308; *Stone v. Brooks*, 85 Cal. 489; *David v. New Orleans*, 16 La. Ann. 404, 79 Am. Dec. 586.

The length of time user by the public continues has been held immaterial in a common-law dedication, as intention is the fundamental element in dedication, and the dedication is established when the intention is first shown to have existed.

Reg. v. Petrie, 30 Eng. L. & Eq. 207; *Wyman v. State*, 13 Wis. 664; *Green v. Oakes*, 17 Ill. 249; *State v. Taff*, 37 Conn. 392; *Chapin v. State*, 24 Conn. 236; *Jarvis v. Dean*, 3 Bing. 447; *Rowan v. Portland*, 8 B. Mon. 232.

This proposition can be true only of cases where the evidence of dedication is precise and certain, as when proved by express evidence.

Noyes v. Ward, 19 Conn. 250; *Penquite v. Lawrence*, 11 Ohio St. 274; *Lewiston v. Proctor*, 27 Ill. 414; *Jackson v. Smiley*, 18 Ind. 247; *Dodge v. Stacy*, 39 Vt. 560.

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When the intention to dedicate cannot be shown by express evidence, the length of time a public user must continue, to lay the foundation for inferring the existence of a dedication or a grant, is twenty years.

Jennings v. Tisbury, 5 Gray, 74; *Holt v. Sargent*, 15 Gray, 97; *Williams v. Cummington*, 18 Pick. 312; *Valentine v. Boston*, 22 Pick. 75, 83 Am. Dec. 711; *Com. v. Coupe*, 128 Mass. 63.

When long user is relied on to prove dedication it need not be shown by whom the dedication was made.

Reg. v. Petrie, 30 Eng. L. & Eq. 207; *Queen v. East Mark*, 11 Q. B. 877.

The element of adverse right, where the bare fact of user for twenty years is relied on to constitute dedication, is supplied by an uninterrupted enjoyment by the public for twenty years.

Onstott v. Murray, 22 Iowa, 457; *Thayer v. Boston*, 19 Pick. 511, 81 Am. Dec. 157; *Green v. Oakes*, 17 Ill. 249; *Holt v. Sargent*, 15 Gray, 97; *Jennings v. Tisbury*, 5 Gray, 74; *Valentine v. Boston*, 22 Pick. 75, 83 Am. Dec. 711.

And a public use of property or rights for twenty years without interruption has been held sufficient evidence of dedication without further proof.

Barclay v. Howell, 6 Pet. 498-513, 8 L. ed. 477-483; *New Orleans v. United States*, 10 Pet. 718, 9 L. ed. 595; *Parrish v. Stephens*, 1 Or. 59; *Lemon v. Hayden*, 13 Wis. 167; *McConnell v. Lexington*, 12 Wheat. 582, 6 L. ed. 735; *Waugh v. Leech*, 28 Ill. 488.

This proposition rests upon the theory that a user uninterrupted and unexplained for twenty years is adverse.

Blake v. Everett, 1 Allen, 248; *Leonard v. Leonard*, 7 Allen, 277; *Barnes v. Haynes*, 13 Gray, 188, 74 Am. Dec. 629; *Sargent v. Ballard*, 9 Pick. 251; *Samuels v. Horryscule*, 104 Mass. 210; *Hammond v. Zehner*, 21 N. Y. 118; *Perrin v. Garfield*, 37 Vt. 304; *Polly v. McCall*, 37 Ala. 20.

And the presumption of a grant or dedication arising from twenty years uninterrupted and unexplained user by the public is imperative and conclusive.

Tyler v. Wilkinson, 4 Mason, 397; *Leonard v. Leonard*, 7 Allen, 277; *Ross v. Thompson*, 78 Ind. 90; *Veale v. Boston*, 185 Mass. 187; *State v. Atherton*, 16 N. H. 203; *Sterens v. Nashua*, 46 N. H. 192; *Wood v. Hurd*, 34 N. J. L. 87.

Dedication once complete is irrevocable.

Dummer v. Den. Jersey City, 20 N. J. L. 86, 40 Am. Dec. 213; *Kennedy v. Cumberland*, 65 Md. 514; *New Orleans v. United States*, 10 Pet. 682-718, 9 L. ed. 573-595; *Post v. Pearsall*, 22 Wend. 425; *Warren v. Jacksonville*, 15 Ill. 236.

It is not legally possible to admit that a way has been open for 100 years and more to the travel of "every citizen" (whomsoever chose), and at the same time deny or avoid the legal consequence following such user, to wit, that the way is a public way, by pleading the nature of the travel.

Schate v. Pfeil, 56 Wis. 429.

It will be sufficient if traveled as much as the circumstances of the surrounding population and their business required.

Baldwin v. Herbst, 54 Iowa, 168; *Bodfish v.*

Bodfish, 105 Mass. 317; *Com. v. Pettitler*, 110 Mass. 62.

Even if denials of the right, complaints, remonstrances, or prohibition of the use of this way, made by the owner of the fee, could be shown between 1790 and 1810, they would not, if unaccompanied by acts which in law would amount to a disturbance of the right and be actionable as such, prevent the acquisition of a right of way by prescription.

Lehigh Valley R. Co. v. McFarlan, 48 N. J. L. 605; *Kimball v. Ladd*, 42 Vt. 747.

The colony ordinance of 1641-1647 has application throughout the entire commonwealth.

Barker v. Bates, 18 Pick. 255, 23 Am. Dec. 678.

This ordinance was intended to devote great ponds to public use.

Cummings v. Barrett, 10 Cush. 188.

This ordinance has never been repealed, and it still applies throughout the commonwealth, and under it great ponds are still devoted to public use.

West Roxbury v. Stoddard, 7 Allen, 166; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 1 L. R. A. 466.

The specific modes of enjoying this right of access to great ponds thus secured by the ordinance have been multiplied by judicial construction.

West Roxbury v. Stoddard, 7 Allen, 166; *Weston v. Sampson*, 8 Cush. 347, 54 Am. Dec. 764.

The right to harvest ice from a great pond is a right which now belongs to every citizen, by virtue of the judicial enlargement of the terms of the colony ordinance of 1641-47.

Hittinger v. Eames, 121 Mass. 539; *Gage v. Steinkrauss*, 131 Mass. 222; *Cummings v. Barrett*, 10 Cush. 188.

From the earliest times the laws of Massachusetts have regarded the rights of the public in great ponds as similar to the rights of the public in the sea.

Com. v. Roxbury, 9 Gray, 451; *Drury v. Natick*, 10 Allen, 169; *Paine v. Woods*, 108 Mass. 169; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 1 L. R. A. 466; *Storer v. Freeman*, 6 Mass. 435, 4 Am. Dec. 185; *Weston v. Sampson*, 8 Cush. 347, 54 Am. Dec. 764.

No principle of equity sanctions the continuance of this injunction in force, no matter how the other issues are determined.

Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 6 Pick. 376; *Irwin v. Dixon*, 9 How. 10, 18 L. ed. 35.

Messrs. W. S. B. Hopkins and Frank Bulkeley Smith, for plaintiff:

In cases of trespass where the trespass has been repeated and is liable to occur in the future, the insolvency of the defendant is a proper cause for instituting a suit in equity, and is a ground for jurisdiction on the equity side of the court.

Clark v. Flint, 22 Pick. 281, 33 Am. Dec. 733; *Bank of Chenango v. Cox*, 26 N. J. Eq. 452; *Wilson v. Hill*, 46 N. J. Eq. 367; *Cottle v. Harrold*, 72 Ga. 330; *Miller v. Burket*, 132 Ind. 469; *Indian River S. B. Co. v. East Coast Transp. Co.* 28 Fla. 387; *McCormick v. Nixon*, 68 N. C. 118; *Hanly v. Watterson*, 39 W. Va. 214; *Hicks v. Compton*, 18 Cal. 206; *James v.* 41 L. R. A.

Dixon, 20 Mo. 80; *Winnipissiogee Lake Co. v. Worster*, 39 N. H. 433; *Hart v. Albany*, 3 Paige, 213; *Muselman v. Marquis*, 1 Bush, 463, 89 Am. Dec. 637.

Injunction will lie on the part of a cotenant to restrain waste on the part of his insolvent cotenant.

Stout v. Curry, 110 Ind. 514; *Smallman v. Onions*, 3 Bro. Ch. 621; *Coffin v. Loper*, 25 N. J. Eq. 448; *McLendon v. Hooks*, 15 Ga. 538.

A court of equity will also order an injunction to restrain an insolvent from committing waste on land under attachment in a bill brought by an attaching creditor.

Camp v. Bates, 11 Conn. 51, 27 Am. Dec. 707.

An insolvent debtor will be restrained at the suit of a vendor, who has a lien for unpaid purchase money.

McCaslin v. State, *Boans*, 44 Ind. 151.

Repeated and continuing trespass is a ground for equitable relief to prevent multiplicity of suits.

Allen v. Martin, L. R. 20 Eq. 462; *Goodson v. Richardson*, L. R. 9 Ch. 221.

The phraseology "great ponds" was unknown to the law and they were not at first reserved as public property, or lying in common. Two instances of private grants are found in the Massachusetts Reports.

1 Mass. Col. Rec. 147, 211; *Lewis*, History of Lynn, 52; *Com. v. Roxbury*, 9 Gray, 451; *Watuppa Reservoir Co. v. Fall River*, 154 Mass. 305, 13 L. R. A. 255.

In 1641 the general court of the colony of Massachusetts bay passed an ordinance to the following effect: "Every inhabitant who is an householder shall have free fishing and fowling in any great ponds, bays, coves, and rivers, so far as the sea ebbs and flows, within the precincts of the town where they dwell, unless the freemen of the same town or the general court have otherwise appropriated them."

And in 1647 another ordinance to the following effect was passed by the same body: "And for great ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowl there, and may pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow."

West Roxbury v. Stoddard, 7 Allen, 158.

These acts were joined together as acts *in pari materia*, and were published in the Body of Liberties for the instruction of the colonists as one continuous ordinance.

Body of Liberties, art. 16; 28 Mass. Hist. Soc. Coll. 219; Ancient Charters, 143, 149; *Com. v. Alger*, 7 Cush. 58.

These ordinances were passed by the Massachusetts Bay colony. No similar ordinance was ever passed by the Plymouth colony, yet we find it in force throughout the whole territory of Massachusetts, including those parts which were formerly the colony of Plymouth, Nantucket, and Dukes county, and also in Maine, although none of these were under the jurisdiction of the colony of Massachusetts Bay.

Barker v. Bates, 13 Pick. 255, 23 Am. Dec. 678; *Mayhew v. Norton*, 17 Pick. 357, 28 Am. Dec. 300; *Weston v. Sampson*, 8 Cush. 347, 54 Am. Dec. 764; *Com. v. Alger*, 7 Cush.

53; *Litchfield v. Scituate*, 186 Mass. 89; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 1 L. R. A. 466.

The rights of the public to the great ponds are similar to their rights to the sea shore.

Drury v. Natick, 10 Allen, 169; *Com. v. Roxbury*, 9 Gray, 451; *Paine v. Woods*, 108 Mass. 160.

This rule of property was a part of the common law of the state.

Watuppa Reservoir Co. v. Fall River, 154 Mass. 305, 18 L. R. A. 255; *Coolidge v. Williams*, 4 Mass. 140.

The great purpose of this ordinance, at the time of its passage, "was to declare a great principle of public right, to abolish the forest laws, the game laws, and the laws designed to secure several and exclusive fisheries, and to make them all free."

West Roxbury v. Stoddard, 7 Allen, 158.

The rule of property regarding great ponds does not give the public the rights in riparian property contended for by the defendant.

Coolidge v. Williams, 4 Mass. 140; *West Roxbury v. Stoddard*, 7 Allen, 158; *Paine v. Woods*, 108 Mass. 173; *Gage v. Steinkrauss*, 131 Mass. 222; *Rowell v. Doyle*, 131 Mass. 474.

Two decisions in Maine are closely in point with the case at bar.

Barrows v. McDermott, 73 Me. 441; *Bra-stow v. Rockport Ice Co.* 77 Me. 100.

The public may have access to the pond over a highway laid out under the general highway law.

Concord Mfg. Co. v. Robertson, 66 N. H. 1, 18 L. R. A. 679.

The master finds that hunters, fishermen, picnic parties, celebrators on public occasions, and whomsoever chose, used and traveled on this way.

This is not sufficient evidence of a dedication. The mere opening of a way or street has been held to amount to a license, but not to a grant or dedication.

Morse v. Stocker, 1 Allen, 150; *Hayden v. Stone*, 112 Mass. 346.

The way must have been opened by the proprietor with the intent to dedicate it to the public use.

Brown v. Suffolk Mfg. Co. 4 Cush. 382; *Hayden v. Stone*, 112 Mass. 349, and cases cited.

There is no evidence of acceptance by the public authorities. Such acceptance is necessary.

Com. v. Coupe, 128 Mass. 63.

The public acquired no right of way by prescription.

To prove a way by prescription, the evidence must be "such as to warrant a presumption of laying out, dedication, or appropriation, by parties having authority to lay out, or a right so to appropriate, like that of prescription or nonappearing grant in case of individuals."

Jennings v. Tisbury, 5 Gray, 78.

Adverse user is necessary.

McKenna v. Boston, 131 Mass. 143.

In the case of either dedication or prescription, the use must be a general use by the public.

Jennings v. Tisbury, 5 Gray, 78; *Taylor v. Boston Water Power Co.* 13 Gray, 415.

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Morton, J., delivered the opinion of the court:

This case comes here on a report from the superior court, and the first question is whether there is jurisdiction in equity of the suit. If the result of allowing the bill to be maintained would be to transfer to the equity side of the court the trial of the question whether the defendants were guilty of trespass as alleged in the bill, and nothing more, then it is clear that, under *Washburn v. Miller*, 117 Mass. 376, the bill would have to be dismissed. But, previous to the filing of the bill, the plaintiff had brought an action at law; and, in addition to this the bill alleges that the defendants, on many occasions, had trespassed on the plaintiff's land, and threatened to continue such, acts regardless of the plaintiff's rights, and were insolvent, so that the plaintiff would be unable to collect from them such damages and costs as he might recover in actions at law. The master has found that the defendant John Gunn claims the right to enter on the plaintiff's premises for the purpose of obtaining access to the great pond on which they lie, in order to cut and carry away ice therefrom; that, previous to the filing of the bill, he had trespassed on the plaintiff's premises under this alleged claim of right; and that he is unable to satisfy an execution for damages. It is plain that, under such circumstances, an action at law will not afford the plaintiff adequate relief, and we think that he is entitled to maintain his bill. The ground on which equity takes jurisdiction in such a case is the inadequacy of the relief afforded by a court of law, and the principle has been applied in numerous cases. *Clark v. Flint*, 22 Pick. 231, 238, 38 Am. Dec. 733; *Goodson v. Richardson*, L. R. 9 Ch. 231; *Smallman v. Onions*, 3 Bro. Ch. 621; *Wilson v. Hill*, 46 N. J. Eq. 367; *Winnepissioes Lake Co. v. Worster*, 29 N. H. 433; *Hicks v. Compton*, 18 Cal. 206; *Cottle v. Harrold*, 72 Ga. 830; *Musselman v. Marguis*, 1 Bush, 463, 89 Am. Dec. 637; *Stout v. Curry*, 110 Ind. 514; *Camp v. Bates*, 11 Conn. 51, 27 Am. Dec. 707. The case is distinguishable from *Washburn v. Miller*, 117 Mass. 376. In that case it did not appear that an action at law had been brought before the filing of the bill, or that the defendant was insolvent, so that the damages which might be recovered could not be collected, or that the plaintiff would be irreparably injured unless relief in equity was granted to him.

The defendants contend that the roadway leading from the townway to the premises of the plaintiff, across the railroad, is a public way, and that they had the right to use it for the purpose of carting ice from the pond, as they were doing at the time of the trespass complained of. If it is not a public way, then they contend that inasmuch as the pond is a great pond, and cutting and carrying away ice have been recognized as a public use, they had the right, under the ordinances of 1641 and 49, to cross the unimproved land of the plaintiff for that purpose, although the defendant Gunn owned land bordering on the pond. It is not contended that the public authorities ever laid out the roadway as a public way. The contention is that it has become such by dedication or prescription. The master has found "that for more than 100 years there has been a well-known and well-

defined roadway extending from the town or public way, across what is now the railroad location and railroad land, over and along the narrow neck of land in controversy, to the larger or main tract of land which with the narrow strip of land constitutes Union Point; that said roadway has been used and traveled by hunters, fishermen, picnic parties, celebrators on public occasions, and by whomsoever chose, without objection and without obstruction, until 1890, when the plaintiff erected a barrier across said road, and prevented the defendant from entering thereon." The master then stated that he did not find that this travel has been of a nature, or of an extent, or under a claim of right, which would give the public an easement by prescription over said roadway as a public way. Though stated negatively, we think that this must be regarded as in effect a finding that the public had not acquired a right of way by prescription over the roadway. The defendants argue that this conclusion is inconsistent with what is found as to the nature and extent of the use.

We do not think so. For aught that appears, the use which was made by fishermen and others of the roadway may have been with the permission, express or implied, of the successive owners of the land. There was nothing in the nature of the use described which, as matter of law, required the master to find that it was adverse and under a claim of right, or that the roadway had become a public way by dedication. Except in one deed, where it is evident from other expressions, that the word "highway" is used erroneously to describe the roadway, there is nothing in any of the deeds introduced in the plaintiffs' or defendants' chain of title which in any way tends to show an intention on the part of their predecessors in title to dedicate the roadway to the public use, or which recognizes any right therein on the part of the public. Even if the master would have been justified in finding an intention on the part of the predecessors in title of the plaintiff to dedicate the roadway to the public use, there was, so far as appears, nothing which, as matter of law, would have required him to find an acceptance on the part of the public authorities; and without that it is clear that the roadway could not become a public way by dedication. *Hayden v. Stone*, 112 Mass. 350; *Com. v. Coupe*, 123 Mass. 68; *Morse v. Stocker*, 1 Allen, 150.

We come, then, to the remaining question, namely, whether, under the ordinances of 1641 and 1649 and the construction which has been given to it, the defendants had a right to cross the plaintiffs' land for the purpose of cutting and carrying away ice from the pond without being deemed guilty of trespass. Various questions have arisen, and have been considered, in regard to the rights of the public and of individuals in the great ponds; but the question whether the public may cross private lands, and, if so, to what extent, for the purpose of gaining access to them, does not seem to have been passed upon, though there are various dicta in our decisions in regard to it, which tend to show that the right of access is limited to cases where it can be exercised without trespassing on the lands of others. *Coolidge v. Williams*, 4 Mass. 140-144; *West Rox-*

bury v. Stoddard, 7 Allen, 158, 171; *Paine v. Woods*, 108 Mass. 173; *Rowell v. Doyle*, 131 Mass. 474.

The law relating to great ponds is peculiar to this commonwealth, and to Maine, which was formerly a part of this commonwealth. The earliest reference to great ponds is found in the "Body of Liberties," adopted in 1641, by the Massachusetts Bay Colony, and is as follows: "Every inhabitant that is an householder shall have free fishing and fowling in any great ponds, and bays, coves, and rivers so far as the sea ebbs and flows within the precincts of the town where they dwell, unless the freemen of the same town or the general court have otherwise appropriated them: provided that this shall not be extended to give leave to any man to come upon others' propriety without their leave." Body of Liberties, art. 16. This, it will be observed, gave no right to cross the land of others except by their leave. Afterwards in 1649, this was amended by a general law or ordinance so as to read as follows: "Every inhabitant who is an householder shall have free fishing and fowling in any great pond, bays, coves, and rivers, so far as the sea ebbs and flows within the precincts of the town where they dwell, unless the freemen of the same town or the general court have otherwise appropriated them: provided that no town shall appropriate to any particular person or persons any great pond containing more than 10 acres of land, and that no man shall cross upon another's propriety without their leave, otherwise than as hereafter expressed. The which clearly to determine: it is declared, that in all creeks, coves, and other places about and upon salt water where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low water mark, where the sea doth not ebb above 100 rods, and not more wheresoever it ebbs further: provided that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels in or through any sea, creeks, or coves to other men's houses or lands. And for great ponds lying in common though within the bounds of some town it shall be free for any man to fish and fowl there, and may pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow." Colonial Laws of Massachusetts, with Supplements 1690 to 1672, by W. H. Whitmore (p. 170). It is under the concluding sentence of this section that the defendants claim a right to cross the plaintiffs' land, provided they do no damage, and the master has found that no damage was done.

The effect of the provision which has been referred to in the Body of Liberties and in the ordinance of 1649 was to reserve the great ponds for the public use. *West Roxbury v. Stoddard*, 7 Allen, 158, 171; *Com. v. Roxbury*, 9 Gray, 451; *Atty. Gen. v. Revere Copper Co.* 152 Mass. 444, 9 L. R. A. 510; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 1 L. R. A. 466. The uses which the public might make of them were not limited to those named in the ordinance or in the Body of Liberties, or to such as could be made of them at that time. The ponds, like any other property, could be applied to such uses as, from time to time, they became capable of. Though fishing and

fowling only were named, the mention of them did not exclude other uses, and the permission to householders never has been construed as a prohibition to those who were not householders. But, as already observed, the manner in which those who did not own any lands on the ponds could gain access to them never has been expressly considered. It is probable, as was said in *West Roxbury v. Stoddard*, 7 Allen, 158, 171, "that many and perhaps most of the large ponds have some common land, or a public way of some kind, lying upon or leading to the shore by which the public has access to them." But, in the absence of such common land or public way, unless provision was made whereby those desirous of doing so could obtain some access to the ponds without being deemed guilty of trespass, the public would or might be excluded in many cases from any benefit of the public reservation. At the time when the ordinances were adopted, the territory to which they applied was almost wholly a wilderness. There naturally would be few public ways leading to great ponds. If there was any common land upon them, it might be remote and inconvenient. The population was small and scattered. Many, if not most, of the ponds would be surrounded with wild lands. No harm would be done by permitting persons to cross these lands for the purpose of gaining access to the ponds for fishing and fowling, which were the uses for which they were principally resorted to. In view of all these circumstances, it was provided by the ordinance of 1649 that any man who desired to gain access to the ponds for these purposes should be free to "pass and repass on foot through any man's property for that end, so they trespass not on any man's corn or meadow." This, we think, was intended to limit the passing and repassing to unimproved and unclosed lands lying on the ponds, and is to be construed with reference to the condition of things existing when the ordinance was adopted. It did not create a right of way over such lands on the part of the public, but relieved persons crossing them in the manner and for the purposes named from liability as trespassers, to the end that the public reservation should in no case altogether fail. If it is regarded as establishing a rule of property, the rule is not an inflexible and unvarying one, but it is to be applied with a due regard to existing conditions. As public means of access to the ponds multiply, and the land about the ponds becomes more valuable, it may well be held that a rule which was adapted to earlier and different conditions should suffer a corresponding modification in its application. In cases where there are no convenient means of access, fishermen and hunters and possibly others may still pass and repass on foot through wild lands lying upon them, for the purpose of gaining access to great ponds. But it hardly could have been intended, we think, that, as the uses of the ponds increased, the right to cross and recross the unimproved and unclosed lands lying upon them should increase also, and that such land should be liable to be subjected to a con-

stantly increasing burden. As the ponds became more valuable for the public use, and were resorted to more by the public, means of access naturally would be provided by the public authorities, and there would be less instead of more necessity for crossing private lands. There is some analogy, perhaps, as the defendants contend, between land lying on great ponds and land bounding on the sea. But except in the case of land lying between high and low water mark, over which, at the time when private ownership was extended to low water mark, the right of fishery and of passage was expressly reserved, it never has been understood that the public were at liberty to cross private lands lying between a highway and the sea, for the purpose of gaining access to the latter. The fact that land is situated on a great pond may furnish a reason (as was said in *Com. v. Alger*, 7 Cush. 53, 94, 95, of land bounding on the sea) for holding that under the rule of property established by the ordinance of 1649, it is subject to be more restricted in its use than land situated elsewhere. Accordingly the legislature has provided that the fishery commissioners, in the discharge of their duties, may enter upon and pass through or over private property, and that all persons shall be allowed reasonable means of access to great ponds of more than 20 acres, for the purpose of fishing, without rendering themselves liable as trespassers. Pub. Stat. chap. 91, §§ 9, 11. If it had been understood that, under the ordinance, the public had a right of access to great ponds over private lands, this legislation would have been unnecessary, except so far as it related to the size of the ponds.

We do not think that any light on the question now under examination can be obtained by considering the rights of the public in the land lying between high and low water mark in tidal waters. At common law great ponds were unknown as such, and the ownership of land bounding on the sea extended only to ordinary high water mark. By the ordinance of 1649, private ownership was extended in the latter case to low water mark when it did not exceed 100 rods, subject to the right of passage over it and of fishing, which the public had always had. We fail to see in this, or in the fact that great ponds were named, in connection with "bays, coves, and rivers," where "the sea ebbs and flows," anything which tends to show that the right of passage on the part of the public over lands lying on great ponds is to be extended as the uses of the ponds increase or is to be enlarged beyond what reasonably may be supposed to have been contemplated in view of the conditions existing at the time of the adoption of the ordinance.

The result is that the exceptions taken by the defendants to the master's report must be overruled, and judgment must be entered for the plaintiff in the action at law, and a final decree entered in his favor in this suit, embodying the terms of the injunction heretofore issued, in accordance with the terms of the judge's report.

So ordered.

TENNESSEE SUPREME COURT.

Rankin ROBERTS *et al.*

v.

T. J. WINTON *et al.*, Appts.

(.....Tenn.....)

1. The law of the state in which a contract of life insurance is made by a resident thereof will control as to the rights of his creditors and beneficiaries, instead of the law of another state in which the beneficiaries reside, or of another state in which the insurance company is located and the policy payable.
2. Creditors of an insolvent have no right to the proceeds of his life insurance made payable to other persons, where he paid the premium therefor only by a worthless check, and never put into the insurance anything upon which the creditors could have had any claim.

(March 5, 1898.)

APPEAL by defendants from a decree of the Court of Chancery Appeals reversing a decree of the Chancery Court for Coffee County in their favor in a creditor's bill to reach the proceeds of a policy of insurance on the life of a deceased insolvent debtor. *Reversed.*

The facts are stated in the opinion.

Mr. B. P. Bashaw, for appellants:

By the death of George T. Winton, defendant T. J. Winton and his wife were vested with a perfect right to the proceeds of the policy, unless the right of the creditors are superior to theirs.

If the bill is maintained upon this theory, it must be under § 6097, Shannon's Code, which authorizes a creditor to file a bill in his own behalf and in behalf of other creditors, if he wishes, to set aside a fraudulent conveyance made by an insolvent debtor.

An assignment, to be subject to attack under this section, must not be of some invisible, valueless thing; it must be of some real and valuable article, and not only this, it must be absolutely subject to execution in favor of a creditor.

See *Leslie v. Joyner*, 2 Head, 514.

George T. Winton never paid one dollar of money in procuring the policy. The only thing he invested was his time, whatever it might have been. This was not subject to execution, nor has the law of our state yet gone so far as to authorize its appropriation to the payment of debts, as is distinctly illustrated in the last foregoing case.

Cunningham v. Edgfield & K. R. Co. 2 Head, 28; *Gaugh v. Henderson*, 2 Head, 628.

George T. Winton was acting, not for himself and in his own behalf, but as agent for his parents, and for money expended, would be entitled to be reimbursed, and to no more.

Southern L. Ins. Co. v. Booker, 9 Heisk. 618, 24 Am. Rep. 844; *Gosling v. Caldwell*, 1 Lea, 454, 27 Am. Rep. 774; *Mobile L. Ins. Co. v.*

NOTE.—As to the rights of creditors in the personal services of a debtor, see *Mayers v. Kaiser* (Wis.) 21 L. R. A. 623, and note; also *Bogges v. Richards* (W. Va.) 26 L. R. A. 587.

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Morris, 8 Lea, 102, 31 Am. Rep. 631; *Fidelity Mut. L. Asso. v. Winn*, 96 Tenn. 224.

The law would require this transaction decided upon the law of New Jersey, the policy upon its face fixing Newark as the place of payment, and saying that it was delivered at the office of the company at that place.

Thompson v. Collins, 2 Head, 441; *Bennett v. Eastern Bldg. & L. Asso.* 177 Pa. 233, 34 L. R. A. 595; Story, Construction of Laws, §§ 304, 305; 2 Kent, Com pp. 460, 461; 2 Peters, Cond. Rep. 96.

Mr. F. M. Smith also for appellants:

Mr. George S. Ramsey, for appellee:

A creditor of an estate, either solvent or insolvent, without first recovering a judgment at law or proceeding against the property of the estate, and even without making the administrator a party, may file his bill in chancery for himself, or for himself and other creditors, to set aside fraudulent conveyances or other devices resorted to by the deceased for the purpose of hindering and delaying creditors, and subject the property by sale or otherwise to the satisfaction of the debt.

Pritchard, Wills & Administration, § 649; *Armstrong v. Croft*, 3 Lea, 191; *Spencer v. Armstrong*, 12 Heisk. 707.

The right of a creditor of a deceased debtor to file a bill and subject property fraudulently conveyed does not depend on Mil. & V. Code, § 8241. Such a creditor may maintain his bill against a fraudulent vendee without a judgment against his debtor or his representative, and without joining the administrator as a party.

Spencer v. Armstrong, 12 Heisk. 707; *Armstrong v. Croft*, 3 Lea, 191; *Pitt v. Poole*, 91 Tenn. 73; *Battle v. Street*, 85 Tenn. 293.

There is no statute in Tennessee exempting to the father and mother the proceeds of a life insurance policy taken out by an unmarried man on his own life.

A transfer by the deceased of this insurance property which is not exempt to the father and mother is a transfer of property the creditors have a right to subject to the payment of their debts; and hence a right to attack a transfer of as fraudulent.

An assignment of a life insurance policy amounts only to a substitution for the assured, of the assignee, as a party to the policy, upon precisely the same terms and conditions as in the original policy. The assignee can only take that which the assignment gives him.

1 Bacon, Ben. Soc. 2d ed. § 299.

The title to the property insurance is a vested interest in the defendants (father and mother).

Gosling v. Caldwell, 1 Lea, 456, 27 Am. Rep. 774; 1 Bacon, Ben. Soc. 2d ed. § 292.

A voluntary settlement of a policy of life insurance under the statute of Elizabeth, taken in connection with the insolvent debtor's act, was held in England to be fraudulent upon the death of the settler.

Bunyon, Life Assur. p. 278.

Life insurance is a chose in action.

Handwerker v. Diermeyer, 96 Tenn. 619.

The transfer of choses in action is liable to investigation on the ground of fraud.

Bump, Fraud. Conv. § 251.

It is therefore within the statutes against fraudulent conveyances.

1 Bacon, Ben. Soc. 2d ed. § 297; *Thompson v. Cundiff*, 11 Bush. 567; *Hathaway v. Sherman*, 61 Me. 475; *Anthracite Ins. Co. v. Sears*, 109 Mass. 383; *Barry v. Equitable L. Assur. Soc.*, 59 N. Y. 593; *Pence v. Makepeace*, 65 Ind. 865; *Stigler v. Stigler*, 77 Va. 163.

Proof of fraud in fact is not required in cases like this.

Wait, Fraud. Conv. 9, 10, 882; Bump, Fraud. Conv. §§ 24-28.

The proceeds belong to the estate of the deceased who paid the consideration.

Bump, Fraud. Conv. 8d ed. §§ 240, 241; *Merchants' & M. Transp. Co. v. Borland*, 53 N. J. Eq. 282; *Schondler v. Wace*, 1 Campb. 487.

Under the law of Alabama this insurance is an asset of the estate of George T. Winton, deceased.

Kearn v. Ward, 80 Ala. 555; *Merchants' & M. Transp. Co. v. Borland*, 53 N. J. Eq. 282.

This executed contract was consummated in the state of Alabama on the very moment the deceased had his father and mother entered in the policy as the beneficiaries. This was an executed contract, voluntarily conveying personal property, and such a conveyance is governed by the *lex loci domicilii* and the *lex loci contractus*.

2 Parsons, Contr. 7th ed. p. 712; Dicey, Confli. L. American notes, p. 589; Bump, Fraud. Conv. 5th ed. § 510.

Personal property has no locality; the laws of the owner's domicile are to determine the rights to its possession as well as to the transfers and alienations, unless there be some "positive or customary law," of the country, where it is found to the contrary.

3 Am. & Eng. Enc. Law, p. 574; *Black v. Zacharie*, 8 How. 483, 11 L. ed. 690; *Anderson, Law Dict.* 837; *Allen v. Bain*, 2 Head, 107; *Dougherty v. Curle*, 2 Humph. 458; *Galt v. Dibrell*, 10 Yerg. 145.

A transfer of personal property good by the law of the country where made will, with a few exceptions, be good everywhere; and the converse of this rule is true.

Lally v. Holland, 1 Swan, 396; *Eaves v. Gillepie*, 1 Swan, 128; *Barnett v. Kinney*, 147 U. S. 479, 87 L. ed. 249.

The question of validity of the transfer or transaction must extend to all the requirements of the *lex loci contractus* to make it binding, and whatever defects would avoid it there, will avoid it elsewhere.

Galt v. Dibrell, 10 Yerg. 146; 2 Meigs, Digest, p. 847; *Robinson v. Queen*, 87 Tenn. 445, 3 L. R. A. 214.

To permit a foreign corporation to insert in its policy a stipulation withdrawing itself from the force and effect of the laws of the state it does business in by mere comity would be subversive of the right of that state to decide on what terms such corporations should be admitted to do business in its territory.

1 Bacon, Ben. Soc. 2d ed. § 176; *Lane v. Bank of West Tennessee*, 9 Heisk. 436; *Talmadge v. North American Coal & Transp. Co.* 3 Head, 840; *Ohio Life Ins. & T. Co. v. Merchants' Ins. & T. Co.* 11 Humph. 1, 53 Am. Dec. 742.

41 L. R. A.

The deceased applied for the policy from the agent of the company in Alabama, the policy was there delivered, and the premiums paid.

Equitable L. Assur. Soc. v. Pettus, 140 U. S. 226, 35 L. ed. 497.

Messrs. T. C. Lind, George R. White, and James Mitchell also for appellee.

Wilkes, J., delivered the opinion of the court:

In December, 1895, George T. Winton, then a resident of Birmingham, Alabama, took out a policy of insurance upon his life, payable to his father and mother, who lived in Coffee county, Tennessee. The policy was for \$5,000, and was issued by the Mutual Benefit Life Insurance Company of Newark, New Jersey. For the first instalment premium upon the policy the assured gave his check for \$38.76 to the agent of the company, and the agent advanced the amount of the check to the company. When presented to the bank, this check was not paid, and the agent retained it in his hands until after the assured's death, on the 15th of January, 1896, and the settlement by the insurance company with the payees of the policy. It was then paid to him by William R. Gunn, a brother of the assured's mother. After the assured's death, in Alabama, his remains were sent to his father, defendant T. J. Winton, in Tennessee, for burial, and at the same time the life insurance policy was delivered to him by William R. Gunn. He returned it to Gunn, to take back with him to Birmingham, where Gunn resided, in order that it might be collected for him. Gunn administered in Alabama upon the estate of the insured, and thereafter returned the policy to the father, in Tennessee; and the insurance company compromised and settled the policy with the father and mother by the payment of \$2,500 to them in full of all liability thereunder. T. J. Winton, the father, paid over, of this amount, \$1,000 to Gunn, partly in consideration of funeral expenses he had advanced and incurred, and upon his promise to settle for the same thereafter. Gunn paid off the check for the first premium (which was held by the agent), as he states, as a worthless claim against the insured; the payment by Gunn being, as he states, gratuitous. In regard to the form of the policy, it is only necessary to state that it was payable to T. J. and Sarah F. Winton, father and mother of the assured, George T. Winton, in case they, or either of them, survived him; if not, then to his estate; and it was payable at the office of the company, in Newark, New Jersey. The complainants are creditors of George T. Winton, the insured, who died insolvent. It is charged that Gunn, the administrator upon the insured's estate in Alabama, conspired with T. J. Winton, the father, to remove the policy to Tennessee, and thus place it, as an asset of George T. Winton's estate, beyond the jurisdiction of the courts of Alabama, and in the hands of the defendant in Tennessee, and that they, as creditors, have a right to follow the proceeds of the policy, and collect and appropriate them to their debts. The bill is filed as a general creditors' bill. An amended bill was filed, alleging that there was no administrator in Ten-

nessee upon the insured's estate, and repeating that the administrator in Alabama had col-
luded with the defendants in Tennessee to re-
move the funds from Alabama, and beyond
the jurisdiction of its courts; and it was asked
that an administrator *ad litem* be appointed,
if necessary. The bill, as thus amended, was
demurred to. It was then amended the second
time, by showing that John E. Patton had
been appointed administrator in Tennessee,
and making him a party; and the demurrer
was then overruled. Defendant Winton an-
swered; denying the equities of the bill, insist-
ing that the contract of insurance should not
be construed by the laws of Alabama, but by
the laws of Tennessee or New Jersey, and
denying that he was guilty of any fraud in
obtaining the proceeds of the policy. The
chancellor was of opinion that the answer de-
nied the equities of the bill, and that it was
not sustained by the proof, and dismissed the
bill. On appeal, the court of chancery ap-
peals reversed this decree, sustained the bill,
and granted the relief prayed; and defendants
have appealed to this court, and assigned er-
rors. It is insisted that the court of chancery
appeals erred in holding that the contract must
be construed by the laws of Alabama, and not
by the laws of New Jersey or Tennessee. It
is further insisted that there was no assign-
ment of the policy of insurance, or other as-
sets of the insured's estate, involved, but that
the policy was made payable in the first in-
stance to the defendants; that there was no re-
lation existing between the insured's creditors
and the defendant beneficiaries that would
warrant any recovery by them against defend-
ants; that defendants having received the
money in good faith, believing that they were
entitled to it, their only liability, if wrongfully
received, was to Gunn, who paid it to him,
and the creditors' remedies were against Gunn,
and not against them; that, as a matter of fact,
the insured never paid any premium or con-
sideration for the policy, and his creditors
could not, therefore, have any interest in it or
its proceeds; and, finally, that, if the creditors
could recover anything, it could only be the
amount paid out by the insured, and not the
insurance purchased by such payment.

The first question presented and necessary to
be considered is whether this contract of insur-
ance is to be construed and governed by the
laws of Alabama, New Jersey, or Tennessee,
so far as the rights of the creditors of the in-
sured and the beneficiaries under the policy
are concerned. The court of chancery appeals
was of opinion that the laws of Alabama, and
not those of New Jersey and Tennessee, must
control; and in this, we are of opinion that
court is correct. Alabama was both the place
where the contract was entered into, and where
the insured resided at the time it was made.
The general rule is that the *lex domicilii* or the
lex loci contractus governs and determines the
validity of contracts relating to personal prop-
erty. 3 Am. & Eng. Enc. Law, pp. 553, 571,
and notes citing authorities. Here the *lex*
domicilii and *lex loci contractus* concur.

Several provisions of the Code of Alabama
are cited, as determining what the law of that
state is in regard to the proceeds of policies of
insurance, and the rights of widows and cred-

itors; but they refer to cases where the in-
surance has been effected by the wife upon
the life of the husband, and not to cases like
the present, where the insured has placed a
policy on his own life in favor of his father and
mother. We are also referred to the case of
Fearn v. Ward, 65 Ala. 38. In that case Fearn
had insurance payable to his infant daughter,
Kate Coles Fearn; and after his death the pro-
ceeds of the policy were paid over for the in-
fant daughter, and invested for her by her
guardian. It appears that the policy was for
\$10,000, and that the insured had paid some-
thing less than \$500 upon it in the way of
premiums. It was held that, under the provi-
sions of § 2733 of the Code of Alabama of 1876,
the exemption therein provided was designed
for the benefit of the wife and children, and,
inasmuch as the policy was payable to and for
the benefit of only one of several children, it
was not protected by the statutes, and that
the statute could not operate as to contracts
made before its passage, and that the con-
veyance of the insurance was voluntary and
fraudulent as to existing creditors, whether
their liability was fixed or contingent. It ap-
pears that the policy was originally taken out
payable to the wife and children, but subse-
quently that policy was canceled, and another
issued to the infant, as before stated. It is
presumed that this is what the court referred
to as a conveyance of the insurance, as no
transfer or assignment of it appears. The de-
murrer to the bill having been overruled, and
cause remanded, it was tried, and again ap-
pealed to the supreme court, where it is re-
ported in 80 Ala. 555. The court thereupon
reaffirmed its former holding, that the policy,
being payable to one only of several children,
was not protected by the exemption in the sta-
tutes. It was further held that the investment
of premiums by the insured in this policy was,
in effect, a gift by the father to the child,
which would be void as to existing creditors
of the father, and that such creditors were en-
titled to have their debts satisfied out of the
proceeds, and were not confined merely to the
premiums paid; that the proceeds of the pol-
icy constituted the property purchased, and
were the subject-matter of the investment; that,
the father being in debt, the premiums paid
must be treated as a voluntary investment, and
hence fraudulent in law as to existing credi-
tors. The court of chancery appeals construe
this holding to be, in effect, that the taking
out of a policy of life insurance upon the life
of any person not protected strictly by the ex-
emptions of the statute must be treated as an
investment of the insured's money, and would
inure to the benefit of his estate, which a credi-
tor, upon the death of the insured, may follow
into the hands of the beneficiary named in the
policy, who has received the same from the in-
surance company. Applying the rule to the
facts of this case, the court of chancery appeals
was of opinion that the creditors of the insured
have the right to follow up and reclaim the
\$2,500 paid over to T. J. Winton, the benefi-
ciary named in the policy, and to have it ad-
ministered as a part of the estate of insured,
deceased, but that inasmuch as the said T. J.
Winton had received the proceeds in good faith,
and had paid part of them on just debts of the

estate, to that extent he should have credit. A decree was therefore entered for the sum of \$2,500, but the cause was remanded to the court below, and execution in the meantime was suspended in order that an account might be taken of the debts thus paid, and for which the defendant is to have credit; and the balance was directed to be paid into the chancery court of Coffee county, to be there administered as assets of the estate of George T. Winton, deceased, as an insolvent estate; and the costs were adjudged against the defendants, so far as accrued. Conceding that the court of chancery appeals are correct in their construction of the law applicable to the case, there is a feature of it, as developed in the record, which is necessarily fatal to the claim of complainants. They can only recover upon the theory that the insured diverted, into life insurance investment, funds which his creditors had a right to subject to their debts. It is only upon the theory that the insured had such a fund or asset liable to his creditors, and which he removed from their grasp by investing it in insurance, that they can recover. To illustrate: Suppose the insured had invested, in insurance, property which by the laws of Alabama was exempt from seizure for his debts, it cannot be that, because such funds were thus invested, nevertheless a creditor could follow the fund into the investment, and seize it, though it was made in the name and for the benefit of another. At most, it could be only a gift, by the son to the father, of funds or property exempt from the seizure by creditors of the son, or the proceeds of such funds so invested. But the present case is even stronger, inasmuch as the deceased did not invest a dollar of his funds, or any of his property, in this insurance, of any kind whatever. On the contrary, he gave his individual check to the agent, which proved entirely worthless, as he had no funds in bank to meet it. In other words, he purchased this insurance with his individual credit,—a promise to pay. But his credit and promise to pay was not an asset which a creditor could seize, any more than would have been his personal labor. Having put nothing into this insurance upon which his creditors could have had any claim when it was put in, or, rather, when the policy was issued, though nothing had been put in or paid, there is nothing which the creditor could follow up. In this view of the case, there is no possible ground upon which the complainants can recover as creditors, or have any right to follow up this policy or its proceeds; but such proceeds passed to the beneficiaries, under the terms of the policy. It is not necessary to pass upon other questions involved, as this must be controlling.

The decree of the Court of Chancery Appeals is reversed, and the complainants' bill dismissed, at their costs.

James M. WILLCOX, *Appt.*,

v.

Lucy S. HINES.

(.....Tenn.....)

1. A landlord is liable for injury to his tenant from the fall of a porch which, to his knowledge at the time of the lease, had drawn away from the house, and which he attempted to repair but negligently left unsafe.
2. A landlord is liable to his tenant for such defects and dangers as are in existence when the lease is made, provided he knew of them, or ought to know of them, and provided also that the tenant does not know of them, and could not know of them,—both parties in the matter exercising reasonable care and diligence.

(March 12, 1898.)

APPEAL by defendant from a judgment of the Circuit Court for Davidson County in favor of plaintiff in an action brought to recover damages for injuries caused by the fall of a porch on leased premises through defects for which the landlord was alleged to be responsible. *Affirmed.*

The facts are stated in the opinion *Messrs. Vertrees & Vertrees, R. T. Smith, R. McP. Smith, and E. H. East* for appellant.

Messrs. Hamilton Parks and E. A. Price for appellee.

Wilkes, J., delivered the opinion of the court:

This is an action by a tenant against a landlord for injuries received from the defective condition of leased premises. The case has been before the court heretofore, and an opinion was rendered, reported in 96 Tenn. 148, and in 96 Tenn. 328, which states quite fully the facts and contentions as then made. At the last trial of the cause in the court below, there was a verdict for plaintiff for \$2,300; and on motion for new trial, upon suggestion by the presiding judge \$500 of this amount was remitted, and for the balance, \$1,800 judgment was rendered; and defendant has appealed and assigned errors.

It is insisted that the court erred in following the rule laid down in *Hines v. Willcox*, 96 Tenn. 148, and 96 Tenn. 328, and *Stenberg v. Willcox*, 96 Tenn. 163, 34 L. R. A. 615, and 96 Tenn. 324, 34 L. R. A. 332, as to the relative duties and liabilities of the landlord and tenant in regard to dangerous premises; and it is earnestly insisted these cases are not a correct exposition of the law. The contention, in brief, is that in the cases referred to this court

NOTE.—The distinction emphasized in the above case between the landlord's liability for a *delictum* in leasing dangerous premises and his contractual liability for the defects therein has not been very plainly brought out or particularly regarded in many of the cases, but they have used general language as to the existence or nonexistence of liability in the circumstances presented. The *note* to this case on former appeal in 34 L. R. A. 324, points out what the annotator understood to be the distinctions between the various phases of the question presented by the prior decisions.

laid down a rule not supported by authority, devolving a duty of active diligence upon the landlord to know the condition of his property when he leases it, as to its safety; and it is insisted the true rule in ordinary cases of rental is *caveat emptor*, and the duty of examining the premises is upon the tenant, and, in the absence of fraud or warranty of condition by the landlord, the tenant takes the property at his own risk. It is insisted that this has been the rule recognized and followed in this state up to the cases of *Hines v. Wilcox*, 96 Tenn. 148, and *Stenberg v. Wilcox*, 96 Tenn. 163, 34 L. R. A. 615, and 96 Tenn. 328, 34 L. R. A. 833, and that the court since the 96 Tenn. case, has returned to and reaffirmed this rule, in the case of *Schmalried v. White*, 97 Tenn. 39, 32 L. R. A. 783. In regard to the latter case, it is only necessary to say that, in it, it is expressly stated that what was therein said was not intended to conflict with the case of *Hines v. Wilcox*, and that case was distinguished from the *Hines v. Wilcox* Case. In the case in 97 Tenn. 39, 32 L. R. A. 783, the court held that the trial judge erred in holding the landlord liable, though he may have been ignorant of any defects and conditions without fault or negligence on his part, thus making the landlord an insurer of the condition of his premises. In the *Hines v. Wilcox* case the landlord was not held to such strict liability, but only held liable for what he knew, or might have known by the exercise of reasonable care and diligence, and then only when the tenant failed to ascertain such facts by the exercise of reasonable care and diligence on his part. There is no conflict in the two cases, so far as the real questions presented are involved. Prior to the case of *Hines v. Wilcox*, there are in Tennessee only three cases in which the question of the liability of the landlord to the tenant, under conditions somewhat similar to the present, are considered. The first is the case of *Banks v. White*, 1 Sneed, 618. In that case the leased premises became untenable during the pendency of the lease, caused by the acts of the city authorities in opening new streets, and not by any act of the landlord, or any defect in the premises themselves when they were leased; and the court held that the law does not imply any warranty as to the continuing condition of the property demised,—a rule laid down in all the cases, and questioned in none, but one wholly different from the principle involved in the present case, which relates to the condition of the premises when leased, and not to any subsequent changes, contingencies, or conditions during the lease. Another case is that of *Southern Oil Works v. Bickford*, 14 Lea, 659. That was a case of a suit by a landlord against a tenant for improperly using and abusing the premises during the continuance of the lease, whereby the houses were broken down. It did not involve the liability of the landlord to the tenant, arising out of the dangerous or defective condition of the premises when they were leased, in any way. In *Young v. Bransford*, 12 Lea, 244, in treating of liability to the public for the condition of the premises, it is stated that it is the duty of the tenant or occupier to keep the premises in repair, so far as to make them safe to the public. This, it will be seen, also relates to the continuing condi-

tion of the premises pending the lease. The same case adds: "The landlord is liable when he covenants to keep the premises in repair, or where the defect exists at the time of the lease," citing 1 Thomp. Neg. p. 317; Whart. Neg. § 817. This is the only case in our state, up to that time, prescribing the rule of liability between the landlord and tenant at the time the lease is made; and it holds the landlord liable for defects and dangerous conditions existing at that time. We are also cited to the case of *Doyle v. Union P. R. Co.* as being a case elaborated with great research and ability. 147 U. S. 418, 87 L. ed. 223. In that case a railroad had let to a party a house, which during the continuance of the lease was overwhelmed with a snowslide. There was no defect in the premises when let. The snowslide was the act of God, occurring afterwards, and the landlord was in no way responsible therefor. The premises were safe when leased. So that this was also a case of continuing condition, and the landlord was not held liable. The case of *Viterbo v. Friedlander*, 120 U. S. 712, 30 L. ed. 777, is also referred to; but that was a Louisiana case, in which the rules of the civil law were applied, and the doctrine of the common law was only incidentally mentioned, and not at all involved in the decision of the case, and not commented on or explained. In the case of *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471, it was laid down as a rule that, if there was a duty devolving on the landlord to inform the tenant of a defect in the premises, there would be no distinction, as a ground of liability, between an intentional and an unintentional neglect to perform it, and there could be no such duty without knowledge of the defect; but this is evidently opposed to the great weight of authority, which discriminates between the intentional and unintentional neglect to perform a duty,—the former being a fraud or tort, and the latter not. In this case it appears that a step in a stairway had been sawn out, and the landlord knew it, and tested it, and deemed it safe; but the tenant, it seems, did not know it, though he had some opportunity to ascertain it; and it was held that he could not recover because of an injury from it. This is an extreme case, which does not commend itself, by its facts or reasoning, to general approval. The defect was one which no tenant would expect, or be on the lookout for; and, while known to the landlord, it was not called to the tenant's attention, and was clearly a trap which the tenant did not see, and could not anticipate, or discover with any reasonable care. The case of *Edwards v. New York & H. R. Co.* 98 N. Y. 245, 50 Am. Rep. 659, is also referred to with approval, and from it is cited an extract as follows: "It is a universal rule to which no exception can be found in any case now regarded as authority, that upon the demise of real estate there is no implied warranty that the property is fit for occupation, or suitable for the use or purpose for which it is hired." This evidently has reference alone to the liabilities arising out of the contractual relation between the landlord and tenant. The same case on page 249, recognizes a distinct ground of liability, resting upon the *delictum* of the landlord, and not on contract. It says: "If he [the landlord] demises premises,

knowing that they are dangerous and unfit for the use for which they are hired, and fails to disclose their condition, he is guilty of negligence, which will in many cases impose responsibility upon him." And again (same page): "The responsibility of the landlord is the same in all cases. If guilty of negligence or other *delictum* which leads directly to the accident and wrong complained of, he is liable; if not so guilty, no liability attaches to him. If he lets a building for a warehouse, knowing that it is so weak and imperfectly constructed that the floors will break down from the weight necessary to be placed upon them, his negligence imposes liability upon him for injury to the person or property of anyone who may lawfully be upon the premises using them for the purposes for which they were demised." The case of *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 433, is also cited, and in that case it is held without any mature consideration, that in the absence of fraud or warranty the landlord is not liable for the present or future condition of leased premises; but the case evidently considers only the liabilities arising out of the contractual relation of the parties, and does not refer to such liabilities as arise out of the *delictum* of the landlord. And the same may be said of *Keates v. Cadogan*, 10 C. B. 591, and *Robbins v. Jones*, 15 C. B. N. S. 240, referred to, which simply state the rights arising out of the contractual relation, and do not consider the matter from the standpoint of *delictum* on the part of the landlord. But in the case of *Jaffe v. Harteau*, the court is evidently influenced, if not controlled, by the fact that the defendant did not know, or have any reason to suspect, that the premises were dangerous; thus impliedly recognizing the doctrine of some care upon the part of the landlord, and relieving him because he did not know, or have reason to suspect.

It may be conceded that no ground of liability arises out of the contract between the landlord and tenant, in the absence of fraud or warranty, but a great number of cases in which the question has been considered hold that there is an independent ground of liability, arising out of the *delictum* or wrong of the landlord in leasing premises dangerous at the time; and there is not necessarily any conflict between the two classes of cases, when properly understood. This distinction was attempted to be pointed out in *Hines v. Wilcox*, 96 Tenn. 332-334, and cases were cited. There is also a distinction drawn in the cases between patent and hidden defects. In the former, when the landlord and tenant exercise the same care, and have equal opportunities for examination, there is no ground of liability on the part of the landlord to the tenant, inasmuch as the negligence of the landlord is neutralized in its effect by the negligence of the tenant, and the ordinary rule of contributory negligence by the injured party applies to defeat any recovery by the tenant. In regard to hidden or secret defects or dangers, the cases are uniform that if they exist, and are known to the landlord, and not disclosed to the tenant, the landlord will be liable, because such conduct amounts to a fraud. It is insisted, however, that in such cases of hidden defects there is no liability, in the ab-

sence of actual knowledge on the part of the landlord, and fraud and deceit practised by him. The case of *Hines v. Wilcox*, heretofore reported, goes one step further than this, and holds the landlord liable not only if he has actual knowledge, but also if, by the exercise of reasonable care and diligence, he could have such knowledge; and it is only upon this latter proposition that there is any difference of opinion. Hence it is strenuously insisted that no active duty devolves upon the landlord to ascertain such hidden defects and dangers; and in the absence of actual knowledge the landlord will not be liable for any damages. The logic of this position is that a landlord is under no obligation to know anything about the condition of his premises,—whether they are dangerous or safe,—whether habitable or a nuisance,—and so long as he keeps himself ignorant, either intentionally or negligently, he cannot be held liable for any damages resulting from the dangerous condition of his property when leased; but if, by accident or examination, he becomes aware that a second defect does exist, then he is liable, if he fails to disclose it. Under this ruling the landlord is placed in the better condition, the more negligent and inattentive he is, and a premium is put upon his ignorance. In the case of *Hines v. Wilcox*, 96 Tenn. 328, and 96 Tenn. 148, the rule was laid down that he is liable for what he knows, or by the exercise of reasonable care and diligence ought to know, about his property, provided the tenant at the same time exercises reasonable care and diligence, and the authorities were cited. It was not attempted, in the 96 Tenn. case, to lay down the degree of diligence that the landlord must exercise; the trial judge having, in his charge, relieved him from any diligence or duty whatever, and the question before the court being whether such charge was correct, as thus broadly put. It was said, however (p. 331, 96 Tenn.), that "the rule laid down does not place upon the landlord the obligation of an insurer or warrantor by contract, nor does it impose the extreme duty of constant care and inspection," but only reasonable care and diligence; and the like reasonable care and diligence are required of the tenant, thus imposing reasonable care and good faith upon both, in the absence of any contract or warranty. Several cases were cited supporting the holding as thus made, and others might have been collated from the mass of authorities upon the subject. The case of *Hines v. Wilcox*, has been re-reported in 34 L. R. A. 824, and extensively annotated by Mr. Henry P. Farnham. The learned annotator states that the case is a new departure in the law of landlord and tenant, and he has industriously collated authorities to sustain his assertion, and has commented upon some of the authorities cited; leaving, however, the great bulk of the cases cited in *Hines v. Wilcox* without comment. The annotation is valuable as a brief upon the liability of the landlord to the tenant arising out of the contractual relation, but it is to be regretted that the learned annotator did not also collate the authorities bearing upon the true question presented in the *Hines v. Wilcox* case, of *delictum* on the part of the landlord in leasing dangerous premises, and

did not comment more fully upon the numerous authorities imposing upon the landlord some obligation to know the condition of his premises when leased. Quite a complete and discriminating review of the authorities up to the date of 1849 is found in the case of *Lowell v. Spaulding*, [4 Cush. 277], 50 Am. Dec. 776-783. See especially, this feature, treated at page 780 with citations.

The ground of liability upon the part of a landlord when he demises dangerous property has nothing special to do with the relation of landlord and tenant. It is the ordinary case of liability for personal misfeasance, which runs through all the relations of individuals to each other. As is substantially said by Ruger, Ch. J., in *Edwards v. New York & H. R. Co.* 98 N. Y. 256 50 Am. Rep. 659 (dissenting opinion): "This liability does not rest upon the theory of an express contract between the owner and the person receiving the injuries, but is predicated upon the obligation which the law imposes on all to so keep and use their property that others using or entering upon it by their invitation shall not be injured by its improper condition or unfitness, and its inadequacy for the purposes to which it has been devoted." And as is stated in *Coven v. Sunderland*, 145 Mass. 368, quoted in *Hines v. Willcox*, there is an exception to the general rule of *caveat emptor*, as between lessor and lessee, "arising from the duty which the lessor owes to the lessee. This duty does not originate directly from the contract, but from the relation of the parties, and is imposed by law." It is not upon the ground of an insurer or warrantor of condition under his lease contract, but on the ground of the obligation implied by law not to expose the tenant or the public to danger which he knows, or in good faith should know, and which the tenant does not know, and cannot ascertain by the exercise of reasonable care and diligence. "In cases where lessors have been held liable for such injuries to the lessees, the liability is founded in negligence. . . . The action of tort has for its foundation the negligence of the defendant, and this means more than a mere breach of promise. . . . There must be some breach of duty distinct from breach of contract," etc. *Tuttle v. George H. Gilbert Mfg. Co.* 145 Mass. 174, 175. In *Kern v. Myll*, 80 Mich. 580, 8 L. R. A. 682, it is said, in a suit between tenant and landlord: "The cause . . . [of action] does not rest upon any covenant, express or implied, of the landlord to repair the premises nor that they were habitable at the time the lease was made; nor does it rest necessarily upon the relation of landlord and tenant. . . . But the cause of action is based upon the maxim that every person must so use his own premises as not to injure others, either in person or property." The declaration showed a nuisance when the premises were leased, known to defendant and concealed from plaintiff, calculated to injure his health.

On the former trial of this cause a few cases were cited upon the point of liability of the landlord where he knows, or by using reasonable care and diligence ought to know, of the danger or nuisance, but it was not attempted to cite them all. The following were cited in 96 Tenn. 385, 34 L. R. A. 884; *Martin v. Richards*, 155 Mass. 381; *State, Basho, v. Boyce*, 73 Md. 469;

Carson v. Godley, 26 Pa. 111, 67 Am. Dec. 404; *Coke v. Gutkess*, 80 Ky. 598, 44 Am. Rep. 499; *Lindsey v. Leighton*, 150 Mass. 288; *Moynihan v. Allyn*, 163 Mass. 272; *Pingrey*, Real Prop. § 592. We add others, but by no means all that may be cited: *Albert v. State, Ryan*, 66 Md. 325; *Timlin v. Standard Oil Co.* 126 N. Y. 514; *Wood, Land. & T. p.* 855; *Coven v. Sunderland*, 145 Mass. 368; *Minor v. Sharon*, 112 Mass. 477, 37 Am. Rep. 122; *Butler v. Cushing*, 48 Hun, 617, mem.; *Cutter v. Hamlen*, 147 Mass. 471, 1 L. R. A. 429; *Booth v. Merriam*, 155 Mass. 521; *Oxford v. Leathe*, 165 Mass. 265; *Willcox v. Zane*, 167 Mass. 306; *Lynch v. Swinn*, 167 Mass. 510; *Lenz v. Aldrich*, 6 App. Div. 178; *Matthews v. De Groff*, 13 App. Div. 356; *O'Dwyer v. O'Brien*, 13 App. Div. 570.

In *Albert v. State, Ryan*, 66 Md. 325, a wharf was rented and it was said: "If defendant knew, or by exercise of reasonable diligence could have known, of its unsafe condition, and that the accident happened in consequence of such condition, the plaintiff was entitled to recover." The true doctrine is well stated in *Timlin v. Standard Oil Co.* 126 N. Y. 514. The law "does not impose [upon the landlord] the duty of constant care and inspection of premises. . . . It imposes upon him the duty of reasonable care to inform himself of the condition of property which he proposes to let, and if at the leasing he knew, or if, in the exercise of reasonable care, he would become informed of the fact that the property has upon it a nuisance dangerous to the public or to an adjoining owner, it imposes upon the owner and proposed lessor the duty to abate it before he leases such property, and if he do not, it leaves him with a liability to respond in damages to anyone injured in consequence of, and by the nuisance." And again it is said (p. 525, 126 N. Y.): "If he were in truth ignorant, and yet, by the exercise of reasonable care and diligence, he would have known of its existence, there is no principle which can exempt him from responsibility, any more than if he created the nuisance himself." In *Wunder v. McLean*, 134 Pa. 384, the matter is presented in a shape that shows the sound reason and good sense of the rule that the landlord is liable if the premises are dangerous when he leases; and the tenant, if they become dangerous when he has them leased. It is laid down that the landlord is liable if the premises are a nuisance when leased, and he cannot escape liability by leasing the property to a tenant, and putting him in possession. To the same effect are *Knauss v. Brua*, 107 Pa. 85; *Fow v. Roberts*, 108 Pa. 489; *Leonard v. Storer* [115 Mass. 86], 15 Am. Rep. 76, 79, note; *Ingwersen v. Rankin* [47 N. J. L. 18], 54 Am. Rep. 109; *Tomle v. Hampton*, 129 Ill. 879; *Kern v. Myll*, 80 Mich. 525, 8 L. R. A. 682; *Riley v. Simpson*, 83 Cal. 217, 7 L. R. A. 622; *Nugent v. Boston, C. & M. R. Co.* 80 Me 63; *Lowell v. Spaulding* [4 Cush. 277], 50 Am. Dec. 780, notes. In *Cutter v. Hamlen*, 147 Mass. 475, 1 L. R. A. 429, the court held that when the landlord knew the drains were defective, and also that diphtheria had been in the house, the jury would have been warranted in finding that the landlord knew, or ought to have known, as a prudent man, that this was dangerous. In *Lindsey v. Leighton*, 150 Mass. 288, the

court was asked to charge that it must be known that the defendant had knowledge of the defect, or they could not hold him. The trial judge refused, and on appeal the supreme court said this refusal was correct; that it was not necessary to show that defendant had actual knowledge of the defect; his duty was that of due care, and ignorance of the defect was no defense; citing *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548; *Readman v. Conway*, 126 Mass. 874; *Looney v. McLean*, 129 Mass. 38, 37 Am. Rep. 295; *Watkins v. Goodall*, 138 Mass. 538. This was a case of defect in steps leading to a tenement occupied by plaintiff. There was evidence that defendant's attention had been called to the defect, and he had frequently passed over the steps. In *Martin v. Richards*, 155 Mass. 386, the court held that if the condition of the vault in 1886 was dangerous, and defendant's attention was called to it, and he undertook to remedy it, and used means which were ineffectual to remedy it, and which he knew, or ought to have known, were ineffectual, he cannot escape liability by employing a servant to do the work, and escape the consequences of the servant's neglect to do the work properly. The knowledge of the servant must be imputed to the master; citing *Baldwin v. Casella*, L. R. 7 Exch. 325; *Gladman v. Johnson*, 36 L. J. C. P. N. S. 158; *Applebee v. Percy*, 43 L. J. C. P. N. S. 385. In *Moynihan v. Allyn*, 162 Mass. 272, it was held that a minor could not recover because the defect was in existence when the premises were let. The defect was in a platform common to several tenants, but the controlling feature was that its condition could have been ascertained by reasonable examination by the tenant. The court held that defendant's duty was to keep the platform in as good condition as when leased, and to inform the tenant of any hidden defects which could not be discovered by reasonable diligence. In *Booth v. Merriam*, 155 Mass. 522, it is said: If there is a concealed defect that renders the premises dangerous, which the tenant cannot discover by the exercise of reasonable diligence, of which the landlord has, or ought to have, knowledge, it is the landlord's duty to disclose it, and he is liable for any injury which results from his concealment of it." It is also said in the case that there was nothing to show that defendant had actual knowledge of the danger, or was culpably responsible for it, and that it was such as would have been easily discernible. In *Oxford v. Leathe*, 165 Mass. 255, the landlord was held liable for the condition of a platform used to go into a place of public amusement, on the ground that he must have contemplated that the public would go on it; and the liability is stated to be just the same as if the premises are let with a nuisance upon them; citing many familiar cases. In *Witcox v. Zane*, 167 Mass. 806, a nurse of the tenant was injured by the defective condition of roof used by all the tenants in the building to hang out clothes, and other purposes. There was no evidence that plaintiff did not exercise due care. There was evidence that the plank which broke was badly decayed, crossgrained, and knotty, and no repairs had been made on the roof for years. The plaintiff testified that he had never noticed the defect. It was held that she had no such

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duty to observe the condition of the roof, as to safety, as the landlord had. In *Lynch v. Swan*, 167 Mass. 510, there was an injury upon a common stairway used by several tenants. The court says that there was some evidence that the step was not strong enough, and the question was whether or not the landlord knew this, or ought to have known it. It was not so apparent that plaintiff could be held to take the risk. The court says: "The question is this: Was there evidence for the jury that the landlord ought to have known it, or would have known it if he had exercised reasonable care?" And again the court emphasizes what the landlord knew, or ought to have known, as the controlling feature in the case. In *Matthews v. De Groff*, 18 App. Div. 356, it was held to be the duty of a landlord to keep in repair a coal hole or chute in the sidewalk in front of premises which he leased, and that he must from time to time examine and see its condition, even though the same tenant held over from time to time; and it is put on the ground that it is the duty of the landlord to examine and ascertain the condition of the property when he leases it, and the holding over from term to term was, in effect, a new lease each term. This proceeds upon the idea that the landlord owes a duty to the public to have his premises safe when he leases them, even though the obligation is on the tenant to make repairs during the lease. In *O'Dwyer v. O'Brien*, 13 App. Div. 570, it was held that the landlord would be liable for the defective repairing of a plank walk on the premises used by plaintiff, but for the fact that the tenant could and did see the defect and danger, and was thus guilty of such contributory negligence as would defeat her recovery. In *State, Bashie, v. Boyce*, 78 Md. 469, it was held that the owner of a wharf was not liable for injuries sustained, by an employee of a lessee, from a rotten plank, unless it appears that the owner knew, or by reasonable care and diligence could have known, the unsafe condition of the wharf when he leased it. See also *Metzger v. Schultz*, 16 Ind. App. 454.

It was not held in *Hines v. Wilcox* that a landlord is liable for a defect which occurs, or a danger that arises, after the lease has been made, and while the tenant is in possession. For these defects and dangers the tenant not only has no recourse against the landlord, but he is, on the contrary, liable himself to third persons who may be injured. But the landlord is liable for such defects and dangers as are in existence when the lease is made, provided he knew of them, or ought to know of them, and provided, also, that the tenant does not know of them, and could not know of them; both parties in the matter exercising reasonable care and diligence. Several distinctions are attempted to be drawn, but, so far as they affect the question of the duty of the landlord to know the condition of his premises, there is no ground for any difference in its application. It is said that many of the cases in which the expression "ought to know" is used in regard to the landlord are cases in which the landlord remains in possession of a portion of the premises, while other portions of the same premises are in the possession of other tenants. But the only differ-

ence between the two classes of cases appears to be this: that the liability of the landlord ordinarily ceases if he rents out the entire premises, but, when he retains part, it continues so long as he is in possession of such part used for common purposes. When the entire premises are leased, the landlord is liable if the premises are dangerous when he makes the lease, but ordinarily not longer. When he remains in possession of a portion, his liability continues so long as he remains in possession of that portion not leased. In the former cases it is his duty to know the condition when he leases; in the latter, to know the condition so long as he retains control of any part of the common property. The obligation in either case to know the condition of the property is the same; but in the former it ceases after the tenant enters; in the latter it is a continuing obligation while the landlord retains possession. It is said that some of the cases cited are cases of public property, such as docks, wharves, theaters, and other places of public resort; and it is attempted to show that these form exceptions to the general rule. Even if this were so, it could not avail in this case, as the property in this case was rented for boarding-house purposes, and so known to the landlord or his agent. But we are unable to see any ground for the application of a different rule in such cases. In the one case we have an instance of a quasi public nuisance; in the other, a case of quasi private nuisance. But the obligation not to expose the individual to danger is the same as that not to expose the public to danger. It has been said that "a private nuisance . . . is anything done, . . . or omitted to be done, contrary to a legal duty," from which an injury results to another. 16 Am. & Eng. Enc. Law, pp. 929, 930. And there is no difference in principle between condition which is called a "private" and one called a "public" nuisance. One is where the danger is to the individual; the other, when it is to a number of individuals, or the entire public.

So far as there is any obligation on the landlord to know the condition of his property, it does not matter whether the dangers and defects are patent or secret, unless, indeed, there is some more stringent duty in the latter case, inasmuch as it may be presumed that, as to patent dangers, they will most probably be seen by the tenant. If he has the opportunity of examination. But to hold that the rule of *caveat emptor* applies to all cases of rental when there is no warranty is to ignore the large mass of cases which hold the landlord liable (1) if he is guilty of fraud or deceit; (2) if he leases premises which are dangerous when leased. The result of this doctrine, if carried out, is that, if a tenant has no opportunity to examine the premises, he must nevertheless take them at his own risk. If, for instance, a landlord leases premises in a distant city, which the tenant does not see, and has no opportunity to examine,—under the rule of *caveat emptor*,—if the tenant enters without an opportunity for examination, and is injured by the dangerous and defective condition of the premises, the landlord is not liable. Such doctrine is not based on any sound reason, and the true rule is that the rule of *caveat emptor* only applies so far as the rights of the parties rest on contract,

or when the tenant has an opportunity to examine the premises, and the defect is so obvious, and the danger is so apparent, that he can see it by using ordinary care and diligence. It is argued with much earnestness and ability that, in order to make the rule operative, it must be held that the landlord is required to exercise a greater degree of diligence and care than the tenant. But this position is not, we think, well taken. The degree of care and diligence required of each is the same; that is, reasonable care and diligence, such as a reasonably prudent person would exercise if surrounded by the same or similar circumstances. From the very nature of the case, the same degree of care and diligence exercised by each would in many, if not all, cases, enable the landlord to know more than the tenant. The former owns the property; has daily access to it, and an opportunity to know its condition; and his attention was or may have been called to defects by previous tenants. The tenant sees the property but once, perhaps, and that in a more or less hurried manner. Not being familiar with the premises, he cannot by such inspection know as much of the property as the landlord does. Again, each may see the same defect, and the danger arising out of such defect may not be apparent at a glance or a single examination, such as the tenant can make; and he may well presume that, if dangerous, the landlord would not let it, nor would previous tenants have occupied it. The landlord, however, may have had his attention called to the defect by prior tenants, and he may have observed them time and again. In such case it would be obligatory upon him to ascertain the cause and extent of the defect, and whether dangerous or not. The opportunities and means of information of the landlord are necessarily greater than those of the tenant, when both exercise the same degree of care and diligence. This idea is forcibly illustrated in the present case, where a defect was clearly apparent, but the cause of it, and the danger arising out of it, were not. The tenant, looking at the opening between the porch and wall, would not discover its cause upon a single examination; and he might well presume that it only amounted to a matter of some discomfort and inconvenience, from falling rains and snows. But the landlord's attention had been called to it more than once by a former tenant, and he had been notified of the danger. Under such circumstances, it was incumbent on him to have examined into the extent and cause of the defect, and the proof is clear that the danger would have appeared to any workman or other person who might investigate the cause of the defect. It is said this rule of reasonable diligence on the part of both landlord and tenant destroys itself; for, if the danger is apparent, either party may see, and the negligence of the landlord being neutralized by that of the tenant, there can be no recovery. Even if this were so, it is no more than the application of a similar doctrine in many other relations of life,—as, for instance, when the negligence of the master is neutralized by the contributing negligence of the servant, so as to prevent the latter from recovering when he would be otherwise entitled to recover. So, also, in case of

railroad or other accidents and injuries, a party injured has the right to recover because of the negligence of the railroad or other party, but he may lose this right because his own negligence has contributed to, and is the direct cause of, the injury; and the same rule applies in other relations. It is evident, however, that this rule of counterbalancing negligence can only apply to cases where the tenant has the opportunity to see, examine, and ascertain, not only the defects, but also the dangers, equally with the landlord. The trial judge, in his charge, followed substantially the rules laid down in *Hines v. Wilcox* and *Stenberg v. Wilcox*, reported in 96 Tenn., and, upon a re-examination of these cases after the ablest arguments and most severe criticism, the majority of the court does not see that the principles there laid down, when properly understood and applied, are wrong. Judges Beard and McAllister do not concur in the rules there laid down.

In the case now on trial there are other features that are equally conclusive of the plaintiff's right to recover. There is evidence in the record tending to show that the defendant actually knew the dangerous condition of the porch when the lease was made; also, that he had his attention called to such dangerous condition after the lease was made, and promised and undertook to make it safe, and sent a carpenter to make the necessary repairs, and that after they were made the tenants were assured the premises were safe. It is true, there is some conflict on both these points as to what repairs were promised, and what were made; but there is evidence from which the jury would be warranted in holding as they did, and in concluding that the undertaking and effort of the landlord were not merely to shut out the snow and rain, by tacking a little tin over the opening, but to make the porch safe and secure; and the evidence is quite clear that any ordinary carpenter or workman, in attempting to make any repairs, could not but see the dangerous conditions existing. Upon this point, see the cases of *Wertheimer v. Saunders*, 95 Wis. 573, 37 L. R. A. 146; *Martin v. Richards*, 155 Mass. 386, and cases there cited.

We are of opinion that there was evidence to warrant the jury in believing that the premises in this case were in dangerous condition when they were let; that while the defect was, to some extent, patent, the danger was not so apparent that the plaintiff, in the exercise of ordinary care and diligence, could have known of it; that there was an obligation upon the landlord to make such examination of the premises as a reasonably prudent man would do, in order to ascertain their condition, and especially under the circumstances of this case; that there is no evidence of any attention or care or diligence on the part of the landlord whatever, his theory being that he was under no obligation to exercise any; that the attention of the landlord and his agent was called to the condition of the porch both before and after the lease, and the defect was of such character as would have led a reasonably prudent man to have seen the danger when he attempted to repair it, and that it was negligence not to make it safe after undertaking to work on it; and

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that there is liability on the part of the landlord to the tenant, arising out of these facts and conditions, for which he is liable.

And the judgment of the court below is affirmed, with costs.

STATE of Tennessee, *ex rel. Grace BETH-ELL*, *Pfiff in Err.*,

v.

W. C. KILVINGTON.

(.....Tenn.....)

1. The power conferred upon county judges by Acts 1891, chap. 195, to cause children to be brought before them and commit them to the industrial school at Nashville if they come within any of the descriptions therein set out, contemplates a proceeding in open court, and a proper investigation upon which to base a committal, and an arbitrary committal by the county judge upon his personal knowledge of the facts without such a proceeding is irregular.
2. The court will not on habeas corpus proceedings instituted by a parent to test the detention of a child in a public institution inquire into the regularity, legality, or sufficiency of the proceedings before the judge or magistrate which resulted in the committal, where the detention is manifestly for the welfare of the child.
3. The provision of Acts 1891, chap. 195, § 6, that no child under eight shall be committed to the industrial school at Nashville, was made to protect the institution, and it cannot be enforced for the purpose of releasing from the institution and restoring to improper hands a child whose welfare would not be subserved by such release, and whose age is uncertain under the proof.

(January 17, 1898.)

ERROR to the Circuit Court for Davidson County to review an order dismissing a petition for a writ of habeas corpus to procure the release of Lyndall Williams from the Tennessee Industrial School. *Affirmed.*

The facts are stated in the opinion.

Messrs. Merritt & Brien and *J. W. Moore* for plaintiff in error.

Messrs. E. A. Price, Champion, Head, & Brown, and *J. A. Ryan* for defendant in error.

Wilkes, J., delivered the opinion of the court:

This is a habeas corpus proceeding to test the detention in the Tennessee Industrial School at Nashville, Tennessee, of Lyndall Williams, a female about seven years of age at the time she was placed in said institution. The relator in the case is the mother of Lyndall Williams, and claims the right to recover the child, and its custody by virtue of the parental relation to her. It appears that her father is dead. The defendant Tennessee Industrial School was originally founded by the benefaction of E. W. Cole, one of the most public-spirited and charitable men Tennessee has ever produced. After its foundation it was taken.

NOTE.—As to the state guardianship of children, see note to *Whalen v. Olmstead* (Conn.) 15 L. R. A. 593.

in charge by the state, and is now being operated as a state institution under a board of directors consisting of the governor and other state officials of the executive department, and a number of gentlemen of the highest character and standing, residing in different portions of the state. The defendant W. C. Kilvington is the superintendent, and has immediate charge of the institution. The state contributes liberally to its support, year after year, and reports of the operations are made to the general assembly at its stated sessions, and that body exercises a supervisory jurisdiction over it. There have been committed to the care of the institution since its opening 1,408 persons, boys and girls, white and black. Of this number 821 have been discharged, and 647 are now in the institution. They are instructed in the trades as well as in the common branches of education. It is not a penal, nor altogether a reformatory, institution, but is rather a place of refuge and school for homeless, penniless children, where they may be received and cared for, taught the different grades of a common-school education, and trained in useful trades and branches of industry. The objects and purposes of the institution are best illustrated by the provisions of the acts of the general assembly, the latest being Acts 1891, chap. 195; Shannon's Code, §§ 4418-4433. The act is entitled and provides as follows, among other things:

"An Act for the Benefit and Protection of Orphan, Helpless, Wayward, and Abandoned Children.

"Sec. 1. Be it enacted by the general assembly of the state of Tennessee, that any judge or chairman of a county court in this state may cause to be brought before the court any child between the age of eight and eighteen years that comes within any of the following descriptions, to wit: (1) That is begging to receive alms, whether openly or under pretense of selling or offering for sale anything; but not when the selling is bona fide and not a pretense or cover for begging or receiving alms. (2) That is found wandering, and not having any home or settled place of abode. (3) That has no proper or sufficient guardianship to care for its physical, moral, and mental welfare, to at least such a degree as will probably save the child from pauperism, lewdness, and crime. (4) That is found destitute, either being an orphan, or having a parent or parents undergoing imprisonment or confined in a lunatic asylum, or where both parents are habitual drunkards, or where the only living parent is an habitual drunkard, and any child of such parent is not properly supported and controlled. (5) That frequents the company of lewd, wanton, or lascivious persons in speech or behavior, or notorious resorts of bad character. (6) That is found wandering in streets, alleys, or public places, with no means of support. (7) That has been abandoned in any way by parent or parents, or guardian, and has no means of support, and with idle habits; and if it shall appear to the satisfaction of the said county court that it would be manifestly for the interest of said child that it be committed to the Tennessee Industrial School, the court will so order and send the child to said school, to be

held by it under the charter and by-laws of said school.

"Sec. 2. Be it further enacted, that said industrial school may receive any child placed in its care and keeping by its parent or parents without the authority of any court; and said school may keep and care for said child until it is twenty-one years of age, unless sooner taken away by the request of its parent or parents, and released under the authority and by-laws of said school.

"Sec. 3. Be it further enacted, that the parent or parents may, and guardians other than parents must, invoke the authority of the county court when they desire to commit any child to said school, on the ground that said parent or parents, or guardians, or those having the child in charge are unable to control the child; and this is hereby made a ground for committing a child to said school, provided, it appear to the satisfaction of the court or officer before whom said child is brought for commitment that the commitment would probably be for the child's interest and welfare. But said industrial school shall not receive any child under this or the preceding section until its parent or parents, or guardians or persons having the child in charge, shall satisfactorily agree with the officers of said school to supply sufficient funds for the maintenance of the child therein during its stay, and shall further agree to abide by all the rules, by-laws, and requirements of said industrial school.

"Sec. 4. Be it further enacted, that no child shall be committed to said school or received or retained therein on any ground other than the one single ground that the interest and welfare of the child will be thereby probably promoted.

"Sec. 5. Be it further enacted, that from the time of the lawful reception of any child into the school, and during its stay, the school shall have exclusive care, custody, and control of said child until it shall be discharged therefrom.

"Sec. 6. Be it further enacted, that no child under eight or over sixteen years of age, in case of females, and under eight and over eighteen in case of males, shall be committed to said school.

"Sec. 7. Be it further enacted, that whenever any child shall be committed to said school as aforesaid, the effect of that commitment shall be to commit the child until he or she is twenty-one years of age, unless sooner discharged by the officers of said school pursuant to its by-laws, who shall have authority to sooner discharge any child from the school, whenever, in their judgment, it shall be for the interest of the child to do so.

"Sec. 8. Be it further enacted, that the officers and managers of said school shall receive and take into it all children committed thereto by competent authority as aforesaid, and shall cause all children in such school to be instructed in such branches of useful knowledge as may be suited to their years and capacities, and shall cause the girls to be especially taught domestic vocations, such as sewing, mending, knitting, and housekeeping in all its departments. The boys shall be taught such useful trades as the board may direct, and all chil-

dren in said school shall be taught according to the course of the common public schools in this state.

"Sec. 9. Be it further enacted, that any commitment under the provision of this act shall be full, sufficient, and competent authority to the officers and agents of said school for the detention and keeping of any child therein."

Hon. Jno. C. Ferris, judge of the county court of Davidson county, caused this child to be taken from the custody of her grandmother, and committed her to the institution, under the following paper:

Office of Judge of the County Court, Davidson Co.

Nashville, Tenn., July 26, 1897.

Mr. W. C. Kilvington, Supt. Tennessee Industrial School.

Dear Sir: Please receive Lyndall Williams within the school, as the law directs. The charges against her are these: . . . Jao. C. Ferris, County Judge.

It is admitted by the defendant that the committal was informal, and summary, and without the issuance of any warrant or any formal investigation. The county judge, who was examined as a witness, states that he based his action principally upon facts known to himself and upon information derived from others. Clearly, the act of the legislature contemplates a proceeding in open court, and a proper investigation upon which to base any committal, and the action of the county judge in this case, though shown by the records to have been prompted by the best of motives, was irregular and not according to law. A child cannot arbitrarily be taken from its parents, or custodians selected by its parents; and, if proper application had been made for the release of the child before she reached the institution, it would have been granted. Here we have a case, however, where a child of tender years is an inmate of a state institution having for its purpose the charitable ends set forth in the act regulating it, and sought to be taken therefrom by its mother. It is held in *People, Roidy, v. New York Juvenile Asylum*, 12 Abb. Pr. 92, that when a child has been committed to a public institution as prescribed by statute, the court will not, on proceedings by habeas corpus, instituted by the parent to recover the child, inquire into the regularity, legality, or sufficiency of the proceedings before the magistrate which resulted in such committal. *Church, Habeas Corpus*, § 442. The writ of habeas corpus is intended to procure and preserve the personal liberty of the citizen, and not to enforce a parent's right to property either in the person or services of the child. *Lea v. White*, 4 Sneed, 73, 67 Am. Dec. 599. The court will not, in such cases, be controlled alone by the wishes of the child, nor by the ties of the parental relation, but will hold the welfare of the child superior to both the wishes of the child and the affections of such parents as cannot show themselves qualified to properly care for, educate, and train them. *State, Paine, v. Paine*, 4 Humph. 528; *Church Habeas Corpus*, §§ 441 41 L. R. A.

et seq.; *Ward v. Roper*, 7 Humph. 111. Due regard must in every instance be paid to the rights of parents and of the child, but this rule must be enforced and construed when the child is brought into court in the interest and for the benefit of the child; and when the detention is manifestly for the welfare of the child it will be allowed and required to remain in the institution. *Ballenger v. McLain*, 54 Ga. 159; *People, Van Heck, v. New York Catholic Protectory*, 38 Hun. 127; *Com. Barnes, v. St. John's Orphan Asylum*, 9 Phila. 579; *Farnham v. Pierce*, 141 Mass. 203, 55 Am. Rep. 452; *Re Ferrier*, 103 Ill. 367, 42 Am. Rep. 10; *Milwaukee Industrial School v. Milwaukee County Supers.* 40 Wis. 828, 23 Am. Rep. 703; *Ex parte Crouse*, 4 Whart. 9.

In these cases it is said, in substance, such statutes are not penal, and the commitment is not in the nature of punishment. Such an institution is a house of refuge; a school, not a prison. The object is the upbuilding of the inmate by industrial training, by education, and instilling principles of morality and religion, and above all by separating them from the corrupting influences of improper associates. In this case it clearly appears that the mother and grandmother of this girl are both of ill repute, that they are now living in disreputable localities, and the girl, if restored to them, or either of them, will be subjected to and surrounded by evil associates, and corrupting influences. Ordinarily, the parent is entitled to the custody, companionship, and care of the child, and should not be deprived thereof except by due process of law. It is a natural right but not an inalienable one. The parents are trusted with the custody of the child upon the idea that under the instincts of parental devotion it is best for the child. But when it clearly appears that it is not for the welfare of the state or the child that it should be taken from such an institution, the court will not so direct, but will leave the child where its safety, purity, and well-being require; and this without regard to the informalities of its commitment, the court, for the time being, acting as its custodian. The right of the parent is sufficiently guarded by permitting the parent on habeas corpus proceedings to inquire into the propriety or necessity of the detention, and to have the custody restored upon a proper showing that he or she is competent, and a proper person, to have charge of the child. In such case the custody of the child will not be denied them. It is said that under § 6 of the act regulating the school no child under eight years of age shall be committed to it, and it is insisted for this reason that the child must be discharged. The original act of 1885 fixed the limit at six years, and not eight, as fixed by the act of 1891. In both acts we think the limitation was provided to protect the institution, and we cannot enforce it so as to release from the institution, and restore to improper hands, a child whose welfare would not be subserved by such release, and whose age is, to say the least, uncertain under the proof. The court below, after hearing the proof, refused to deliver up the child to the custody of its mother or grandmother, and remanded her to the institution with liberty to the mother to

visit her on Wednesday of each week, and under the record as we find it we think this was proper, and we affirm the order and judgment of

the court below, dismissing the petition at petitioner's cost.

WISCONSIN SUPREME COURT.

Frank SCHAEFER

v.

City of FOND DU LAC.

(.....Wis.....)

The street-railway company in the defendant city so constructed and maintained its railway track on one of the streets of such city as to render such street defective and dangerous for public travel. While such condition existed Ellhu Colman, with knowledge of the facts, purchased the railway track and left the same in possession of the railway company under an option to purchase the property, but without any agreement binding the railway company to remedy the defective condition of the street. While such condition of things existed, the plaintiff lawfully traveling on such street at the point of danger, without fault on his part, was injured by reason of such condition. Plaintiff thereafter gave due notice of his injury to the defendant city, and thereafter prosecuted an action against the railway company to judgment, for his damages. The company, pending the suit, notified the defendant herein of the action, in order that it might defend the same. After exhausting all legal remedies against such company, plaintiff sued the defendant city, setting up the proceedings in the first suit and the fact of failure to collect the damages from the railway company after exhausting all legal remedies to that end. In the second suit it was claimed that the defendant city was bound by the judgment in the first suit, as to the defective condition of the street, the happening of the accident, and the amount of damages. Defendant pleaded and insisted, among other things, that Ellhu Colman was primarily liable for the damages, and that the exhaustion of all legal remedies against him was a condition precedent to the right of plaintiff to proceed against the defendant city. Plaintiff recovered judgment, but for a less sum than in the first suit, the court holding that Colman was not primarily liable and that defendant was not bound by the former proceedings. On appeals by both parties.—*Held:*

(a) **That Colman, and the railway company as well, were primarily liable to plaintiff,** and that the exhaustion of all legal remedies as to both was a condition precedent to the right of plaintiff to proceed against the city under the charter thereof, which provides that in such cases the city shall not be liable till all legal remedies shall have been exhausted to collect the damages from the person or corporation whose wrong or neglect produced or caused the defective condition of the street.

(b) **That the right to recover of the city is a creature of the statute,** hence the legislature may grant the right, take it away,

*Headnotes by MARSHALL, J.

NOTE.—As to liability of landlord to third persons for the condition of premises in possession of a tenant, see *note* to *Lee v. McLaughlin* (Me.) 26 L. R. A. 197.

4: L. R. A.

or make the exercise of it contingent upon the performance of such conditions as in its wisdom may be deemed best, and without any warrant for holding that the law in that regard is unreasonable. Such legislation being in derogation of the common law, should be construed most favorably to the public corporation, and not the claimant for damages.

(c) **If property, when in such defective condition as to be dangerous to persons lawfully in the vicinity thereof, be purchased by a person with knowledge of the facts, who leases it to another, especially if the lease does not contain a clause requiring the lessee to remedy the defects, and a person so lawfully in the vicinity of such danger, but having no connection whatever with such lessee, be injured thereby, such lessor is liable to such injured party; he cannot escape liability from the mere fact of the lease to, or possession by, such other person.**

(d) **The doctrine that where a person against whom suit is brought to recover damages is entitled to indemnity from another, in case of being compelled to pay such damages, such other is bound by the judgment against such person if he be notified of the pendency of the suit and has an opportunity to defend against the same, does not apply to the facts of this case.** The judgment against the indemnitee in such a case is binding on the indemnitor, but if the latter be first sued the judgment in a subsequent suit by the same plaintiff against the indemnitee will not affect the plaintiff as to any question litigated in such first suit.

(April 12, 1898.)

CROSS-APPEALS from a judgment of the Circuit Court for Fond du Lac County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by a defective street; the defendant appealing from so much of the judgment as held it liable for any damages, and plaintiff appealing from so much as refused to allow the amount of its claim. *Reversed on defendant's appeal.*

Statement by Marshall, J.:

Action to recover compensation for personal injuries alleged to have been caused by a defective street in the city of Fond du Lac. The date of the injury was June 25, 1895. The defective character of the street grew out of the manner in which the street-car track was originally constructed, and was maintained, in the street in question. The Fond du Lac Light, Power, & Railway Company constructed the track, owned it till the 28th day of December, 1895, and operated the railway up to and inclusive of the time of the injury. Suit was first brought against the company, and such proceedings were had therein that all the facts requisite to a recovery were found in the plaintiff's favor. The damages were assessed at \$2,063.21. Judgment was entered

accordingly, on which execution was duly issued and returned unsatisfied. After the action was brought against the railway company, it notified the city of Fond du Lac of the pendency of the action in order that the city might defend the same. After the return of the execution aforesaid, this suit was commenced. The complaint contained appropriate allegations to make a cause of action, including appropriate allegations to show that plaintiff had exhausted his legal remedy against the railway company, which was claimed to be the person primarily liable for the injury. The amount recovered in the first case was duly set forth in the complaint. The defendant answered, taking issue on the allegations in regard to the sufficiency of the street, the cause of the injury, and the amount of the damages. It also contained allegations to the effect that Elihu Colman was the owner of the road at the time of the accident, and a person primarily liable for the injury, and that no effort had been made to collect of him. On the trial there was evidence tending to prove the allegations of the complaint in respect to the defective condition of the street, the injury, the damages, the action against the street-railway company as the party primarily liable, and the amount recovered on such action. Proof was made also of the other allegations of the complaint, requisite to entitle plaintiff, prima facie, to recover. The evidence showed that plaintiff was endeavoring to drive his team across the track, he standing on a high load of lumber; that he had a stake in a fixed position, where he could take hold of it to steady himself; that when his wagon struck the defects in the street he was suddenly jerked and compelled to take hold of the stake, which broke, and he was precipitated to the ground, causing the injuries complained of. The evidence tended to show that the defective condition of the street existed on the 28th day of December, 1894, and continuously thereafter up to the time of the accident; that on the day named the street-railway track, as it lay in the street, and the road-bed, and some other property of the company, was duly conveyed by sheriff's deed to Elihu Colman, but that there was a verbal understanding between him and the street-railway company that it was to have the property back upon complying with certain conditions of purchase; that it continued to operate the road after the sale to Colman, till after the happening of the injury to plaintiff, under an option to purchase the property; that the option was never accepted, and that Colman finally took up the track. On the evidence the defendant moved the court for a verdict in its favor, which was denied, and the ruling duly excepted to. A special verdict was thereupon ordered on defendant's motion. The jury found that June 25, 1895, at the time the plaintiff was injured, Main street, where the injury occurred, was in an unsafe condition for travel; that plaintiff was thrown from his wagon and injured in consequence of such defective condition of the street; that the city had notice of such defective condition of the street for a sufficient length of time, by the exercise of reasonable care and diligence, to have discovered and remedied the defects; that the

plaintiff was free from contributory negligence; that he was damaged to the extent of \$800; that notice of the injury was given to the proper officers of the defendant as required by law. The jury also found, by order of the court, that the defective condition of the street was not caused by, nor did it arise from, any wrong, default, or negligence of Elihu Colman. Defendant's counsel moved the court to set the verdict aside and grant a new trial, which was denied. Plaintiff moved the court for judgment for the amount due upon the judgment in the first action, which was denied. Judgment was thereupon perfected for \$800 and costs. Both parties appealed.

Messrs. Edward W. Phelps and Maurice McKenna, for plaintiff:

Respondent was guilty of such contributory negligence as to defeat his action.

Parish v. Eden, 62 Wis. 272.

Where the negligence is clearly defined and palpable, such that no verdict of a jury could make it otherwise, it should be decided by the judge as a question of law.

2 Thomp. Neg. § 1674; *Rudolph v. Fuchs*, 44 How. Pr. 155; *Houff v. Fulton*, 29 Wis. 296, 9 Am. Rep. 568; *Fernandes v. Sacramento City R. Co.* 52 Cal. 45.

Cases where the question of negligence could be withdrawn from the jury are comparatively rare.

Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99; *Rudolph v. Fuchs*, 44 How. Pr. 155; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745.

But the courts have, therefore, developed a stronger tendency, in recent times, toward withdrawing such questions from juries.

The conduct of plaintiff seems to be analogous to the case where a person had knowledge of a defect in a sidewalk, and there was another walk which might have been taken with safety. In such cases it has been held there could be recovery.

Parkhill v. Brighton, 61 Iowa, 108.

Plaintiff's right to recover, in any event, is purely a statutory one. At common law, there is no liability for a defective highway on the part of a municipality; such liability exists only by statute.

Stilling v. Thorp, 54 Wis. 528, 41 Am. Rep. 60.

A legislative act making a private owner who is a wrongdoer, primarily liable, is valid.

Hincks v. Milwaukee, 48 Wis. 55; 83 Am. Rep. 735; *Papworth v. Milwaukee*, 64 Wis. 397; *Raymond v. Sheboygan*, 70 Wis. 331; *Hughes v. Fond du Lac*, 73 Wis. 332; *Cooper v. Waterloo*, 88 Wis. 483.

The general principles of law, requiring one party to defend an action brought by another, or be concluded by the judgment, can, in no rational manner, be applied to the defendant city in the case at bar, so as to make it concluded, as to the amount of damages recovered in plaintiff's action against said street-railway company.

Cooper v. Watson, 10 Wend. 205; *Paul v. Witman*, 8 Watts & S. 409; *Turner v. Goodrich*, 26 Vt. 708; *Hinds v. Allen*, 84 Conn. 195; *Chapman v. Holmes*, 10 N. J. L. 24; *N. Louis v. Bissell*, 46 Mo. 157; *Wimberly v. Collier*, 83

Ga. 18; *Boyd v. Whitfield*, 19 Ark. 469; *Wendel v. North*, 24 Wis. 228.

Primary liability is fixed by express statute. In the case at bar, upon the defendant, the Fond du Lac Light, Power, & Railway Company.

Laws 1883 chap. 152, subchap. 18, § 4.

The city is no longer regarded as a mere guarantor of any damages that may be recovered against the principal wrongdoer.

Raymond v. Sheboygan, 76 Wis. 835; *Raymond v. Heseberg*, 91 Wis. 191.

Mr. Edward S. Bragg, for defendant:

Had the action been decided upon the issues made in the pleadings in favor of the defendant railway company, and a judgment entered thereon in favor of such defendant, it could have been used and pleaded as a bar to this action by the plaintiff against the city as secondarily liable.

Hill v. Bain, 15 R. I. 75.

By reason of its enforced liability to protect and care for its streets, particularly against a franchise granted by it to a third party, to use its streets in the construction of a railway, the city ultimately made a guarantor for the payment of all damages which are sustained by reason of any defect in the streets occasioned by the party to whom it has surrendered partial control of the streets.

McFarlane v. Milwaukee, 51 Wis. 691.

Its liability, under such quasi guaranty, is only that it shall have had notice of the accident, as required by law, and notice, either in fact or presumptive, of the existence of the defect, the result of the action of its creature, to whom the franchise was extended.

Venzie v. Penobscot R. Co. 49 Me. 119; *Atkinson v. White*, 60 Me. 398; *Lorjoy v. Murray*, 3 Wall. 19, 18 L. ed. 134; *Chicago v. Robbins*, 2 Black. 422, 17 L. ed. 308; *Robbins v. Chicago City*, 4 Wall. 672-675, 18 L. ed. 430-431.

The original judgment is *res judicata* upon all questions covered by it.

Washington Gaslight Co. v. District of Columbia, 161 U. S. 829, 40 L. ed. 719; *Dill. Mun. Corp.* ¶ 1024; *Boston v. Worthington*, 10 Gray, 496; *Aberdeen v. Blackmar*, 6 Ill. 324; *Port Jervis v. First Nat. Bank*, 96 N. Y. 550; *Littleton v. Richardson*, 84 N. H. 179, 66 Am. Dec. 759; *Bigelow, Estoppel*, pp. 122, 123, 182, 183.

Marshall, J., delivered the opinion of the court:

At the outset, the question of the liability of Elihu Colman is of paramount importance. It stands without question on the record that he was the owner of the street-car track at the time of the injury complained of, and had been such for several months prior thereto; that the defective condition of the street existed when he purchased the property; that he then knew the facts; that the railway company occupied and used the property the same after such purchase as before, but pursuant to an option to buy it back, the particulars of which option were not testified to. The learned circuit judge decided, as a matter of law, on such facts, that Colman was not liable for the injury to plaintiff, because the defects in the street were not caused by, nor did they arise from or were they produced by, him. That reasoning hardly meets the facts of this case fully. It leaves

out the element that Colman continued the defective condition of the street by allowing the railway company to hold under him without any covenant on its part to remedy such condition. With the added element, the decision has some support by some things said in *Fellows v. Gilhuber*, 82 Wis. 689, 17 L. R. A. 577, where the awning in front of an hotel was thrown down, partly through defects existing in one of the supporting posts, whereby a guest at the hotel, standing on the walk, was injured, the hotel being in possession of a lessee, and the defect existing with knowledge of the landlord when the lease was made. It was held that the lessor was not liable, but the decision was put on the ground that there was an agreement in the lease which obligated the lessee to repair. Upon that theory the decision is in accord with much authority in this country and England, but it must be said there is much authority of a very respectable character against it. Whatever is said in the opinion, however, that may be read to support the proposition that the rule that a landlord who leases dangerous premises, knowing, or with means of knowledge, of such dangers, without any covenant to repair on the part of the lessee, is not liable to the tenant or subtenant holding under the first lessee, or any person having business connection with the property, under the tenant, injured by such dangers, applies to cases arising between the landlord and a mere stranger lawfully in the vicinity thereof, and injured thereby, must be considered as *obiter*, and the decision read as applying only to the facts of the particular case.

The law is firmly established by the great weight of authority, that as between the owner of leased property and a mere stranger, the owner is liable for an injury to the latter, caused by a dangerous defect in the property existing at the time of the lease, unless protected by a covenant binding the lessee to remedy such defects; and there is much authority that he is liable anyway, that is, that he cannot shift the liability for known existing dangers onto the lessee by a covenant to repair. But there is no necessity for discussing the conflict in that regard, in this case, for there is nothing in the record to indicate that the railway company was under any obligation to Colman to repair the defects in the street caused by the railway track. So far as appears from the evidence, the company continued in possession of the property, without any agreement other than a mere option to purchase.

Authorities which apply to the facts unfavorably to plaintiff are very numerous, and without substantial conflict. We will cite but a few of them. In *Conhocton Stone Road v. Buffalo, N. Y. & E. R. Co.* 51 N. Y. 578, 10 Am. Rep. 646, defendant demised premises, in a dangerous condition, and was held not liable for want of notice of the defects at the time of the demise, or thereafter, prior to the injury. In *Ahern v. Steele*, 115 N. Y. 208, 5 L. R. A. 449, defendants became the owners of a defective pier, subject to an outstanding lease which contained no covenant to repair. The defects antedated the lease. They were created and existed before the property came to the defendants. The court held that defendants were not liable for the injury caused by such defects,

though solely on the ground of want of notice. To the same effect are *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603, and *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295. In *Albert v. State, Ryan*, 66 Md. 325, 59 Am. Rep. 159, the following instruction given in the trial court was approved, the action being to recover damages sustained by a minor through the death of his parents, caused by a defective wharf occupied by the defendant's tenant: "If . . . [the jury] find that the defendant was the owner of the wharf, and that he rented it out to a tenant, and at the time of the renting the wharf was unsafe, and defendant knew, or by the exercise of reasonable diligence could have known, of its unsafe condition, . . . the plaintiff was entitled to recover." To the same effect are *Knauss v. Brua*, 107 Pa. 85; *Cunningham v. Cambridge Sav. Bank*, 138 Mass. 480; *Dalay v. Savage*, 145 Mass. 38; *Nugent v. Boston, O. & M. R. Co.* 80 Me. 62.

The rule appears to be very firmly established as above indicated, that under circumstances such as mentioned in the foregoing authorities, there being no covenant to repair or remedy defects, on the part of the tenant, the liability of the owner for injuries thereby received turns on knowledge, or reasonable means of knowledge, of the existence of the defects on the part of such owner. Probably no case can be found that more nearly touches this at every point than *Dalay v. Savage*, 145 Mass. 38. There the defendant purchased premises abutting on a public way, having a defective coal hole in the sidewalk appurtenant to the premises, which caused the injury. Defendant had a right to the possession, but instead of asserting it, left the person in possession who was there at the time of the purchase, as a tenant at will, without any agreement to repair the coal hole. It was held that the defendant was liable.

Further citations appear to be unnecessary. The rule on which they proceed is quite elementary, and may be stated thus: If a person purchases premises which are in a defective condition, with knowledge, or reasonable means of knowledge, of the defects, and then leases the same to another, or allows such other to hold possession of such premises under such conditions as to indicate permission to continue the defects, and a third person having no connection with such other, without fault on his part, is injured by reason of such defects while rightfully in the vicinity of the danger, such purchaser is liable to respond in damages to such third person for such injury.

Applying the foregoing to this case, it must be held that Colman, by reason of his ownership of the property and knowledge of its dangerous condition when he purchased it, and up to the time of the injury complained of, was liable to the plaintiff. His allowing the railway company to remain in possession, especially without any agreement on its part to repair the street, did not operate to relieve him from responsibility. As said in *Dalay v. Savage*, 145 Mass. 38, that the railway company was also liable, is no defense for Colman, who held the title and was the actual owner of the property.

There is nothing in the foregoing inconsistent with what was decided in *Fellows v. Gilhuber*, 82 Wis. 689, 17 L. R. A. 577, or *Dowling v. Nuebling*, 97 Wis. 850. In the latter case 41 L. R. A.

the contest was between the landlord and his tenant.

What has preceded leads to a consideration of whether Colman was a party "primarily liable" within the meaning of the charter of the defendant city, which provides that, "in case of injury or damage by reason of insufficient, defective, or dangerous conditions of streets, not included in sidewalks, produced or caused by the wrong, neglect of duty, default, or negligence of any person or corporation, such person or corporation shall be primarily liable for damages for such injury in a suit for the recovery thereof by the person sustaining such damages, and the city shall not be liable therefor until all legal remedies shall have been exhausted to collect such damages from such person or corporation." The words "primarily liable" have a very definite and certain meaning. The section in which they are used does not create the liability, nor is there any statute liability on the subject. *Toutloff v. Green Bay*, 91 Wis. 490; *Cooper v. Waterloo*, 88 Wis. 433. They refer to the common-law liability that exists against the wrongdoer and renders him liable to the injured person, and over to the city in case of a recovery against it on the statutory liability, hence the words obviously include all persons liable at common law for the wrong. They would include persons made liable by statute as well, if any such existed. It is argued that such construction of the statute throws much embarrassment in the way of recovering from municipal corporations in such cases as this, because it requires great caution in order to bring into the first controversy all persons liable for the injury, other than the city, who are so circumstanced as to be liable to indemnify it. That is hardly a sufficient reason for adopting a different construction, even if the language were of doubtful meaning. There is no liability on the part of the municipal corporation at all, independent of the statute. The law creating the right being in derogation of the common law, is to be strictly construed in favor of the public corporation, not in favor of the claimant for damages. The section under consideration, while it regulates the remedy, bears on the right as well, hence comes within the rule stated. Taken in connection with the statute creating the municipal liability, it makes that contingent on a previous exhaustion of all legal remedies against the persons or corporations whose wrong, neglect of duty, default, or negligence, produced or caused the defective condition of the street. It is wholly in the power of the legislature to give the right or take it away, or make it contingent on the performance of such conditions precedent, as in the wisdom of legislative power seems best, and without any ground for contending that the legislation in that regard is unreasonable.

It follows from the preceding, on the undisputed evidence in the case, that plaintiff ought not to have recovered, because of failure to prove performance of the condition precedent, requiring plaintiff to exhaust all legal remedies against the persons primarily liable, before proceeding against the city. That condition was properly pleaded and insisted upon at the trial.

It is contended that the verdict was contrary

to the evidence on the subject of contributory negligence. Any discussion of that appears to be unnecessary. Suffice it to say, however, that a consideration of the evidence preserved in the record, leads to the conclusion that the question was properly submitted to the jury.

It is further contended on plaintiff's appeal, that the court erred in not limiting the defendant, in making its defense, on the theory that the recovery against the railway company was conclusive on the city as to the injury, the cause of it, the amount of damages, and notice to the city. That was pressed on the attention of this court with much earnestness and learning by the eminent counsel who argued the plaintiff's side of the case, and many authorities were cited in support of the position, all of which have been carefully considered, and none of which, in our judgment, fit the facts before us. The doctrine that where a person is responsible over to another who is sued, either by operation of law or express contract, and such person is duly notified of the pendency of the suit and requested to take upon himself the defense of it, the judgment is conclusive against him whether he appears or not, is quite familiar. That is the doctrine which the learned counsel invoked to sustain his contention that the judgment against the railway company is binding on the defendant city. In *Boston v. Worthington*, 10 Gray, 496, recovery was first had of the plaintiff by the injured party; then such party sued the defendants for indemnity, they having created the danger which caused the injury. They were given notice and opportunity to defend in the first case, but declined to do so. The court held that they were bound by the judgment in such first case. In *Littleton v. Richardson*, 34 N. H. 179. 66 Am. Dec. 759, plaintiff town was sued by a person who was injured by obstructions placed in the highway

by another. Such other had an opportunity to defend. Recovery was had of the city, whereupon it sued such other for indemnity for the loss. There was the same situation in *Port Jervis v. First Nat. Bank*, 96 N. Y. 550; *Lowell v. Boston & L. R. Corp.* 23 Pick. 24, 84 Am. Dec. 33; *Robbins v. Chicago City*, 4 Wall. 657, 18 L. ed. 427, and several other cases cited by counsel, and many more that might be added, in all of which it was held that the judgment in the first case was conclusive against the defendant in the second. It is clear that to make the doctrine under discussion apply, the person first sued must have a right of action over against another for indemnity in case of loss. The conclusive character of the first judgment is only where the person first sued himself becomes a plaintiff against the indemnitor, to recover over for the loss sustained by being compelled to pay in the first case. Here we are asked to apply it, not in favor of the indemnitee who has paid the loss, against the indemnitor, but against the indemnitee in favor of a person who had a right of action against both the indemnitor and the indemnitee. No precedent for that, we may safely venture to say, can be found in the books. Certainly, none was cited by counsel.

The result of the foregoing is that the trial court rightly held that the defendant was not concluded on any question in respect to its liability, by the judgment in the action against the railway company, and erred in deciding that Colman was not a party primarily liable within the meaning of the city charter. Therefore both appeals must be decided in favor of the defendant, and the judgment reversed accordingly and the cause remanded for a new trial.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

OHIO SUPREME COURT.

John W. MASON, *Plff. in Err.*,

v.

STATE of Ohio, *ex rel.*, C. F. McCOY.

(58 Ohio St. 30.)

*1. The provisions of the act of April 8, 1896, entitled "An Act to Prevent Corrupt Practices at Elections" (22 Ohio Laws, 123), which direct the commencement of an action by the prosecuting attorney, at the instance of the attorney general, for the purpose of inquiring into the title to an office of a successful candidate who is charged with acts made unlawful by any law of this state, and which authorize the court, upon finding any of such charges true, to render

judgment declaring the election void, the office vacant, and excluding the incumbent therefrom, are not in conflict with the Constitution, and are valid.

2. In such action neither party has a right to trial by jury.

(March 1, 1898.)

ERROR to the Circuit Court for Adams County to review a judgment ousting defendant from the office of probate judge for alleged violation of the corrupt practices act. *Affirmed.*

Statement by Spear, Ch. J.:

The action below was in quo warranto, brought in the circuit court by C. F. McCoy, prosecuting attorney of Adams county, at the

NOTE.—The above case seems to be the first decision from a court of last resort in this country on what are called corrupt practices acts. In con- 41 L. R. A.

nection herewith, see the later decision of State, Crow, v. Bland (Mo.) post, 297.

instance of the attorney general of the state, against the plaintiff in error, John W. Mason, for the purpose of inquiring into his title to the office of probate judge of that county, upon divers charges respecting his conduct in procuring an election to said office. A number of the charges were stricken out on motion of defendant. A demurrer to the petition was heard, and overruled. An answer was filed. The cause being ready for trial, a jury was demanded by defendant, which was refused. The cause then proceeded to trial to the court. The court thereupon found as follows: "(1) The court finds that the defendant, John W. Mason, was elected to the office of probate judge for Adams county, Ohio, at the general election held in the said county on the 3d day of November, 1896, and duly commissioned, and is now in possession of said office, exercising the duties and functions pertaining thereto, and is receiving the fees and emoluments connected therewith and belonging thereto. (2) That the relator was duly and legally instructed and required by the attorney general of the state of Ohio in accordance with the provisions of § 8 of an act entitled 'An Act to Prevent Corrupt Practices at Elections,' passed April 8, 1896 (92 Ohio Laws, 123), to institute said action, and that within ten days after the receipt of said instructions the relator brought said action in accordance with the provisions of said act. (3) That the eleventh, thirteenth, and fifteenth charges preferred against said Mason in said petition are true, and that the other charges against said Mason preferred in said petition are not true. (4) That the defendant, John W. Mason, on the 9th day of February, 1897, did intrude into and usurp, and does still usurp, the said office of probate judge of said county of Adams. And as conclusions of law from said findings of facts the court does hold that the election of the defendant to said office of probate judge of said county is void, and that he should be ousted and excluded therefrom."

The charges found to be true are as follows: "(11) That while said Mason was a candidate, as aforesaid, for said office, he, the said Mason, promised one H. W. Scott, he being then an elector in said county of Adams, that if he, the said Scott, would vote for said Mason for probate judge at said election, and use his influence with one Wm Jones to induce said Jones to vote for said Mason, he, the said Mason, would appoint said Scott one of the examiners of the treasury of said Adams county, and that such appointment would be worth \$5 per day for several days to said Scott. (12) That while said Mason was a candidate, as aforesaid, for said office, he, the said Mason, promised one Robert L. Wilson, through the medium and agency of one Tabitha Lawler, a sister of said Wilson, that if he, the said Wilson, would vote for said Mason for probate judge at said election, he, the said Mason, would appoint said Wilson one of the examiners of the county treasury of said county of Adams. (13) That while said Mason was a candidate, as aforesaid, for said office, he, the said Mason, promised one A. C. Easter, a qualified elector in said county, that if he, the said Easter, would vote for said Mason for probate judge at said election, he the said Mason, would secure for said

Easter a seat in the jury of said court, which would be worth \$25 to \$30 to said Easter. (15) That while said Mason was a candidate, as aforesaid, for said office, he the said Mason, promised one John Troutman, a legal elector in said county, that if he, the said Troutman, would use his influence, and cause others to vote for said Mason for probate judge of said county at said election, he, the said Mason, would cause said Troutman to be placed on the juries in said probate court, which would be worth from \$15 to \$20 to said Troutman for each winter for three years. And said Mason further promised said Troutman that if he, said Troutman, would vote and work for said Mason for said office at said election, he, the said Mason, would allow said Troutman to rent said Mason's farm."

The court thereupon proceeded to render judgment as follows: "It is thereupon ordered, adjudged, and decreed by the court that the election of the defendant on the 3d day of November, 1896, to said office of probate judge for Adams county, Ohio, be, and the same is hereby, declared null and void, and that the defendant, John W. Mason, be, and he is hereby, ousted and entirely excluded from exercising and holding said office, and said office of probate judge of said county, is hereby declared vacant; and that the relator recover from the defendant his costs herein expended, taxed at \$—, save and except the costs of witnesses subpoenaed for the exclusive purpose of proving the specifications which were stricken out by the court on motion of defendant, and which said costs should be, and hereby are, adjudged against the relator taxed at \$—." To all of which the defendant excepted, and, his motion for a new trial being overruled, he brings the case here, asking a reversal.

Messrs. F. D. Bayless, A. Z. Blair, W. C. Coryell, and Bowman & Bowman, for plaintiff in error:

All legislative power in this state is vested in the general assembly by the Constitution, and any prohibition upon that power must either be found in express terms or be clearly inferable by necessary implication from the language of the instrument when fairly construed according to its manifest spirit and meaning.

Lehman v. McBride, 15 Ohio St. 573.

The power to exclude from office by legislative enactment is clearly defined by the Constitution, and from the carefully guarded grant of such power, such grant expresses the limit of that power.

The Constitution provides that the general assembly shall have power to exclude from the privilege of voting or of being eligible to office, any person convicted of bribery, perjury, or other infamous crime.

Art. 5, § 4. See also art. 2, § 5.

No clearer case for the application of the maxim *Expressio unius est exclusio alterius* can be conceived of.

Kent v. Mahaffy, 2 Ohio St. 498.

What the legislature cannot do directly, it cannot do by indirection.

Monroe v. Collins, 17 Ohio St. 686.

When the Constitution defines the circumstances under which a right may be exercised

or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases.

Cooley, Const. Lim. 4th ed. p. 78.

The act is in violation of §§ 1 and 2 of the Bill of Rights, and within the scope of the principle established in *Palmer v. Tingle*, 55 Ohio St. 428.

The framers of our Constitution conferred the elective franchise upon certain male citizens.

Art. 5, § 1.

By this provision, the Constitution guarantees to every such citizen, not only the right to cast his ballot at any and all elections, but guarantees that when his ballot is so cast it shall be counted, and that the result declared by such ballot shall stand, unless set aside in conformity to other provisions of the Constitution. If the legislature has no right, directly or indirectly, to deny or abridge the constitutional right of a citizen to vote or unnecessarily to impede its exercise (*Monroe v. Collins*, 17 Ohio St. 665, and *State v. Constantine*, 42 Ohio St. 487, 51 Am. Rep. 838), how can it be claimed, then, that the legislature has the right to, either directly or indirectly, deny or abridge the force and effect of his ballot when cast, or render the effect of the ballot void?

The demand of the defendant, Mason, for a trial by jury ought to have been granted.

The right of trial by jury shall be inviolate. Ohio Const. art. 1, § 5.

This provision of the Constitution guarantees the right of a trial, on issues purely of fact, arising in proceedings by information in the nature of quo warranto, as fully as it does in any other proceeding.

Buckman v. State, *Spencer*, 34 Fla. 48, 24 L. R. A. 806; *Van Dorn v. State*, *Clurke*, 34 Fla. 62; *Com., Atty. Gen., v. Walter*, 83 Pa. 105, 24 Am. Rep. 154; *People, White, v. Doesburg*, 16 Mich. 188.

Mears. Keifer & Keifer, for defendant in error:

The act is not inimical to any provision of the Constitution, and it certainly is not opposed to good morals or public policy.

In New York, where the Constitution (art. 2, § 1) guarantees the right to vote for all elective officers, and where the Constitution authorizes no limitation on this right, save by the exclusion of persons convicted of bribery, larceny, or any infamous crime (art. 2, § 2), it is held that the votes of electors for a person who already holds an office are void, and that said candidate "is made ineligible to an election or appointment thereto."

People, Furman, v. Clute, 50 N. Y. 451, 10 Am. Rep. 508.

Eligibility to hold office is not a constitutionally guaranteed right, such as the right of a person accused of crime to be tried by jury, etc.

Barker v. People, 3 Cow. 686, 15 Am. Dec. 322; *Dent v. West Virginia*, 129 U. S. 114, 121, 124, 32 L. ed. 623, 625, 626.

And this applies to an office created by the Constitution of a state.

People, Smith, v. Fisher, 24 Wend. 215; *People, Henderson, v. Snedeker*, 14 N. Y. 52; *Ex parte M'Collum*, 1 Cow. 550.

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The commission of any of the offenses *ipso facto* disqualifies the candidate from being elected, or annihilates his status as a candidate.

Galway County Election Petition, 2 Moak, Eng. Rep. 711; 1 Russell, Crimes, p. 450.

Bribery at elections was a crime at common law.

Rez v. Pitt, 8 Burr. 1835; 1 Russell, Crimes, p. 155; Cushing, Law & Practice of Legislative Assemblies, § 189.

The right of a legislative assembly, in those states where a conviction is necessary to disqualify, to set aside an election for bribery, where the majority is not thereby affected, before a conviction at law has taken place, seems to be clear.

Cushing, Law & Practice of Legislative Assemblies, ¶ 192, p. 71.

A failure of a man to perform or do what the law requires forfeits the office for which he is a candidate.

Cawley v. People, Woodford County, 95 Ill. 249.

Primary elections and nominating conventions are a part of the political election system of this country.

Leonard v. Com., Cassidy, 112 Pa. 625.

The election of all officers "shall be made in such manner as may be directed by law." Ohio Const. art. 2, § 27.

Under this section the general assembly "may direct by law the manner in which any officer . . . shall be elected."

State, Atty. Gen., v. Covington, 29 Ohio St. 102.

The Constitution provides that "no person shall be elected or appointed to any office in this state unless he possess the qualifications of an elector."

Article 15, § 4.

This "does not, by implication, forbid the legislature to require other reasonable qualifications for office."

State, Atty. Gen. v. Covington, 29 Ohio St. 102, 118.

The votes cast for a candidate who is disqualified from taking the office are void as to him.

Galway County Election Petition, 2 Moak, Eng. Rep. 711; *People, Furman, v. Clute*, 50 N. Y. 451, 10 Am. Rep. 508; Cushing, Election Cases, p. 576.

It is common to prohibit one person from holding two offices at the same time.

Rev. Stat. §§ 18, 1020, 1164, 1268; *State, Southan, v. Taylor*, 12 Ohio St. 130.

This works a disqualification and prevents a candidate while holding one office from being elected to another.

People, Furman, v. Clute, 50 N. Y. 451, 10 Am. Rep. 508.

The most of the offices of this state are created and filled by law, and, like municipal offices, are created and abolished at the will of the general assembly.

State, Atty. Gen., v. Hawkins, 44 Ohio St. 110; *State v. Constantine*, 42 Ohio St. 487, 51 Am. Rep. 838; Cooley, Const. Lim. p. 831.

Such offices are not necessarily filled by election; they may be filled by appointment.

State, Atty. Gen., v. Covington, 29 Ohio St. 102.

There is abundant authority for a legisla-

ture to prescribe reasonable qualifications for the holding of office.

State, Loomis, v. Moffitt, 5 Ohio, 365; *State, Irwin, v. Crooks*, 7 Ohio, pt. 2, p. 227; *State, Atty. Gen., v. Covington*, 29 Ohio St. 102; *State, Thompson, v. McAllister*, 38 W. Va. 485, 24 L. R. A. 343; *Rogers v. Buffalo*, 123 N. Y. 173, 9 L. R. A. 579; *State v. Nelson*, 52 Ohio St. 99, 28 L. R. 317; *Daggett v. Hudson*, 43 Ohio St. 549, 54 Am. Rep. 832; *Monroe v. Collins*, 17 Ohio St. 686; *Lehman v. McBride*, 15 Ohio St. 573; *State, Bateman, v. Bode*, 55 Ohio St. 224, 34 L. R. A. 498.

In Ohio, there is no property in a public office or any expected emoluments thereof.

State, Atty. Gen., v. Hawkins, 44 Ohio St. 109; *State, Flinn, v. Wright*, 7 Ohio St. 333; *Steubenville v. Culp*, 38 Ohio St. 23, 43 Am. Rep. 417; *Knoup v. Piqua Branch of State Bank*, 1 Ohio St. 616; *Reeves v. Griffin*, 29 Ohio L. J. 281; *Donahue v. Will County*, 100 Ill. 94.

The legislative power is vested in a general assembly.

Const. art. 2, § 1; *State v. Frame*, 39 Ohio St. 407; *State, Herron, v. Smith*, 44 Ohio St. 348; *State v. Nelson*, 52 Ohio St. 88, 26 L. R. A. 317; *Roth v. State*, 51 Ohio St. 209; *Brass v. North Dakota*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670; *Powell v. Pennsylvania*, 127 U. S. 686, 32 L. ed. 257; *Lauton v. Steele*, 152 U. S. 133, 38 L. ed. 385; *Ex parte Curtis*, 106 U. S. 371, 27 L. ed. 232; *New York Health Dept. v. Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710; *People v. Formosa*, 131 N. Y. 478; *United States v. Newton*, 9 Mackey, 226; *Quigley v. State*, 5 Ohio C. C. 645.

Where the Constitution of a state provides that no person except a citizen shall be elected to office, there is no implication that the legislature may not provide other qualifications.

State, Thompson, v. McAllister, 38 W. Va. 485, 24 L. R. A. 343; *Darrow v. People, Norris*, 8 Colo. 420; *State, Loomis, v. Moffitt*, 5 Ohio, 365; *State, Irwin, v. Crooks*, 7 Ohio, pt. 2, p. 226; *State, Atty. Gen., v. Covington*, 29 Ohio St. 102; *Daggett v. Hudson*, 43 Ohio St. 558, 54 Am. Rep. 832.

The right of removal under § 1685 (and therefore the constitutionality of the section) is clearly recognized in—

State v. Heinmiller, 38 Ohio St. 101; *State, Atty. Gen. v. Bryson*, 44 Ohio St. 469.

The right of a governor to remove from office is upheld in—

State, Atty. Gen., v. Hawkins, 44 Ohio St. 98.

An office may be created by law, and filled by an elector, and then abolished during his term by the repeal of the law, and thus the officer lose his office.

State, Flinn, v. Wright, 7 Ohio St. 333; *State, Atty. Gen., v. Covington*, 29 Ohio St. 102; *Knoup v. Piqua Branch of State Bank*, 1 Ohio St. 608; *State, Atty. Gen., v. Bailey*, 37 Ohio St. 98.

The presumptions must always be in favor of the validity of laws, if the contrary is not clearly demonstrated.

Lehman v. McBride, 15 Ohio St. 573; *Walker v. Cincinnati*, 21 Ohio St. 41, 8 Am. Rep. 24; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *Cincinnati, W. & Z. R. Co. v. Clinton County Comrs.*, 1 Ohio St. 77; *State, Atty. 41 L. R. A.*

Gen., v. Kennon, 7 Ohio St. 546; *Adams v. Howe*, 14 Mass. 340, 7 Am. Dec. 216; *Wellington Petitioner*, 16 Pick. 95, 26 Am. Dec. 631; *Com., Dyar, v. M. Williams*, 11 Pa. 70; *Cookey, Const. Lim. *128, *171; State, Herron, v. Smith*, 44 Ohio St. 348.

On the question of the power, duty, or right of courts to hold a law constitutional unless it is manifestly against some express provision of the Constitution, see—

Gilpin v. Williams, 25 Ohio St. 294; *Western U. Teleg. Co. v. Mayer*, 28 Ohio St. 540; *Bloom v. Xenia*, 32 Ohio St. 464; *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377; *Amy v. Watertown*, 130 U. S. 319, 32 L. ed. 952; *Cooper v. Telfair*, 4 Dall. 14, 1 L. ed. 731; *People, Carter, v. Rice*, 135 N. Y. 473, 16 L. R. A. 336; *People, Wood, v. Draper*, 15 N. Y. 546.

Messrs. C. F. McCoy and G. Bambach & Son also for defendant in error.

Spear, Ch. J., delivered the opinion of the court:

The action in the circuit court was brought under favor of the act of April 8, 1896, entitled "An Act to Prevent Corrupt Practices at Elections" (92 Ohio Laws, 123). Section 7 of that act gives the right to any elector entitled to vote at any election (save for members of Congress or the general assembly) to present in writing to the attorney general an application setting forth, among other charges, the doing by a person elected to office at such election of any act or acts declared unlawful by any law of this state for the purpose of promoting his election, and thereupon it becomes the duty of the attorney general to direct the prosecuting attorney of the proper county to bring an action to have the office declared vacant, such action to "be deemed to be and conducted according to the rules prescribed by law for an action against the usurper of an office;" and, if any of the charges are sustained, judgment shall be rendered declaring void the election, declaring such office vacant, and ousting the defendant. The petition charged, among other things, a violation by the defendant of that part of § 83 of the election law of April 18, 1892 (89 Ohio Laws, 451), which provides that, "whoever, directly or indirectly by himself or through any other person, either gives, offers, or procures or promises to procure, or endeavors to procure, any office, place, or employment to, or for any elector; or to or for any other person, in order to induce any elector to register or refrain from registering, for any election, or to vote or refrain from voting at any election, or to vote or refrain from voting at such election for any particular person or persons, or question or proposition," shall be punished by fine, or imprisonment in the penitentiary, or both. The demurrer to the petition raises the question of the constitutionality of that part of § 7 of the act of April 8, 1896, heretofore recited, and the refusal of a jury by the trial court raises the question whether or not, in such an action, the defendant is entitled to trial by jury. Other provisions of the statute are attacked as unconstitutional. But those questions are not raised by this record, and it is not necessary for us to inquire beyond the questions actually involved.

1. The constitutionality of the act. It is assailed as repugnant to the Constitution, in that it undertakes to declare a citizen ineligible to office for criminal acts of his without a conviction of such crime. Section 4 of article 5 is cited. That section provides that "the general assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of bribery, perjury, or other infamous crime." The contention is that this section is a grant of power to the general assembly; that a grant of power to deprive a citizen of part of his political rights, on conviction of certain crimes, necessarily denies the power to do so without conviction, or for different crimes; and that the case comes within the rule, as given in *Cooley*, Const. Lim. p. 78, "that when the Constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases." The rule seems to have met with general acceptance. Its application in the present case would appear to depend upon whether the section quoted is a grant of power or a limitation upon power otherwise granted. To determine this, we should look at other provisions of the Constitution, to ascertain where, by its terms, power to punish crimes, to direct the conduct of elections, to prescribe qualifications for voting and for taking office, is lodged. Clearly, in the nature of things, such power cannot belong either to the executive or judicial departments. It belongs naturally to the legislative. It is a part of the legislative power, and we find that by § 5 of article 2 this power is vested in the general assembly in as ample terms as could be chosen to express it. "In creating a legislative department, and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose. . . . The legislative department is not made a special agency for the exercise of specifically defined legislative powers, but is intrusted with the general authority to make laws at discretion." *Cooley*, Const. Lim. p. 104. And says *Denio, J.*, in *People, Wood, v. Draper*, 15 N. Y. 532: "The people, in framing the Constitution, committed to the legislature the whole lawmaking power of the state, which they did not expressly withhold. Plenary power in the legislature for all purposes of civil government is the rule. A prohibition to exercise a particular power is an exception." And by *Scott, J.*, in *Lehman v. McBride*, 15 Ohio St. 591, 592: "This grant of power is general in its terms, not special: it embraces all such legislative power as the people of the state could, under the Federal Constitution, confer,—the whole legislative power of the state." The limitations upon the exercise of the power thus broadly conferred, are special, and are to be found in other parts of the same instrument. . . . Therefore, when the power of the general assembly to enact such a law [the soldiers' voting act] is drawn in question, the proper inquiry is whether such an exercise of legislative power is clearly prohibited

by the Constitution. The grant of power being general, the question is as to the existence of a limitation, arising from special prohibition. . . . Such prohibition must either be found in express terms, or be clearly inferable, by necessary implication, from the language of the instrument, when fairly construed according to its manifest spirit and meaning,"—citing *Baker v. Cincinnati*, 11 Ohio St. 542, where it is said by *Gholson, J.*: "It will be observed that the provision is not that the legislative power, as conferred in the Constitution, shall be vested in the general assembly, but that the legislative power of this state shall be vested. That includes all legislative power which the object and purposes of the state government may require, and we must look to other provisions of the Constitution to see how far, and to what extent, legislative discretion is qualified or restricted."—citing also, *State, Evans, v. Dudley*, 1 Ohio St. 437, and *Cass v. Dillon*, 2 Ohio St. 607. It follows from this that, without question, ample power to legislate upon all the subjects hereinbefore enumerated is conferred upon the general assembly.

The right to vote and to hold office is not of necessity connected with citizenship. Neither is it a natural right, such as the right to personal security, personal liberty, or the right to acquire and enjoy property. It is within the power of the people to give or refuse, restrict and regulate, the franchise, and, when conferred, is not a natural right, but may be taken away by the power that gave it. *McCrary, Elections*, §§ 3, 4. That is, the right depends upon the law of the land, and, except where restrained by the Constitution, the power of the general assembly over it is unlimited. And belonging to this general subject is the subject of elections. No subject comes more certainly within legislative power than does this. In the very nature of things it must be so. But the general duty is especially devolved on the general assembly by the Constitution. The time for the election of legislative, executive, and judicial officers having been designated, and provision having been made that all elections shall be by ballot, by § 1 of article 10 the duty is enjoined upon that body to provide by law for the election of county and township officers, and by § 27 of article 2 it is provided that "the election . . . of all officers . . . not otherwise provided for by this Constitution . . . shall be made in such manner as may be directed by law." It thus appears that the whole subject of elections, save so far as it is in distinct terms, or by clear implication, controlled by the Constitution, is devolved upon the general assembly, and that the power of that body over it is untrammelled, and that the details, as they relate to the manner or mode of holding elections, are expressly referred to legislative discretion. From a consideration of all the provisions of the Constitution referred to, we are led to the conclusion that, while the question may not be free from doubt, the better view is that § 4 of article 5 is not in itself a grant of power, but a limitation upon power otherwise generally granted; and that this conclusion is in no way affected by § 5 of article 2. That is, had these sections not been adopted, the general assembly, by

force of the general grant of legislative power, could have provided a permanent disqualification from voting and from holding office for causes or offenses other than those enumerated in the sections above cited. This conclusion leads to the further conclusion that the rule given by Cooley, cited by counsel and herein-before quoted, does not control the case, but that other rules of construction, equally reasonable and equally well recognized, which are given by the same author, are more in point. One is that, "when a Constitution gives a general power, or enjoins a duty, it also gives by implication every particular power necessary for the exercise of the one or the performance of the other." And, akin to this, "where power is granted in general terms, the power is to be construed as coextensive with the terms, unless some clear restriction upon it is deducible (expressly or by implication) from the context." It would obviously follow that where, by one section, a general, unlimited power is given, and that is abridged by another section of the same instrument, the limitation is not to be held more comprehensive than its terms clearly import. And, to justify the claim that the limitation of the Constitution inhibits the attempted exercise of the power in the particular case by the general assembly, it should be shown that the objects contemplated by the constitutional provision and the statutes are substantially identical. Such, we think, is not the case here. The object of § 4 is to authorize the general assembly to award a punishment upon conviction of infamous crime, which will permanently exclude the criminal from voting and from holding office, and the effect of the statute enacted by virtue of that section is to accomplish that object. The corrupt practices act does not undertake to authorize this. It does not provide any disability as to voting, nor does it render the person offending permanently ineligible to office. Comparing the two provisions by their operation and effect, the operation and effect of the constitutional provision, carried into legislation, are to punish for infamous crime committed anywhere, at any time, with reference to any subject matter, and to permanently disqualify from voting at any election and from holding any office; while the operation and effect of the provision of the statute are simply and only to disqualify from a particular office in the interest of pure elections where the person claiming the office has violated the terms of the statute under which and by virtue of which he claims to have been elected. The statute operates upon the election and upon the office. It holds the one void and the other vacant. As a result it excludes the person from any benefit under the election which his unlawful acts have rendered of no effect, but it does not award punishment. The vice which enters into the election, and renders it void, is the misconduct in reference to that particular election of the person who claims a benefit under it. He has violated the implied interdiction of the statute by attempting to promote his election by impure and immoral acts, having a tendency to corrupt the voters, and prevent a fair and legal election. Upon every principle of justice and fairness he should be prevented from reaping an advantage from his own wrong.

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A question much discussed is as to whether the statute should be treated as imposing a test of ineligibility, or as providing a method of removal. The matter may be not free from doubt. Possibly the provision involves both characteristics. But the better conclusion, we think, is that the intent of the legislature was, not to provide a method by which a person lawfully elected to an office may be removed therefrom, but rather a method by which the title of one to an office which he has obtained possession of in violation of the terms of the statute upon which his claimed right vests may be inquired into. It is, therefore, a challenge of the title to the office, resting upon charges of misconduct in procuring it, rather than a process to remove, resting upon charges of misconduct in office. Our conclusion with respect to the effect of § 4 of article 5 is that, if the framers of the Constitution had intended to deny to the general assembly the power to render void an election because of illegal acts by the successful candidate, done for the purpose of promoting his election, they would have declared that purpose in unequivocal terms, and would not have left such result to depend upon doubtful implication. We have already found that there is no clear expression of such an intent. It follows that the provisions of the corrupt practices act involved in the case before us do not contravene § 4 of article 5 of the Constitution. Nor are the provisions of the statute in conflict with either article 5 or with § 4 of article 15 of the Constitution. The former article provides who may be electors, and that electors shall be entitled to vote at all elections. Section 4 of article 15 is: "No person shall be elected or appointed to any office in this state unless he possess the qualifications of an elector." But it does not follow from this that every person who has the qualifications of an elector shall be eligible to any office in the state. The well-settled rule is that, while the legislature is without power to deny or abridge a constitutional right of a citizen to vote or to hold office, nevertheless laws to regulate the exercise of the elective franchise, if reasonable, uniform, and impartial, and calculated to facilitate the exercise of the right, are clearly within the legislative competency; and decisions to the effect that qualifications upon the right to take office, other than the one imposed by the section quoted, are constitutional, are numerous. *State, Irwin, v. Crooks*, 7 Ohio, pt. 2, p. 227; *State, Atty. Gen., v. Covington*, 29 Ohio St. 102. At page 118 it is remarked by McIlvaine, J.: "If the framers of the Constitution had intended to take away from the legislature the power to name disqualifications for office, other than the one named in the Constitution, it would not have been left to the very doubtful implication which is claimed from the provision under consideration. The power under the general grant being ample and certain, a statute should not be declared void because in conflict with an alleged implication, unless such implication be clear and indubitable." It may be added that there are implied disqualifications. A person may not hold incompatible offices,—as an officer who presents his personal account for audit and officer who passes upon it, or sheriff and justice of the

peace, or governor and member of the general assembly, or, as held in *State, Louthan, v. Taylor*, 12 Ohio St. 130, the office of director of county infirmary and superintendent of the infirmary. The list might be indefinitely extended. No duty enjoined upon the general assembly is higher, or of greater general interest to the commonwealth and the individual citizen, than that of securing, within constitutional limits, the full, untrammelled right of the elector to vote, to have that vote counted, and not neutralized by an illegal vote, and securing, in addition, a fair expression at the ballot box of the public voice freed from corrupting influences. And where this duty has been attempted by legislation calculated to secure these rational and desirable ends, courts will interfere with its operation only upon the clearest and most unquestioned conviction of its invalidity. A mere doubt is not sufficient. We are of opinion that the provisions of the act involved in this case are not in contravention of any section of the Constitution, at least not clearly so, and are valid.

2. The right to a jury. Our Constitution declares that the right of trial by jury shall be inviolate. This means the right as it existed in this state at the adoption of the Constitution of 1892. Not that every question of fact was to be tried by a jury; only questions of fact in certain classes of cases. The distinctions indicated by our statutes, and by practice from the organization of the state, show this. Code, §§ 263, 264; 51 Ohio Laws, 100; Rev. Stat. §§ 5180, 5181. The right applied only to common-law courts, and in actions involving life, liberty, or the right to

private property. *Willyard v. Hamilton*, 7 Ohio, pt. 2, p. 111, 80 Am. Dec. 195. And we regard it as safe to say that there never has been a statute in Ohio authorizing a jury, nor will there be found a reported case in this state where a jury was called, or held to be proper, in a suit to determine title to an office; certainly none has been cited. We suppose the reason to be plain. A public office is a trust held for the benefit of the public. The incumbent, if he performs the duties, may be entitled to the emoluments, but he cannot have, under our governmental system, any property in the office itself. *State, Atty. Gen., v. Hawkins*, 44 Ohio St. 98, and see especially remarks of Minshall, J., on pages 110 and 113, 44 Ohio St., and the cases there cited. There being no property right involved in the inquiry, a jury cannot be had in an action to try title to an office. Contrary holdings have been made in other states by courts of high repute, but we think the law of Ohio is clearly as held by the circuit court. The question is not a new one in this court. In *State, Atty. Gen., v. Blood* (quo warranto) a demand for a jury was made March 25, 1887, and argued by eminent counsel. The demand was refused. 17 Week. L. Bull. 290. The case was then referred to a master to take testimony, but was finally dismissed by relator, and for that reason was not reported.

Other questions of procedure are argued, but we do not regard them of sufficient importance to warrant comment, except to say that we find no error.

Judgment affirmed.

MISSOURI SUPREME COURT (In Banc).

STATE of Missouri, by Edward C. CROW,
upon Application of Roderick E. Rom-
bauer,

v.

Charles C. BLAND.

(.....Mo.....)

1. Strict construction should be given to the corrupt practices act of 1893, which provides, not only for the forfeiture of office, but for punishment of the violations of law as felonies and misdemeanors.
2. Procuring the withdrawal of a candidate and the substitution of the name of the candidate of another party as the nominee of the former party also, although it is done by the payment of money and by giving other valuable inducements and results in procuring additional votes for the fusion candidate, does not constitute a bribery of voters within the meaning of the corrupt practices act of 1893.
3. A proceeding under the corrupt practices act of March 31, 1893,

NOTE.—See preceding case of *Mason v. State, McCoy*, which is also a determination under a corrupt practices act.

41 L. R. A.

brought by the attorney general on the initiative of the defeated candidate who, by § 10, is required to specify the charges under the act, is not a proceeding by quo warranto instituted by the attorney general *ex officio*, but is a special proceeding subject to the limitations and restrictions of the statute.

4. A petition in a proceeding under the corrupt practices act of March 31, 1893, by the attorney general on the application of the defeated candidate, is demurrable if it does not clearly state charges which are made actionable by the act, although it alleges that the defendant is usurping the office.
5. The expenditure to secure the nomination and election of a candidate of more money than the law permits, if it is done without his knowledge or consent, will not avoid his election under the corrupt practices act of 1893.

(Brace and Robinson, JJ., dissent.)

(May 10, 1898.)

ORIGINAL proceeding under the corrupt practices act to have defendant's election

to the office of judge of the St. Louis Court of Appeals declared void because of his alleged violation of the statute in procuring the election. *Judgment for defendant.*

The facts are stated in the opinion.

Messrs. R. L. Goode, John M. Wood, and Adiel Sherwood, for respondent, in support of demurrer:

It is necessary for the attorney general to make a case by the allegations of his information as much so as for any other pleader. Inasmuch as the attorney general has undertaken to set out the grounds of disqualification, he must set out sufficient grounds. Besides, as this is a proceeding under the statute to oust the incumbent, the causes must be stated therein, and inasmuch as the statute prescribes the mode in which this must be done and the causes therefore there can be no reference to the common law to aid in the task. Further, this is not a common-law proceeding for the reason that the attorney general cannot act of his own motion, but must await the pleasure of the defeated candidate. Hence, the information is bad because it does not allege facts which show that respondent is disqualified or that the election was not a legal election. The information is not one at common law for the additional reason that Rombauer is in as a party plaintiff under the provisions of the act.

Anderson & M. Turnp. Corp. v. Gould, 6 Mass. 40, 4 Am. Dec. 80; *Franklin Glass Co. v. White*, 14 Mass. 286; *Dudley v. Mayhew*, 3 N. Y. 15; *St. Pancras v. Batterbury*, 2 C. B. N. S. 477; *Edwards v. Davis*, 16 Johns. 281; *Almy v. Harris*, 5 Johns. 175; *Smith v. Lockwood*, 13 Barb. 209; *Brown v. Grover*, 6 Bush, 1; *Com., Lehman, v. Sutherland*, 8 Serg. & R. 145.

A private relator cannot be joined in quo warranto with the attorney general.

State, Gibbs, v. Somers Point, 49 N. J. L. 515.

Specific facts and illegal acts are not alleged. *Rez v. Pinney*, 3 Barn. & Ad. 947, 5 Car. & P. 254; *Macon v. Shaw*, 16 Ga. 187; *King v. Mashiter*, 6 Ad. & El. 153; *State, Norton, v. Lupton*, 64 Mo. 415, 27 Am. Rep. 253.

No facts are stated to show election to be illegal.

First Parish in Sudbury v. Stearns, 21 Pick. 154; *Re McCullough*, 12 Phila. 570; *School Dist. No. 3 v. Gibbs*, 2 Cush. 89; *Rez v. Jefferson*, 2 Nev. & M. 487; *State, Clements, v. Humphries*, 74 Tex. 466, 5 L. R. A. 217; *Queen v. Cousins*, L. R. 8 Q. B. 216; *State, Roche, v. Bruggemann*, 58 N. J. L. 122; *People, Bush, v. Thornton*, 25 Hun, 456.

Moreover, section *11 does not apply where the officer elected was successful by fraudulent and illegal votes.

Stine v. Berry, 96 Ky. 68.

Section 10, which specifies certain offenses committed thereunder, and §§ 11, 12, 13, 14, 15, and 16, which directly refer to said § 10, do not make that an offense which is alleged in the first, second, third, and fourth counts of the information. These counts do not show that voters were corrupted, or that any money, reward, or influence was promised to the voters.

Lehlbach v. Haynes, 54 N. J. L. 77; *Griffin v. Wall*, 32 Ala. 149; *Preston v. Culbertson*, 58 41 L. R. A.

Cal. 211; *People, Seearce, v. Glenn County*, 100 Cal. 419; *Todd v. Stewart*, 14 Colo. 286; *State v. Krueger*, 184 Mo. 271; *State v. Miller*, 132 Mo. 297.

In view of our other statutes punishing bribery at elections with forfeiture of office upon conviction of the offense (Rev. Stat. 1889, § 3784) with which the "corrupt practices act" is *in pari materia*, a prior conviction is necessary before a judgment of ouster of respondent for bribery can be entered under the latter act.

State, Clements, v. Humphries, 74 Tex. 466, 5 L. R. A. 217; *Com. v. Jones*, 10 Bush, 725; *Huber v. Reilly*, 53 Pa. 112; *State v. Symonds*, 57 Me. 148; *Burkett v. McCarty*, 10 Bush, 758; *Page v. Hardin*, 8 B. Mon. 648; *Curry v. Stewart*, 8 Bush, 560; *Hyde v. State*, 52 Miss. 665; *Honey v. Graham*, 39 Tex. 1; *Pitts v. Pitts*, 52 N. Y. 593; *Schiffer v. Pruden*, 64 N. Y. 47; *Blaufus v. People*, 69 N. Y. 109; *Barker v. People*, 20 Johns. 457; *Royall v. Thomas*, 28 Gratt. 180; 1 Whart. Ev. § 397; *Black, Const. Law*, p. 486; *King v. Heaven*, 2 T. R. 773; *Doe, Griffith, v. Pritchard*, 2 Nev. & M. 489; *State, Jersey City Police Comrs., v. Pritchard*, 36 N. J. L. 106; *Re Dorsey*, 7 Port. (Ala.) 386; *Com. v. Barry, Hardin (Ky.)* 281; *Lowe v. Com.* 3 Met. (Ky.) 239; *Brown v. Grover*, 6 Bush, 3; *Rez v. Richardson*, 1 Burr. 517; *McCrary, Elections*, 4th ed. §§ 120, 125, 344, 345; *Gotcheus v. Matheison*, 58 Barb. 152.

It must result in sufficient votes to change the result.

Rez v. Jefferson, 2 Nev. & M. 487; *State, Jersey City Police Comrs., v. Pritchard*, 36 N. J. L. 106; *First Parish in Sudbury v. Stearns*, 21 Pick. 154; *Re McCullough*, 12 Phila. 570; *School Dist. No. 3 v. Gibbs*, 2 Cush. 89; *State, Clements, v. Humphries*, 74 Tex. 466, 5 L. R. A. 217; *Queen v. Cousins*, L. R. 8 Q. B. 216; *State, Roche, v. Bruggemann*, 58 N. J. L. 122; *People, Bush, v. Thornton*, 25 Hun, 456.

The wrong must be intentional and corrupt. *State, Atty. Gen., v. Churchill*, 41 Mo. 41; *State, Adamson, v. Lafayette County Ct.* 41 Mo. 545; *State v. Krueger*, 184 Mo. 271; *State, Jackson, v. Howard County Ct.* 41 Mo. 247; *Rez v. Pinney*, 3 Barn. & Ad. 947.

Names of illegal voters must be alleged and proved.

Lehlbach v. Haynes, 54 N. J. L. 77; *Griffin v. Wall*, 32 Ala. 149; *People, Seearce, v. Glenn County*, 100 Cal. 419; *Todd v. Stewart*, 14 Colo. 286; *Todd v. Cass County*, 30 Neb. 823; *State v. Krueger*, 184 Mo. 272.

The second count or charge in said information fails to allege that the promise alleged to have been made to John W. North was a promise whereby any voter was corrupted or influenced to vote for respondent, and fails to state the names of the persons who thus were induced to vote for respondent by the retirement of said North from the canvass. The fact that, as a consequence of the alleged arrangement between Bland and North, the latter withdrew, which resulted in voters voting for Bland who otherwise would have voted for North, shows no corruption whatever of the voter.

Lehlbach v. Haynes, 54 N. J. L. 81; *Griffin v. Wall*, 32 Ala. 149; *Preston v. Culbertson*, 58 Cal. 211; *Todd v. Cass County* 30 Neb. 823;

State v. Miller, 132 Mo. 297; *State v. Krueger*, 134 Mo. 271.

The third count or charge in said information does not, if the facts alleged are true, constitute a violation of § 10 of said act, and does not state the names of the voters who thus were secured for respondent by the withdrawal of John W. North from the People's party ticket.

State v. Krueger, 134 Mo. 272; *State, Atty. Gen. v. Mason*, 77 Mo. 191.

The fourth count or charge in the information does not show or charge any one of the offenses created by § 10 of said act, and said count fails to state the names of the voters whose votes were corruptly secured or otherwise by respondent by the withdrawal of said North and the substitution of respondent as a candidate of the People's party.

State v. Krueger, 134 Mo. 272.

It is not a valid objection that illegal votes were received if they did not change the majority.

First Parish in Sudbury v. Stearns, 21 Pick. 154; *Re McCullough*, 13 Phila. 570; *School Dist. No. 3 v. Gibbs*, 2 Cush. 89; *People, Bush, v. Thornton*, 25 Hun. 456; *State, Roche, v. Bruggmann*, 53 N.J. L. 122; *State, Atty. Gen., v. Mason*, 77 Mo. 191.

The sixth count or charge in said information is insufficient for the reason that said count does not allege any one of the grounds of ouster prescribed by § 10 of said act, but undertakes to enlarge the scope of said section by including moneys expended by others than the respondent, and said count or charge fails to set out the names of the persons to whom said money as alleged was unlawfully paid, the amount paid to each and when the same was paid.

State v. Miller, 132 Mo. 297; *State v. Slows*, 132 Mo. 199; 1 Chitty, Crim. L. p. 169; *State v. Terry*, 109 Mo. 601; *State v. Moore*, 27 N.J. L. 109; 1 Bishop, Crim. Proc. § 625; *State, Atty. Gen., v. Mason*, 77 Mo. 191.

The word "election," used in the act of March 31, 1893, does not include the steps taken by a candidate to secure his "nomination."

Potter's Dwar. Stat. pp. 194, 215; *State, Harris, v. Tucker*, 54 Ala. 205; *State, Clarke, v. Irwin*, 5 Nev. 111; *People, Crawford, v. Molitor*, 23 Mich. 341; Endlich, Interpretation of Statutes, § 387; *Queen v. Poor Law Comrs.* 6 Ad. & El. 68; *Com., Directors of Poor, v. Wells*, 110 Pa. 463; *Hall v. Marshall*, 80 Ky. 552.

No inquiry can be made except into the legality of votes cast.

State, Atty. Gen., v. Mason, 77 Mo. 189; *State, Harrison, v. Frazier*, 98 Mo. 426; *Gaston v. Lamkin*, 115 Mo. 33; *State, Brown, v. McMillan*, 108 Mo. 153; *State, Atty. Gen., v. Vail*, 53 Mo. 97; *State, Boyd, v. Rose*, 84 Mo. 202.

The act is void if it is susceptible of a construction which warrants an ouster from and a forfeiture of an office upon a judgment to that effect entered in a civil proceeding, to wit, in the special proceeding provided by § 11 of the act, and this without sentence of a court of competent jurisdiction after conviction upon trial by jury, under indictment by a grand jury.

Mo. Const. art. 2, §§ 28, 30; U. S. Const. 41 L. R. A.

5th & 15th Amendments; *State, Clements, v. Humphries*, 74 Tex. 466, 5 L. R. A. 217; *Com. v. Jones*, 10 Bush. 725; *Huber v. Reily*, 53 Pa. 112; *State v. Symonds*, 57 Me. 148; *Burkett v. McCarty*, 10 Bush. 758; *Puge v. Hardin*, 3 B. Mon. 648; *Curry v. Stewart*, 8 Bush. 560; *Hyde v. State*, 52 Miss. 665; *Honey v. Graham*, 39 Tex. 1; *Pitts v. Pitts*, 53 N. Y. 593; *Schiffer v. Pruden*, 64 N. Y. 47; *Blaufus v. People*, 69 N. Y. 109; *Barker v. People*, 20 Johns. 457; *Royall v. Thomas*, 28 Gratt. 180; *King v. Heaven*, 2 T. R. 772; *Doe, Griffith, v. Pritchard*, 3 Nev. & M. 489; *State, Jersey City Police Comrs., v. Pritchard*, 36 N. J. L. 106; *Re Dorsey*, 7 Port. (Ala.) 336; *Com. v. Barry*, Hardin (Ky.) 231; *Lowe v. Com.* 3 Met. (Ky.) 239; *Brown v. Grover*, 6 Bush. 3; *Re v. Richardson*, 1 Burr. 517; *McCrary, Elections*, 4th ed. §§ 120-125, 344, 345; *Gotheus v. Matheon*, 58 Barb. 152.

The office of judge of the St. Louis court of appeals is one provided by the Constitution of the state, and the right to an incumbent to hold the same can only be inquired into by one of the modes therein prescribed, to wit, by impeachment, contest of election or address; that is to say, under § 1 of art. 7, or under §§ 3 and 9 of art. 8, or under § 41 of art. 6; or the office may be forfeited after a conviction of a crime upon indictment, etc.

Ex parte Arnold, 128 Mo. 256, 33 L. R. A. 386; *State, St. Louis, v. Seibert*, 123 Mo. 424; *Heidelberg v. St. Francis County*, 100 Mo. 74; *Sutherland, Stat. Constr.* §§ 325, 328; *Bishop, Statutory Crimes*, 2d ed. § 249; *Barker v. People*, 20 Johns. 249; *Hyde v. State*, 52 Miss. 665; *State, Ewing, v. Francis*, 88 Mo. 557.

Mr. John H. Overall also for respondent.

Messrs. Edward C. Crow and Chester H. Krum, for informant:

An *ex officio* information need only be general in its character, and no averments, further than general averments, are required. The information is not required to show the title of the relator; it is enough to allege in general terms that the incumbent of the office is in possession thereof without legal authority.

People, Falkenbury, v. Miles, 2 Mich. 348; *People, Flynn, v. Abbott*, 16 Cal. 358; *People, Atty. Gen., v. Utica Ins. Co.* 15 Johns. 358, 8 Am. Dec. 243; *People, Palmer v. Woodbury*, 14 Cal. 43; *People v. Richardson*, 4 Cow. 97.

When the intention can be collected from the statute words may be modified, altered, or supplied so as to obviate any repugnancy or inconsistency of such intention.

State, Missouri Mut. L. Ins. Co., v. King, 44 Mo. 283; *Matheus v. Com.* 18 Gratt. 989; *State v. Rockstruck*, 136 Mo. 335; *State, Crow, v. Hostetter*, 137 Mo. 636, 38 L. R. A. 208.

Who shall be declared elected at an election, or who shall be regarded as elected, is exclusively for the legislature to determine.

State, Brown, v. McMillan, 108 Mo. 162.

The statute operates upon the election and upon the office; it holds the one void and the other vacant.

Mason, v. State, McCoy, 58 Ohio St. 30.

A proceeding by quo warranto is merely a civil proceeding.

State, Brison, v. Lingo, 26 Mo. 496; *State, McIlhenny, v. Stewart*, 32 Mo. 379; *State, Meriwether v. Campbell*, 120 Mo. 396; *State,*

Walker, v. Equitable Loan & Invest Co. 142 Mo. 325.

And in quo warranto a defendant has no constitutional right to trial by jury.

State, Atty. Gen., v. Vail, 58 Mo. 97; *State, Norton, v. Lupton*, 64 Mo. 415. 27 Am. Rep. 253; *Mason v. State, McCoy*, 58 Ohio St. 30.

It does not follow, however, that the court may not allow the defendant to have a jury. It may be accorded *ex gratia*.

State, Norton, v. Lupton, 64 Mo. 417, 27 Am. Rep. 253; *State, Ewing, v. Townsley*, 56 Mo. 107.

If the present proceeding is a contest of election in its nature, and if the legislature had already provided for such contest by §§ 4783-4787, then in so far as the present act conflicts with them, it repeals them by implication.

State, Maguire, v. Draper, 47 Mo. 29; *State, McRee, v. Maguire*, 47 Mo. 35; *State, Atty. Gen., v. Miller*, 100 Mo. 446; *State v. Bennett*, 102 Mo. 362, 10 L. R. A. 717.

This court has the power under the Constitution to grant the writ, and the attorney general has the constitutional right to apply for the writ. No statute can abridge either of these rights.

State, Walker, v. Equitable Loan & Invest. Co. 142 Mo. 325.

Marshall, J., delivered the opinion of the court:

This is an original proceeding instituted in this court on the 18th of January, 1898, by the attorney general, on the application in writing of Roderick E. Rombauer, under the provisions of the act of the general assembly of Missouri, entitled "An Act to Prevent Corrupt Practices in Elections, to Limit the Expenses of Candidates, to Prescribe the Duties of Candidates and Political Committees, and Provide Penalties and Remedies for Violation of [of] This Act," approved March 31, 1893 (Acts 1893, p. 157).

The petition is as follows:

"The state of Missouri by the information of Edward C. Crow, attorney general, gives the court to understand and be informed that at the general election held in the state of Missouri, under the laws of said state, on the 6th day of November, 1896, one Charles C. Bland and Roderick E. Rombauer were respectively candidates of the Democratic and Republican parties for judge of the St. Louis court of appeals; that at said election, according to the official count, said Bland received 172,691 votes constituting the majority of all the votes cast at said election for said office; that he was thereupon declared duly elected and was properly commissioned and qualified for the term of twelve years and assumed the duties of said office and still exercises the same; that said Roderick E. Rombauer at said election received 159,168 votes, according to the official count, which number was the next highest number cast for any person for said office at said election.

"Relator charges that defendant, without any legal right or authority whatsoever, has been, since the — day of January, 1897, usurping, holding, using, and exercising the office of judge of the St. Louis court of appeals an important public office in the state of Mis-

souri, and still does usurp, hold, use, and exercise the same within the state of Missouri, and since the day aforesaid has unlawfully claimed, received, and enjoyed the rights, fees, and emoluments belonging and appertaining to the said office.

"Relator charges that at the election held on the 6th day of November, 1896, and therefore during the canvass and after the nomination of said Charles C. Bland, that said Bland was guilty of divers violations of the act of the general assembly of the state of Missouri approved March 31, 1893, in this, to wit:

"First: That said Bland paid the sum of \$1,000 to one Samuel B. Cook, with intent that the same was wholly or in part to be expended in securing the retirement from the canvass of one John W. North, the candidate for said office of a political party different from the one which nominated said Bland, and with intent that the money thus paid should be used to induce the said North and his political friends to cast their votes for him, the said Bland, for said office at said election, and that said votes were actually thus secured for said Bland, which would otherwise have been given to said North.

"Second: That at said election, to wit: after the various parties had nominated their candidates for judge of said St. Louis court of appeals, the said Bland promised to the said North, that if he, the said North, would retire from the said canvass in favor of him, the said Bland, that he, the said Bland, would use his influence to have him, the said North, appointed to the office of reporter of the St. Louis court of appeals, which office is a public office of great value, to wit: of the value of \$2,000 per annum, requires skill and capacity, and should be bestowed on the most worthy and competent person, regardless of other considerations. That thereupon said North, induced by said promise, did retire from said canvass, whereby a great many votes were secured to said Bland which would otherwise have been given to said North.

"Third: That said Bland at said election, to wit: after the various parties had nominated their candidates for the office of judge of the St. Louis court of appeals, did promise one Arthur B. Rozelle, who was then and there the chairman of the state central committee of the People's party, that if he the said Rozelle would secure the withdrawal of the said John W. North's name from the ticket of the said People's party, and cause the substitution of the said Charles C. Bland's name on said ticket, in place of the name of the said John W. North, that he, the said Bland, would pay to the said Rozelle the sum of \$1,000, and that thereupon the said Rozelle with his confederates did secure such withdrawal and substitution, whereby very many votes were secured for said Bland which would otherwise have been given for said North.

"Fourth: That the said Bland shortly preceding the said election did promise to and agree with one Henry W. Bond, or else had a tacit understanding with him, the said Bond, who was then and there a judge of said St. Louis court of appeals, that if he, the said Bond, would aid him in carrying out his said promise to said North, that he, the said Bond,

should have the controlling voice in the selection of other officers, which might be appointed by said St. Louis court of appeals, and that by such inducement he, the said Bland, secured the promise of said Bond to vote for the election of said North for reporter, and secured the withdrawal of said North from the canvass, and the substitution of his own name in place of that of said North, whereby very many votes were secured for said Bland, which would otherwise have been given for said North.

"Fifth: That said Bland was guilty of the violation of the 7th section of said act by not filing with the secretary of state and with the recorder of deeds of the county wherein the said Bland resided, and within the time required by said act, such a sworn statement of his expenditures and promises as said act requires, to wit: A statement setting forth in detail all sums of money (except all moneys paid for actual traveling expenses, including hotel or lodging bills) contributed, disbursed, expended, or promised by him, and to the best of his knowledge and belief, by any other person or persons in his behalf, wholly or in part endeavoring to secure or in any way in connection with his nomination or election, or in connection with the election of any other persons at said election, and showing the dates when, and the persons to whom, and the purpose for which, all such moneys were paid, expended, or promised.

"Sixth: That at said election the amount expended, contributed, and incurred by said Bland for the purpose of securing his own nomination and election, and the amount expended by other person or persons, wholly or in part with his knowledge for said purpose, exceeded in the aggregate the sum of \$1,792.62, which was the amount authorized to be expended by any one candidate for judge of the said St. Louis court of appeals, in furtherance of his nomination and election by the provisions of the act hereinbefore recited.

"Relator further avers that heretofore, to wit: on the 18th day of January, A. D. 1898, the above-named Roderick E. Rombauer filed with relator herein, as attorney general of the state of Missouri, complaint in writing, as required by § 10 of the act approved March 31, 1893, relating to elections and corrupt practices therein, a copy of which said complaint is hereto attached and marked 'Exhibit A'; that on the said 18th day of January, A. D. 1898, said Roderick E. Rombauer filed with relator, as attorney general of the state of Missouri, a bond to the state of Missouri in penalty of \$1,000 subscribed by two or more sureties justifying as freeholders of the state in double the amount of the penalty of such bond exclusive of all liabilities and property exempt by law from levy and sale in execution, conditioned for the payment to the state of all the costs and disbursements for which it might become liable for or on account of such action, a copy of which said bond is hereto attached and marked 'Exhibit B'.

"Wherefore relator prays for judgment that the said defendant has usurped and unlawfully held, used, and exercised said office of judge of the St. Louis court of appeals and that he be ousted therefrom and that the said Roderick

E. Rombauer be adjudged entitled to the said office and that he be allowed to assume the execution of the duties of the same on taking the oath and qualifying as prescribed by law.

"Edward C. Crow, Atty. Gen. of Mo."

The respondent interposed a demurrer, general and special, containing nine grounds, but in the view we take of the case it is only necessary to refer to the general ground, "that said information does not state facts sufficient to constitute a cause of action in this, to wit: (1) the several charges contained in the information nor any of them constitute a ground under the provisions of the act of the general assembly of the state of Missouri, approved March 31, 1893, upon which this proceeding was instituted, for ousting respondent from office."

The case was submitted on the 15th of March, 1898, upon the demurrer to the petition, after full oral argument, and upon elaborate and exhaustive briefs of counsel, whose diligence and research have greatly aided the court.

The case is one of first impression in this state, under the "corrupt practices" act.

It is patent that the proceeding is predicated upon §§ 10 and 6 of the act, which are as follows:

"Sec. 10. At any time during the term of office of any public officer elected under the laws of this state, or under the charter of any city therein, the person who received the next highest number of votes for such office at the election at which such public officer was elected, as shown by the official count, may present an application in writing, and verified by his affidavit, to the attorney general, setting forth one or more of the following charges against such public officer, to wit: That at the election at which such public officer was elected, the total amount expended, contributed, or incurred by such officer exceeded the sum allowed by § 6 of this act for such candidate, or that votes were secured by him or his agent or agents, or with his consent or connivance, or with the consent or connivance of his agent or agents, by some committee or organization, or some political party, of which party such public officer was a nominee, or by which he was supported, or the agent or agents of some such committee or organization, by paying, contributing, offering, or promising to contribute money or other valuable thing as a compensation or reward, or by some promise or influence, the giving such vote or votes, or that votes were withheld from such applicant by reason of such practices by or on behalf of such officer, agent, committee, or organization, or by reason of some act on behalf of such officer declared by this act to be unlawful; and further setting forth that the applicant desires said attorney general to bring an action to have such public office declared vacant on account of said violation of the laws concerning elections. Such application shall be accompanied by a bond to the state of Missouri in the penalty of \$1,000, subscribed by two sureties, who shall justify as freeholders of the state, and in double the amount of such penalty, exclusive of all their debts and liabilities, and property exempt by law from levy and sale under execution—such bond to be conditioned for the payment to the state of all the taxable costs and

disbursements for which it may become liable for or on account of such action."

"Sec. 6. No candidate for Congress or for any public office in this state, or in any county, district, or municipality thereof, which office is to be filled by popular election, shall, by himself or by or through any agent or agents, committee or organization, or any person or persons whatsoever, in the aggregate pay out or expend, or promise or agree or offer to pay, contribute, or expend any money, or other valuable thing in order to secure or aid in securing his nomination or election, or the nomination or election of any other person or persons, or both such nomination and election, to any office to be voted for at the same election, or in aid of any party or measure, in excess of a sum to be determined upon the following basis, namely: For 5,000 voters or less, \$100; for each 100 voters over 5,000 and under 25,000, \$2; for each 100 voters over 25,000 and under 50,000, \$1; and for each 100 voters over 50,000, 50 cents—the number of voters to be ascertained by the total number of votes cast for all the candidates for such office at the last preceding regular election held to fill the same; and any payment, contribution, or expenditure, or promise, agreement, or offer to pay, contribute, or expend any money or valuable thing in excess of said sum, for such objects or purposes, is hereby declared unlawful."

It thus appears that § 10 authorizes a proceeding of this character against any officer upon any one or more of the following charges:

1. That he expended, contributed, or incurred at the election a greater amount of money than the limit fixed by § 6.

2. That votes were secured by him or his agents with his or their consent or connivance, by some committee or political party of which he was the nominee or by which he was supported or by the agents of such committee or political party, "by paying, contributing, offering, or promising to contribute money or other valuable thing as a compensation or reward, or by some promise or influence, the giving such vote or votes, or that votes were withheld from such applicant [the defeated candidate who received the next highest vote] by reason of such practices by or on behalf of such officer, agent, committee, or organization, or by reason of some act on behalf of such officer declared by this act to be unlawful."

Reduced to a minimum of verbiage the act provides (1) that if a public officer exceeds the limit of money he is authorized to expend, or (2) that if he or his agent or committee or political party procures votes for him by bribery of voters, he shall be ousted from office, and the defeated candidate, who received the next highest number of votes, shall be installed in the office.

The purpose of this proceeding is to oust defendant and to instal Roderick E. Rombauer, the applicant, in the office of judge of the St. Louis court of appeals.

The petition contains six charges against defendant, but it is admitted by informant and applicant that the fifth charge states no cause for ouster under the act, and the demurrer is therefore confessed as to that charge.

Of the remaining charges, the first, second,

third, and fourth attempt to charge bribery, and the sixth that the limit of expenditure was exceeded. The demurrer challenges the sufficiency of these charges, and the question for our decision is whether the acts charged against defendant bring the case within the provisions of the corrupt practices act.

The first charge is that defendant paid Cook \$1,000 with intent that it should be used wholly or in part to secure the retirement from the canvass of North, the candidate of another political party for said office, "and with intent that the money thus paid should be used to induce the said North and his political friends to cast their votes for him, the said Bland, and that said votes were actually thus secured for said Bland, which would otherwise have been given to said North."

The second charge is that Bland promised North that if he would withdraw in his favor, he, Bland, would use his influence to have him, North, appointed reporter of the St. Louis court of appeals.

The third charge is that Bland promised Rozelle, the chairman of the state central committee of the People's party, that if he, Rozelle, would secure North's withdrawal and his, Bland's, substitution, as the nominee of the People's party, he, Bland, would pay him, Rozelle, \$1,000, and that Rozelle accomplished this, "whereby very many votes were secured for said Bland which would otherwise have been given for said North."

The fourth charge is that Bland agreed with Judge Bond of the St. Louis court of appeals, "or else had a tacit understanding with him," that if Bond would aid him, Bland, in carrying out his, Bland's, promise to North to make him reporter of the St. Louis court of appeals Bond might appoint the other officers of that court, in consequence of which Bond's vote was secured, North withdrew from the canvass, Bland became the nominee of the People's party, and many votes were secured for Bland which would otherwise have been given for North.

The sixth charge is that the amount expended, contributed, and incurred by Bland to secure his nomination and election, "and the amount expended by other person, or persons, wholly or in part with his knowledge for said purpose," exceeded the legal limit.

Considered in the abstract or in the concrete, the first, second, third, and fourth charges do not bring this case within any of the provisions of the act of 1893. The act prohibits "bribery of voters." The charges allege the payment of money or promise of appointment to office to secure the withdrawal of North and the substitution of Bland as the nominee of the People's party. It is not charged that the money was paid or the appointment promised to secure the vote of even North himself for Bland, nor that North actually voted for Bland. It is averred that in consequence of the substitution of Bland for North as the nominee of the People's party, votes were secured for Bland which would otherwise have been given to North. This is necessarily true, but a like result always follows whenever the same person is nominated by more than one political party. We take judicial notice of such events as constitute a part of the political history of our country and

state (*Homes v. Kring*, 93 Mo. loc. cit. 456; 1 Greenl. Ev. 15th ed. § 6), and are therefore aware of the historical fact that in 1872, Horace Greeley was the nominee of the Democrat and Liberal-Republicans for President of the United States, while U. S. Grant was the Republican nominee, and Charles O'Connor was the Democratic nominee; and later in 1884 in our state, that Nicholas Ford was the nominee of the Fusion party, which was made up of the Republican party and of other minor political organizations. We also know that in 1896 the same persons were nominated and voted for as presidential electors for the fourth, eighth, and fourteenth districts, by the Democratic and Populist parties.

It is therefore not unusual or unprecedented that the same person may be the nominee of more than one political party at the same time. In fact it is customary for minority parties to coalesce when they can, for in no other way could they hope to cope successfully with the majority or plurality party.

The act of 1893 does not prohibit such fusions. The charges allege a fusion between the Democrats and Populists, whereby Bland became the nominee of both parties and as such received the votes of both. The fact that North withdrew in consequence of any influence does not taint the transaction with bribery, for it is not charged that the money or influence was paid or promised to secure North's vote, nor that any such inhibited means were employed by Bland or anyone for him to secure the votes of any voter. The charge is single, that in consequence of Bland's substitution for North as the regular nominee of the People's party, Bland received votes which would have otherwise been cast for North. This may be accepted as almost a truism, but it is neither illegal nor unreasonable. The payment of money to Cook to secure the withdrawal of North, the payment of money to Rozelle to procure the substitution of Bland for North as the nominee of the People's party, the promise of Bland to North to use his influence to have North appointed reporter of the St. Louis court of appeals if he would withdraw from the People's ticket, and the promise by Bland to Bond to let him have the appointment of the other officers of the court of appeals if he would aid Bland in carrying out his promise to North, constitute the gravamen and essence of the complaint against Bland, and although stated in four separate charges are in reality only the separate means alleged to have been employed to accomplish the single end of creating a fusion between the Democratic and People's party so far as the office of judge of the St. Louis court of appeals was concerned. Yet none of these acts come within the prohibitions of the act of 1893; they do not constitute bribery of voters. In this connection it is profitable to analyze the charges. The first charge alleges a payment of \$1,000 to Cook to be used wholly or in part to secure North's withdrawal and with the intent that the money should be used to induce North and his friends to vote for Bland, and that votes were actually thus secured for Bland which would otherwise have been given to North. Yet there is no allegation that Cook ever paid any of the money to North or to any

of his friends to secure their votes. On the contrary, it is alleged that it was the withdrawal of North which secured the votes for Bland. So this charge states no bribery of voters. The second charge likewise alleges a promise to influence the appointment of North as reporter if he would withdraw. Here again there is no allegation of bribery of voters, nor even an averment that North himself voted for Bland. The third charge states a promise to pay Rozelle \$1,000 to secure Bland's substitution for North as the nominee of the People's party and an accomplishment of that end, but no allegation of bribery of a voter, nor that Rozelle himself voted for Bland. The fourth charge alleges an agreement or "tacit understanding" between Bland and Bond concerning the appointment of officers of the St. Louis court of appeals, to enable Bland to carry out his promise to North. Still there is no averment of bribery of voters.

Thus it appears that if the charges be taken as true they do not state the offense of bribery of voters, which is the prohibited act under the law of 1893.

This act is penal in its very nature and fibre. It provides for punishment as for felonies and as for misdemeanors, and also for forfeiture of office even after the incumbent has received a majority of the votes cast at the election, and has been inducted into office. The act should therefore be strictly construed, and nothing should be regarded as included in it which is not clearly and intelligently described in its very words. *Rozelle v. Harmon*, 108 Mo. 889, 12 L. R. A. 187; *Connell v. Western U. Tel. Co.* 108 Mo. 459; *State, Wood, v. Smith*, 114 Mo. 180; *Dudley v. Western U. Tel. Co.* 54 Mo. App. 391.

The history of the legislation against corrupt practices in elections confirms and emphasizes the view we have taken that fusions between political parties, or such acts as are charged in this case, are not within the scope of the act of 1893. This act was manifestly patterned after the English corrupt practices acts of 1854 (17 & 18 Vict. Pub. Gen. Stat. 1854, p. 523) and 1883 (46 & 47 Vict. Law Reports, Vol. 19, p. 243). In the English statute of 1854, there was no prohibition against inducing the withdrawal of a candidate at an election by any means that might be employed to accomplish the purpose. It was not until 1883 that procuring the withdrawal of a candidate was prohibited. Then for the first time the bans of the law were laid upon such practices. The 15th section of the English act of 1883 is as follows: "Any person who corruptly induces or procures any other person to withdraw from being a candidate at an election, in consideration of any payment or promise of payment, shall be guilty of illegal payment, and any person withdrawing, in pursuance of such inducement or procurement, shall also be guilty of illegal payment." Prior to the adoption of this regulation the English law had for years contained provisions in almost the same words as our act of 1893, against bribery of voters, and the expenditure of more money than the limit fixed by the act, besides various other provisions not included in our act, but until 1883 it had not been deemed necessary or expedient to prohibit one candidate from securing

the withdrawal of an opposing candidate. We have adopted the old English law, but have not yet enacted any law similar to the section quoted of the English law of 1883, and until the legislature sees fit to enact such a law, we cannot, by construction, enlarge the provisions of the act of 1893, so as to add to the acts now prohibited other acts, such as those charged in this case.

Laws of this character have always been strictly construed. Thus, in *Com., Directors of the Poor, v. Wells*, 110 Pa. 463, an act prohibiting betting at an election was held not to apply to betting upon the result of a primary election held to nominate candidates for a political party.

The case of *Mason v. State*, lately decided by the supreme court of Ohio, but not yet officially reported, did not involve the questions now under consideration. That was a plain case of bribery of voters, and consequently has no application to this case.

The sixth charge alleges that the amount expended by Bland to secure his nomination and election, "and the amount expended by other person, or persons, wholly or in part with his knowledge for said purpose," exceeded the legal limit.

It will be observed that it is not charged that Bland himself, or any other person for him with his knowledge or consent, spent more money than the law permits. The allegation is that what he spent and what his friends spent partly with his knowledge and partly without his knowledge exceeded the legal limit. It needs no deep discernment to see that if the expenditure of money for a candidate without his knowledge or consent would work a forfeiture of his office, an officer might be ousted for acts done by others beyond his control and without his knowledge. Under such a construction of the statute no man, however honest or law-abiding, would ever have a safe tenure of office, for if he can be ousted because of the acts of others done without his knowledge, then in order to accomplish this purpose it would only be necessary for some evil-minded or designing person to spend enough money, added to the amount the officer had legitimately spent, to exceed the limit, and the innocent officer would lose the office to which the people had elected him. This is a *reductio ad absurdum*, but it points extremities to which we would be led if the sixth charge was held good. No man was ever punished or deprived of an office for an act he did not commit himself, or which was done without his knowledge or consent, where the integrity of the voters' will was not violated or the legality of the election itself was not questioned.

It is too plain for argument therefore that the sixth charge states no cause of action against the defendant.

It is insisted, however, that this is a proceeding by quo warranto, instituted by the attorney general *ex officio*, under his constitutional right, that the petition in this case is good even if all the charges be disregarded, because it alleges that defendant is usurping a public office, and that the burden of showing a right to the office in question is devolved upon the defendant.

The error in this contention consists in assuming that this is a proceeding by quo warranto, instituted by the attorney general *ex officio*. Proceedings by quo warranto may be instituted by the attorney general in his official capacity and of his own motion. (*State v. Merry*, 8 Mo. 278; *State, Boyd, v. Rose*, 84 Mo. 198; *State, Harrison, v. Frazier*, 98 Mo. 426; *State, Brown, v. McMillan*, 108 Mo. 153; *State, Walker, v. Equitable Loan & Invest. Co.* 142 Mo. 325; *State, Dearing, v. Berkeley*, 140 Mo. 184; *State, Crow, v. Vallins*, 140 Mo. 528), and it is not necessary or proper that there should be a private relator in such a proceeding. But under the act of 1893, the attorney general has no right or power, *ex officio*, to institute a proceeding of this character. On the contrary, he cannot institute the proceeding until the defeated candidate takes the initiative by making an application to him, and giving a bond, and the applicant has the express right under the act to be a party to the proceeding, and if the defendant is ousted, the applicant may obtain a judgment awarding the office to him. In no proper sense, therefore, can this be regarded as a proceeding by quo warranto instituted by the attorney general at his own instance, or *ex officio*, but it is purely a special proceeding instituted under the act of 1893, and therefore falls within all the limitations and restrictions by the statute provided. The fact that § 11 of the act provides that the action shall be deemed to be and shall be conducted according to the rules prescribed by law for an action against the usurper of an office, does not change the action from a proceeding under the statute to a common-law proceeding by quo warranto. For while we find these provisions in § 11, we also find that by § 10 the defeated candidate is required to make an application, in writing, verified by his affidavit, to the attorney general, setting forth one or more of the charges specified in that section and asking the attorney general "to bring an action to have such public office declared vacant on account of said violation of the laws concerning elections." That is, the applicant is required to specify the charge and the attorney general must (he has no discretion) bring the action to have the office declared vacant, "on account of said violation of the laws concerning elections." The attorney general is therefore limited to the charges specified by the applicant, and the office can only be declared vacant on account of "said violation." (The petition in this case complies with the statutory requirement by averring the filing of the verified charges and bond, and even makes them exhibits in the case.) Manifestly, therefore, the petition in the case must set out the charges preferred by the applicant, so that the defendant may be advised of the nature of the charges against him, and so that he may demur to them or join issue upon them. The proceeding being highly penal in its character, the petition must state, clearly, charges which are made actionable by the act. In this, and, in fact, in all cases, the petition must state a cause of action, and it is the privilege of a defendant to challenge the sufficiency of the petition by raising the questions of law, which are apparent upon the face of the petition, by a demurrer, or he may join issue as to the

facts. But whether the defendant demurs or answers he can always, at any time, during the progress of the case, insist that the petition states no cause of action in law against him, for the petition is always a part of the record, and errors apparent upon the face of the record may be assailed even for the first time in this court. Courts are instituted for the enforcement of the laws, and as no litigant can confer jurisdiction over the subject-matter upon a court, even by consent, it is wholly immaterial whether the parties raise the question of jurisdiction by answer or demurrer or refuse to raise it at all. If the petition fails to charge any offense against the laws of the state, it is the province, privilege, and duty of the court to refuse to enter a judgment against the defendant. It is a solecism to say a court of law would enter a judgment punishing a defendant for doing an act that was never made unlawful by any law (*Kansas v. Corrigan*, 86 Mo. 100, loc. cit. 69.) In this case the defendant demurred to the petition instead of filing an answer. This was proper practice, and was conducive to a speedy determination of the question of whether the charges constitute any offense under the corrupt practice act of 1893, but, as above observed, it would have been the duty of the court to decide that question before it could render a judgment, whether the defendant raised the question in one way, or another or not at all, for courts are not mere playthings for litigants, but are created for the discharge of serious and solemn duties.

In reaching the conclusion announced in this case, we feel the importance of the questions involved. We realize that pure, fair, and honest elections, untainted by fraud and unstained by even a suspicion of wrongdoing, are the foundations upon which our institutions rest. We appreciate the especial necessity of rigidly enforcing all constitutional laws having for their object the protection of the sacred right of the electors to have their wishes faithfully recorded and strictly respected. We

understand that the purpose of acts like that of 1893 is to purify elections, by guaranteeing assurance and protection to the law-abiding citizens, and by punishing with symbolic stripe and shaven head, rough fare, and hard labor, all who are so bereft of patriotism, or so impregnated with criminal selfishness, as to pollute the fountain from which spring the liberties of the people. But under the division of powers in our form of government we have no right to trench upon the prerogatives of the other co-ordinate branches of our government. We have no right to make laws. Our duty and province is ended when we construe and enforce the laws that are made by the legislature, and by as much as we should overstep the boundary lines of our powers, and attempt to invade the province of the legislature, we would be ourselves violators of the Constitution and laws we are solemnly sworn to obey. These truisms in our law are not threadbare utterances. It is as wholesome to recall them today as it ever was in our history. They are the alphabet of the language of freedom, and the *ultima thule* of the liberties of our people.

Our conclusion is that the charges contained in the petition do not constitute any offense against any law of our state, and do not bring this case within any of the provisions of the corrupt practices act of 1893, and that the petition be adjudged insufficient in law, and judgment entered for the defendant.

It is so ordered.

Gantt, Ch. J., Sherwood, Burgess, and Williams, JJ., concur.

Brace, J., dissents:

I cannot concur in the foregoing opinion of Judge Marshall for the reason that in my judgment an offense under the provisions of the corrupt practices act of 1893 is sufficiently charged, in the first, second, and third specifications of the petition; hence the demurrer should be overruled.

Robinson, J., concurs in my view.

Rehearing denied.

UTAH SUPREME COURT.

OGDEN CITY, *Respt.*,

v.

BEAR LAKE & RIVER WATERWORKS
& IRRIGATION COMPANY *et al.*, *Appts.*

(.....Utah.....)

*1. An order appointing a receiver is a final judgment, within the meaning of § 9, art. 8, of the state Constitution, and is appealable. In determining whether an order is appealable, its effects upon the rights of the parties will be considered, rather than the stage of the litigation at which it was made.

2. The authority of a public corporation is limited to such powers as are expressly

*Headnotes by ZANE, Ch. J.

NOTE.—As to right of municipality to sell waterworks, see also *Huron Waterworks Co. v. Huron* (S. D.) 30 L. R. A. 848, and *note*.

As to lease of property by municipality, see also 41 L. R. A.

granted to it, and such as may become necessary to their exercise.

3. The provision of the charter of Ogden City, authorizing it to lease, convey, and dispose of property, real and personal, for its benefit, did not authorize it to lease or otherwise transfer its waterworks system, or its water right used in supplying its inhabitants with water. A special provision is required to authorize the transfer of property so used.

4. Personal or real property, not devoted to the use of the public, or needed therefor, may be sold or transferred by a municipality under a general provision of its charter authorizing it to sell property.

5. A receiver will not be appointed to take possession of property and charge of business in the hands of a defendant, unless

Sun Printing & Pub. Assn. v. New York (N. Y.) 37 L. R. A. 788; *Baily v. Philadelphia* (Pa.) 30 L. R. A. 837.

the plaintiff's right is sufficiently probable, or when it is not probable that such property will be lost or will sustain injury during the suit if the same is left in defendant's hands, or that the business will be mismanaged.

(March 26, 1898.)

APPEAL by defendants from a judgment of the District Court for Weber County appointing a receiver of the defendant corporation in a suit brought to set aside a lease of waterworks to defendants and to recover possession of them. *Reversed.*

Statement by **Zane, Ch. J.:**

It appears from the record in this case that on July 16, 1884, the Ogden Waterworks Company assigned and conveyed to Ogden City, Utah, for the consideration of \$74,864.50, and for the further consideration that the latter assumed all the liabilities of the former, all the water rights, rights of way, ditches, dams, flumes, reservoirs, water pipes, hydrants, and all instruments used for the purpose of diverting and distributing water owned and used by such company, and belonging to or connected with its water system; that the city of Ogden took possession of such water rights and system, and dedicated them to the use of its inhabitants, and repaired, improved, and extended the same, and established, by ordinance, water rates. It appears further that on August 6, 1889, a contract was entered into between Ogden City and one John R. Bothwell, by which the former purported to convey to the latter the right to furnish water to the city and its inhabitants, and the use of its streets for the purpose of laying water pipes for the water system described. The contract also provided: That upon the completion and operation of the system within the time designated, and in consideration of the benefits secured, the city would lease to him, for the full time that said Bothwell or assigns should furnish water through the system for municipal purposes, the water right owned by it, for an annual rent of \$1. "That within one year from the date hereof, he or his assigns will have in operation a complete distributive water system, furnishing the city and her inhabitants a plentiful and ample supply of water suitable for domestic purposes, continuously, from the mountains immediately east, and, as a part of said system, will have completed on said date a conduit, commencing in Ogden cañon, at a sufficient elevation, and made of size sufficient, to convey the flow of Ogden river, and terminating at the mouth of the cañon, and from the terminus thereof a supply main or mains of sufficient diameter to convey an abundance of water for all purposes as contemplated by this contract, to the intersection of Pierce avenue and Twenty-Fifth street, and from thence the distribution shall be by first-class iron pipes, upon the streets and in the manner designated in the map hereto attached, marked 'Exhibit A,' and made a part hereof, and to be approved by the city council, and will extend the same as fast as adjoining property owners produce revenue equaling 8 per cent cost of the extensions." And it was provided that the grantee should furnish 200 gallons per day *per capita*, and the city was given

41 L. R. A.

the right at any time, at its option, to purchase the entire distributive system emanating from the mouth of the conduit, at the original cost of construction, "and may pay for the same in cash, or in 8 per cent bonds of the city, provided they be legal and valid. In case of the purchase of the distributive system as set out in § 5, then the city shall have the right, at its option, to also purchase from the said John R. Bothwell or assigns all or such portion of the water of Ogden river as she shall elect, at a price to be established by arbitration." The contract contains other provisions, which we do not deem it necessary to refer to in this statement of the case. It appears further that the rights and obligations of Bothwell under the contract were transferred to the Bear Lake & River Waterworks & Irrigation Company, defendant, and were by it transferred to the Bear River Irrigation & Ogden Waterworks Company; that the latter company before the commencement of this suit expended more than \$267,925.80 in substituting its new system for the old one, and in extending, improving, and repairing such waterworks, and distributive system; and that it has received as much as \$22,500 annually in rents for water distributed and delivered. After the corporate defendants had been in possession, under the contract mentioned, from October, 1890, the plaintiff filed its bill in chancery against the defendants on July 10, 1897, in which it set up the above facts, with others, and asked the court to find and decree the plaintiff to be the owner of the entire water system, and to require the Bear River Irrigation & Ogden Waterworks Company to deliver the same to the plaintiff, and to enjoin them from collecting any water rents from persons using the water through the system, and for an accounting for rents collected. The decree was asked on the ground, as alleged, that the city of Ogden did not possess the power to convey its waterworks and water system to John R. Bothwell, or any of the defendants, or to lease its water rights; that the use of its waterworks and water right had been dedicated to the public. A decree was also asked, in case the contract should be held valid, on the further ground that defendants' rights under the contract had been forfeited by a refusal or failure to comply with the contract set forth. The bill did not contain a prayer for the appointment of a receiver of the waterworks, and the property or business thereof. But on January 4, 1898, about six months after commencing the action, the plaintiff entered a motion in the case for the appointment of a receiver of the entire water system and the business, with power to take possession thereof and collect water rates, and to transact all the business thereof. A receiver was asked for on the ground that the plaintiff had an interest in the waterworks and its business, and that such interest would be in danger of being lost or greatly impaired unless a receiver should be appointed, and that the defendants were insolvent. Affidavits were read to the court, and other evidence was heard in support of the motion and against it, and insolvency of the defendants was denied. After hearing the motion upon the affidavits, and other evidence, the court granted an order or decree appointing a receiver of the entire water

system and the business thereof, with directions to take possession; and the receiver having taken possession under the decree, the defendants took this appeal, which brings the decree before us for review.

Messrs. Evans & Rogers, E. G. Vaughan, and A. G. Horn for appellants.
Messrs. E. M. Allison, Jr., C. C. Richards, J. H. MacMillan, and C. C. Day, for respondent:

An order appointing a receiver is not a final judgment, from which an appeal will lie; and the appeal in this case should therefore be dismissed.

High, Receivers, § 820; *North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co.* 14 Utah, 155; *United States v. Church of Jesus Church of L. D. S.* 5 Utah, 394; *Re Kelsey*, 12 Utah, 393; *Eastman v. Gurrey*, 14 Utah, 169; *Watson v. Mayberry*, 15 Utah, 265; *White v. Pease*, 15 Utah, 170; *Nelson v. Southern P. Co.* 15 Utah, 325; *Bear River Valley Orchard Co. v. Hanley*, 15 Utah, 506.

If an order granting a temporary injunction is not appealable, an order appointing a receiver temporarily is not appealable.

Beach, Receivers, § 736; High, Receivers, § 737.

No judgment or decree will be regarded as final within the meaning of the statutes in reference to appeals, unless all the issues of law and fact necessary to be determined were determined, and the case completely disposed of, so far as the court had power to dispose of it.

1 Freeman, Judgm. 4th ed. § 34; 1 Black, Judgm. § 24; *Lodge v. Twell*, 185 U. S. 232, 34 L. ed. 153; *Dainese v. Kendall*, 119 U. S. 53, 80 L. ed. 305; *McGourkey v. Toledo & O. C. R. Co.* 146 U. S. 536, 36 L. ed. 1079; *Louisiana Nat. Bank v. Whitney*, 121 U. S. 284, 30 L. ed. 961.

The rule is firmly established by an almost unanimous expression of the courts, that such orders are not final judgments, and consequently no appeal lies therefrom.

Eaton & H. R. Co. v. Varnum, 10 Ohio St. 622; *Meadow Valley Min. Co. v. Doids*, 6 Nev. 261; *Holden v. McMakin*, Pars. Sel. Eq. Cas. 270; *Coates v. Cunningham*, 80 Ill. 467; *Hottenstein v. Conrad*, 5 Kan. 249; *Kansas Rolling Mill Co. v. Atchison, T. & S. F. R. Co.* 31 Kan. 90; *Johnston v. Hanner*, 2 Lea, 8; *Duncan v. Campau*, 15 Mich. 415; *Brown v. Vandermeulen*, 41 Mich. 418; *Wilson v. Davis*, 1 Mont. 98; *French Bank Case*, 58 Cal. 495; *Emery v. Alvarado*, 64 Cal. 529; *East & West Texas Lumber Co. v. Williams*, 71 Tex. 444; *Hanon v. Weil Bros.* 69 Mich. 476; *Forgay v. Conrad*, 6 How. 201, 12 L. ed. 404; *American Construction Co. v. Pennsylvania Co. for Insurance on Lives and Granting Annuities*, 148 U. S. 378, 379, 37 L. ed. 489.

The pretended gift of the waterworks and water right by Ogden City or its officers was and is *ultra vires* and absolutely void.

When a municipality is vested by its charter with power to buy or construct and maintain a system of waterworks, and it accepts the charter and proceeds to exercise such power by either buying and maintaining or constructing and maintaining a system of waterworks at the expense of the citizens of the municipal

ity, the waterworks so bought or constructed and maintained are clothed with a public trust, and are devoted to a public use, and are dedicated irrevocably to the public use of the inhabitants of the city.

Huron Waterworks Co. v. Huron, 7 S. D. 9, 30 L. R. A. 848; 2 Dill. Mun. Corp. § 635; 1 Dill. Mun. Corp. §§ 27, 110, 508; 2 Morawetz, Priv. Corp. 1120-1129; *Meriwether v. Garrett*, 102 U. S. 478, 26 L. ed. 197; *New Orleans v. Morris*, 105 U. S. 600, 26 L. ed. 1184; 2 Beach, Pub. Corp. § 1327; 15 Am. & Eng. Enc. Law, pp. 1100-1108; *Atlantic City Waterworks Co. v. Read*, 50 N. J. L. 665; *Noel v. San Antonio*, 11 Tex. Civ. App. 580, and cases cited; *Farmers' Loan & T. Co. v. Galesburg*, 183 U. S. 156, 33 L. ed. 573; *West Hartford v. Hartford Water Comrs.* 44 Conn. 360; *Smith v. Nashville*, 88 Tenn. 464, 7 L. R. A. 469; *Roberts v. Louisville*, 92 Ky. 95, 13 L. R. A. 844.

And such property so dedicated to, and held for the public uses of the inhabitants of Ogden City could not be subjected to the payment of the debts of the city. Its public character forbids such an appropriation.

Huron Waterworks Co. v. Huron, 7 S. D. 9, 30 L. R. A. 848; *Meriwether v. Garrett*, 102 U. S. 478, 26 L. ed. 197; 2 Dill. Mun. Corp. § 578; *New Orleans v. Morris*, 105 U. S. 600, 26 L. ed. 1184; 15 Am. & Eng. Enc. Law, p. 1068.

The business of constructing and maintaining waterworks, and of furnishing water for fire protection and domestic use, is within the scope of the governmental functions of the municipality, as distinguished from its private or business functions, and all of which are for public uses and public purposes.

2 Morawetz, Priv. Corp. § 1114; *State, Atty. Gen., v. Toledo*, 48 Ohio St. 112, 11 L. R. A. 729; *Lumbard v. Stearns*, 4 Cush. 60; *Huron Waterworks Co. v. Huron*, 7 S. D. 9, 30 L. R. A. 848; *Opinion of the Justices*, 150 Mass. 596, 8 L. R. A. 487; *Detroit v. Moran*, 44 Mich. 602; *Smith v. Nashville*, 88 Tenn. 464, 7 L. R. A. 469; *Levy v. Salt Lake City*, 5 Utah, 312; *Springville v. Fullmer*, 7 Utah, 452; *Rochester v. Rush*, 80 N. Y. 310; *Haugen v. Albina Light & W. Co.* 21 Or. 411, 14 L. R. A. 424; *Olmsted v. Proprietors of Morris Aqueduct*, 47 N. J. L. 333.

And neither Ogden City, nor the officers thereof, assuming to act for it, had any power to sell or give away its waterworks or water rights, and the attempted sale or gift thereof was void.

Huron Waterworks Co. v. Huron, 7 S. D. 9, 30 L. R. A. 848; *New Orleans v. Morris*, 105 U. S. 600, 26 L. ed. 1184; *Illinois & St. L. R. & Canal Co. v. St. Louis*, 2 Dill. 70, Fed. Cas. No. 7,007, and note; *Taggart v. Detroit*, 71 Mich. 93; *McCullough v. San Francisco Bd. of Edu.* 51 Cal. 418; *San Francisco v. Itell*, 80 Cal. 57; *Hoadley v. San Francisco*, 124 U. S. 639-646, 31 L. ed. 553-556.

Even private corporations cannot sell or lease, or in any manner transfer, the property necessary to perform their obligations and duties to the public, which are imposed by their charters.

2 Morawetz, Priv. Corp. §§ 1120-1129; 5 Thomp. Corp. §§ 5880, 5881, 5998-6000, 6137; 4 Thomp. Corp. §§ 5855-5857.

Ratification is a species of estoppel, and, as such contracts are absolutely void, no principle of estoppel will be allowed to control.

1 Beach, Pub. Corp. §§ 248, 628; Reese, *Ultra Vires*, § 78; Green's *Brice's Ultra Vires*, chap. 6; 2 Morawetz, *Priv. Corp.* § 619; Ang. & A. Corp. § 804; 1 Dill. Mun. Corp. 8d ed. §§ 885, 886; *Dimpfall v. Ohio & M. R. Co.* 110 U. S. 209, 28 L. ed. 121; *Thomas v. West Jersey R. Co.* 101 U. S. 73, 25 L. ed. 950; *Oregon R. & Nav. Co. v. Oregonian R. Co.* 180 U. S. 22, 32 L. ed. 840; *Central Transp. Co. v. Pullman Palace Car Co.* 189 U. S. 24, 85 L. ed. 55; *Tippencanoe County Comrs. v. Lafayette, M. & B. R. Co.* 50 Ind. 86; *Irvine v. Union Bank*, L. R. 2 App. Cas. 386; *Christian University v. Jordan*, 29 Mo. 68; *National Trust Co. v. Miller*, 33 N. J. Eq. 153.

The power to construct waterworks and supply the inhabitants of the city with water, was required to be by ordinance and the enforcement thereof, at the time the so-called contract of sale was entered into.

1 C. L. 18-8, §§ 293, 294.

The statutory provisions were mandatory, and the power to sell, lease, or otherwise dispose of or to ratify a defective or irregular sale must have been exercised by ordinance in order to be valid.

Milford v. Milford Water Co. 124 Pa. 610, 8 L. R. A. 122; *Durango v. Pennington*, 8 Colo. 257; *McCoy v. Bryant*, 53 Cal. 249; *San Diego Water Co. v. San Diego*, 59 Cal. 519; *Central City v. Sears*, 2 Colo. 589; *State, Hunt, v. Lambertville*, 45 N. J. L. 281; *Newman v. Emporia*, 32 Kan. 456; *McBrien v. Grand Rapids*, 56 Mich. 95; 1 Dill. Mun. Corp. § 809, and note; 2 Beach, Pub. Corp. § 1328, and note; 1 Beach, Pub. Corp. § 251; *Brown v. New York*, 63 N. Y. 239; *People v. Swift*, 81 Cal. 26; *Cross v. Morristown*, 18 N. J. Eq. 305; *New Orleans v. Clark*, 95 U. S. 644, 24 L. ed. 521; *McCracken v. San Francisco*, 16 Cal. 591; Reese, *Ultra Vires*, §§ 189, 190, 194.

The power to purchase or construct a system of waterworks by the city is a franchise conferred upon the municipality for the purpose of securing some advantage to the public, and when once that power is exercised the public have a right to complain of its relinquishment.

Taggart v. Detroit, 71 Mich. 92; *Gulf, O. & S. F. R. Co. v. Morris*, 67 Tex. 692; *Mullarky v. Cedar Falls*, 19 Iowa, 21; *Ottawa v. People*, 48 Ill. 289; *Lord v. Oconto*, 47 Wis. 386; *Atlantic City Waterworks Co. v. Atlantic City*, 39 N. J. Eq. 875; 15 Am. & Eng. Enc. Law, p. 1047; *East Hartford v. Hartford Bridge Co.* 10 How. 511, 18 L. ed. 518; *Oregon R. & Nav. Co. v. Oregonian R. Co.* 180 U. S. 1, 32 L. ed. 887; *Central Transp. Co. v. Pullman Palace Car Co.* 189 U. S. 24, 85 L. ed. 55; *Branch v. Jessup*, 106 U. S. 469, 27 L. ed. 279.

The appointment of the receiver was discretionary, and unless there has been an abuse of that discretion, the order appointing will not be reviewed on appeal.

High, *Receivers*, §§ 7, 25, 65; Beach, *Receivers*, §§ 5, 7; 20 Am. & Eng. Enc. Law, pp. 18-20, 107, 108; *Rolfe v. Burnham*, 110 Mich. 660; 3 Pom. Eq. Jur. § 1381; *United States v. Church of Jesus Christ of L. D. S.* 5 Utah, 361; *Ostrander v. Weber*, 114 N. Y. 95, 41 L. R. A.

The court had the power to appoint a receiver.

This is clearly a suit in equity. A part of the property involved consists of water rights, the right to take tolls and other franchises and easements, which cannot in any case constitute the subject-matter of an action in ejectment.

7 Enc. Pl. & Pr. p. 275 et seq., and cases cited; *Winona v. Huff*, 11 Minn. 119; *Caldwell v. Fulton*, 81 Pa. 488, 72 Am. Dec. 760; *Den, Farley, v. Craig*, 15 N. J. L. 191; *Hancock v. McCoy*, 151 Pa. 464, 18 L. R. A. 781; *Northern Turnp. Road Co. v. Smith*, 15 Barb. 858; *Parker v. West Coast Pkg. Co.* 17 Or. 510, 5 L. R. A. 61; *Wood v. Truckee Turnp. Co.* 24 Cal. 488.

The party taking property from a trustee steps into the shoes of the trustee, and himself becomes a trustee of the property.

1 Perry, Tr. 4th ed. § 217, and cases cited; 2 Pom. Eq. Jur. 2d ed. §§ 1044, 1053; 2 Perry, Tr. 4th ed. § 828; *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. ed. 152; Cooley, *Const. Lim.* p. 250; 2 Dill. Mun. Corp. 4th ed. §§ 575-577; 15 Am. & Eng. Enc. Law, pp. 1064, 1068; *Ransom v. Boal*, 29 Iowa, 68, 4 Am. Rep. 195; *Alton v. Illinois Transp. Co.* 12 Ill. 88, 53 Am. Dec. 475; *Merrweiler v. Garrett*, 102 U. S. 477, 26 L. ed. 197.

The existence of such a state of facts makes it imperative that an accounting be had, in order to properly adjust the rights between the *cestui que trust* and trustee, thereby bringing the case exclusively within the equitable jurisdiction of the court; and no special prayer is necessary to call for an accounting or to confer equitable jurisdiction.

Wood v. Brown, 84 N. Y. 387; *Dyckman v. Valiente*, 42 N. Y. 549.

The court possessed the undoubted power under the statutes of this state to appoint a receiver *pendente lite* to preserve the property in dispute until a final adjudication is had.

8 Pom. Eq. Jur. 2d ed. 1830-1836; High, *Receivers*, 8d ed. §§ 5-9; Beach, *Receivers*, § 3.

The appointment of receivers has long been a common remedy by courts of equity in cases of trusts, either express or implied, as against trustees and persons occupying fiduciary relations.

High, *Receivers*, § 692; Beach, *Receivers*, §§ 67, 486, 589, 593, 595; *Ladd v. Harcey*, 21 N. H. 514.

This action is brought, among other things, to vacate a fraudulent purchase of trust property. It is brought by the vendor as required by the statute. A vendor is one who disposes of property for a consideration. A purchaser is one who acquires property by any means except by descent.

20 Am. & Eng. Enc. Law, 68-70, and notes; Bouvier, *Law Dict.* title *Purchase*; 3 Bl. Com. p. 241.

Ogden City owed the duty to its inhabitants to retain and control its water system, and it had no power to transfer that duty to any other corporation or individual; and hence the contract by which the city attempted so to do is *ultra vires* and void.

In such a case a continuing duty rests upon both parties to the contract to disaffirm it at the earliest moment, which duty is not diminished by the lapse of years.

5 Thomp. Corp. §§ 5998-6000; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 86, 25 L. ed. 950, 958; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 317, 30 L. ed. 83, 94.

An interlocutory order appointing a receiver will not be reversed because of the insufficiency of the complaint to state a cause of action, as the complaint is still pending in the trial court, subject to amendment.

Gray v. Oughton, 146 Ind. 285; *Johnson v. San Francisco City & County Supers.* Ct. 60 Cal. 578.

Zane, Ch. J., delivered the opinion of the court:

The respondent insists that the order appointing a receiver is not a final judgment, within the meaning of § 9, art. 8, of the Constitution of this state. That section declares that "from all final judgments of the district court there shall be a right of appeal to the supreme court." The Bear River Irrigation & Ogden Waterworks Company had been in the actual possession of the water system, and the business transferred to the receiver by the order more than seven years before the order appointing the receiver and depriving it of its possession of the property and the control of the business was made. The order determined finally the rights of the parties to the possession of the property in dispute, and the control of the business, during the pendency of the suit; and the right to collect all demands due, and to pay all liabilities incurred, was also given to the receiver during that time. When the court shall finally determine the rights of the parties with respect to the property and business, and order them turned over to the one adjudged to be entitled, the order appointing the receiver will be recognized as binding. It will not be modified, added to, or changed. Before that time the receiver may collect and add to the fund, pay out a portion of it, and he will then deliver and transmit whatever remains to the person found to be entitled. The order, when made, was final, as to the appointment of the receiver. No further action of the court was contemplated with respect to it. Errors, if any, in the order, can only be reviewed on an appeal from it. It would be idle to review such errors after the duties of the receiver shall have been terminated,—after the order shall have spent its force. Any injury to the party entitled to the benefit of the possession and the business during the litigation will have been sustained before that time, and errors, if any, in appointing the receiver, will have accomplished their effects. By it, important rights were taken from the defendant the Bear River Irrigation & Ogden Waterworks Company, for the injurious consequences of which, if erroneous, there can be no redress without appeal from the order. In determining whether the order is appealable, we must consider its effects upon the rights of the parties, rather than the stage of the litigation at which it was made. While some of the authorities bearing upon the question cannot be reconciled, we are disposed to follow those supporting an appeal in cases like this. They appear to be supported by the better reasons. *Barry v. Briggs*, 22 Mich. 201; *Brown v. Ring*, 77 Mich. 159; *Lewis v. Campau*, 14 Mich. 458, 90 Am. Dec. 245.

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The appellants insist that the order appointing the receiver, appealed from, is erroneous; that the court was not authorized, under the pleadings and the evidence, to make the order. They rely upon the contract of August 6, 1889, between the city of Ogden and John R. Bothwell, and the transfers by which it came to the Bear River Irrigation & Ogden Waterworks Company, and the resolutions of the city council, of October 4, 1890, purporting to turn over and transfer to the Bear Lake & River Waterworks Company the Ogden City waterworks system. They insist that thereby the latter company obtained the title to the Ogden City waterworks system, and the right to furnish water to the city and its inhabitants, and the use of its streets for water pipes, and a lease for the full time that Bothwell or his assigns should furnish water through the waterworks system for municipal purposes; while the respondent claims that the waterworks system and the water, the right to which is in dispute, was dedicated to the use of the public, and that the city authorities could not transfer it to Bothwell, or to the defendants, or either or any of them, without the express authority of a legislative enactment, and that, no such authority being in existence, the transfer relied upon by the defendants was absolutely void. If the defendants are right in their contention, the plaintiff has no right to the water system or water right in dispute, or to the control of the business, and the appointment of the receiver must be held to be erroneous. On the contrary, if the plaintiff is right in its contention, or we can say from the pleadings and evidence upon which the receiver was appointed that the plaintiff is probably right in its contention, and that the property or proceeds of the business was in danger of being materially injured, or any considerable part of it was in danger of being lost, if left in the hands of the defendant, the Bear River Irrigation & Ogden Waterworks Company, during the pendency of this suit, we must hold that the appointment of the receiver was not erroneous.

As to the first proposition in the order we will consider them. Was the city of Ogden authorized to enter into a contract transferring its rights to the waters and system in question to the defendants, or either of them? Ogden City was a public corporation, and its authority was limited to such powers as were expressly granted by statute, and such as might be necessary to those expressly given. Undoubtedly, water distributed to a city and its inhabitants is devoted to a public use, and the entire system, whether consisting of reservoirs, conduits, pipes, or other means used to accomplish the delivery, is also dedicated to the same use. The charter of Ogden City contained a provision authorizing it to "purchase, receive, hold, sell, lease, convey, and dispose of property real and personal for the benefit of the city." No authority is expressly or by necessary implication given to convey, transfer, or lease to a private corporation, or other person, property used by the public,—dedicated to a public use. The control and management of property dedicated to the use of the people of a city is given for their benefit, not for the individual benefit of the public authorities. A public corpora-

tion is not a legal entity or person, whose interests can be considered separate and apart from its people. It is but an instrumentality created and perpetuated for their benefit. Its officers as such are nothing more than agents of the public. They must act within the scope of their authority. Their acts outside are perfectly impotent, from a legal standpoint. Their authority and control of the property and rights of the corporation used by the people are not given them for the purpose of being transferred to private corporations, or anyone else, to enable them in that way to deprive the public of its use; nor can the city authorities divest the city of its rights to it, and in that way rid themselves of the management and control of it for the city and its inhabitants. They cannot deprive the public of the benefit of property rights or powers affected with a public use by conveying or leasing it to others, unless their charter specially authorizes it, though such other corporation or person may undertake to give the public the use of it for compensation deemed reasonable. Such officers are selected by the people, to whom they are responsible, and they may be removed and superseded by others. While the use of public property is controlled and managed by public officers, whatever compensation is received goes into the public treasury; and, if the compensation exceeds the actual cost, the public gets the benefit of the surplus or net income. When property whose use is devoted to the public is conveyed or leased to private corporations, though a contract may require its use to be given to the public for a reasonable remuneration, the public, to a great extent, loses its control over it, and any net income realized goes into the hands and pockets of private parties. In fact, such parties cannot give the use of their property to the public for the actual cost of it, and the actual expense of the business, as in this case. They must have profits, and it is to the interest of such parties to make the profits or net income as large as public officials will consent to make it. The people usually get fleeced when the city places its waterworks in the hands of private parties. Public spirited men are not at all times free from the undue influence of self-interest. Their disposition to favor the public is not equal to their inclinations to favor themselves. Such are the leanings of human nature, even when engaged in public-spirited projects. A city sometimes has on hand personal and real property not devoted to the use of the public. Fire engines, horses, or other personal property, may become unsuited to the use for which they were designed, and be replaced, and cease to be used. Public buildings may become unfit for the public use, and for sufficient reasons the city may not wish to build on the same lot; and such buildings, and the lots upon which they stand, may be no longer used by the public. The city from time to time may have other classes of property that has ceased to be used, or is not used by the public. All such property of a municipal corporation, not devoted to the public use, may be sold or leased under the general authority to sell or lease, as the public welfare may demand. Such property may be converted into money or other things, and in that form devoted to the use of the public. But property devoted to a

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public use cannot be sold or leased without special statutory authority. It follows that the writing purporting to grant to John R. Bothwell the right of Ogden City to furnish water to it and its inhabitants, and to lease to him its water rights, as long as he or his assigns should furnish water to it, and the resolution of its city council purporting to turn over to the Bear Lake & River Waterworks Company the waterworks system of the city, were absolutely void, because made without authority of law. *Huron Waterworks Co. v. Huron*, 7 S. D. 9, 30 L. R. A. 818; 5 Thomp. Corp. § 5880; 5 Am. & Eng. Enc. Law, p. 1068.

It appears from the pleadings in the record that about seven years intervened after the corporate defendant took actual possession under the void grant and lease, before this suit was instituted, and that nearly all of the pipes and other parts of the water system delivered to the corporate defendants by the plaintiff had been replaced, and that the distributive system had been greatly added to and extended; that the Bear River Irrigation & Ogden Waterworks Company had expended more than \$269,925.80 in replacing the old system, and in adding to and extending it; that the replacement of such new system at this time would cost that amount. While we are of the opinion that the attempted transfer of the old waterworks system by the plaintiff, and the leasing of its water right, were invalid, and the city of Ogden must be held to be the owner and entitled to the possession and control of the remaining portion, the possession of which it transferred to the corporate defendants, and that it is the owner and entitled to the possession and control of the water right, notwithstanding the lease to Bothwell and his assigns, we do not deem it necessary on this appeal to determine the rights and interests of the respective parties to and in so much of the present system constructed by the corporate defendants, or either of them. Such rights can be more satisfactorily determined in the light of all the evidence upon the final trial. The relative rights of the parties with respect to so much of the new system as replaced the old may be distinguished from their rights with respect to so much of the system as consists of additions to and extensions of the old. The right and interest of the plaintiff to and in that portion of the system which the Bear River Irrigation and Ogden Water-Works Company built during the time it was in possession and control is not sufficiently manifest and probable from the proof,—particularly their right and interest in and to so much of the plant and system consisting of additions and extensions. Nor was the danger of loss, removal, or material injury sufficiently established to authorize the court to take the possession of the entire water-works system and business from the defendants, and place it in the hands of a receiver. The property involved consisted of a reservoir, conduits, and water pipes buried in the ground, and fire hydrants and other instrumentalities connected with them. The defendants are not likely to lose, remove, or materially injure these; and it does not appear from the evidence that business pertaining to the waterworks has been neglected or mismanaged by the corporate defendants, or either of them.

The order of the court below appointing Thomas D. Dee receiver is reversed and the cause is remanded, with directions to order a return of the property to the Bear River Irrigation & Ogden Waterworks Company.

Costs are awarded to the appellants.

Bartch, J.: I concur in the judgment of reversal, directing the property to be returned to the defendant company.

Miner, J., concurring in part:

I concur in the opinion of the Chief Justice, in so far as it directs a reversal of the order appointing a receiver. This being an appeal from an order appointing a receiver, the question as to the validity of the writing and contract between the city of Ogden and the Bear Lake & River Waterworks Company, and of the resolution of the city council purporting to turn over to the Bear Lake & River Waterworks Company the waterworks system of the city of Ogden, are not properly before this court, upon this appeal, for determination. Upon the final hearing many questions not heretofore presented to, or passed upon by, the trial court, may arise; and until that time, in my opinion, a decision upon questions not necessary for the determination of the question at issue, or upon the merits of the case, should be withheld. At the time this court denied the application made in this case for a writ of *certiorari*, and permitted, without argument, an appeal to be taken from the order appointing a receiver, the case of *United States v. Church of Jesus Christ of L. D. S.*, decided by the territorial supreme court, and reported in 5 Utah, 394, holding that an appeal would not lie from an order appointing a receiver, had not been called to the attention of this court. So far as the present case is concerned, the determination of that question is the law of this case. But whether an appeal will lie from an order appointing a receiver in all cases is a question upon which I have serious doubts, under the decisions of this court, and the authorities cited. I expressly refrain from assenting to the doctrine laid down in the opinion of the Chief Justice upon this subject.

John HAGUE, *Respt.*,

v.

NEPHEI IRRIGATION COMPANY, *Appt.*

(.....Utah.....)

*1. Where the allegations of a complaint in a suit brought to determine the plaintiff's right to the use of water of a stream state, in general terms, a cause of action by alleging clearly and distinctly ownership, invasion of rights, and injury, without distinct allegations of how plaintiff became the owner of a water right, whether by appropriation, adverse user, or purchase, plaintiff's title can be shown

*Headnotes by BARTCH, J.

NOTE.—As to prior appropriation of water, see note to *Isaacs v. Barber* (Wash.) 30 L. R. A. 665; as to change in use of water, see note to *McGuire v. Brown* (Cal.) 30 L. R. A. 384.
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by proof, and the allegations will be sufficient to withstand a general demurrer.

2. Where a party diverts the water of a stream, the appropriation, intention of the appropriator, use, and beneficial purpose are the tests which determine the rights acquired, and, if more water is diverted than is necessary for the beneficial purpose intended, the excess may be appropriated by a subsequent appropriator for a useful purpose.

3. Where parties have diverted the waters of a stream for domestic and irrigation purposes in larger quantities than necessary for their use, the owner of a mill may appropriate the excess for manufacturing purposes to an extent necessary for his use.

4. Where a prior appropriator of water merely changes the place of diversion without causing injury to a subsequent appropriator, the subsequent appropriator has no cause of complaint, but, if the prior and subsequent appropriators are each entitled to a certain portion of the stream, neither can change the place of diversion so as to injuriously affect the rights of the other.

5. The failure to make a finding on an issue is not a reversible error, where the finding, under the facts and circumstances disclosed by the evidence, would necessarily have been prejudicial to the appellant, and the facts found are sufficient to sustain the decree.

6. In a cause in equity, when there is ample proof in the record, unassailed, to support and justify the findings and decree, it is not necessary for the appellate court to determine the competency of evidence which cannot affect the decree.

(March 18, 1898.)

APPEAL by defendant from a judgment of the District Court for the Fifth District in favor of plaintiff in an action brought to quiet plaintiff's title to the use of certain water and to enjoin defendants from interfering therewith. *Affirmed.*

Statement by **Bartch, J.:**

This is a controversy over the use of the water of Salt Creek, in the town of Nephi, the plaintiff claiming the right to the use of a certain portion thereof for manufacturing purposes, and the defendant the right to divert a part of such portion, for the purposes of irrigation, before its subjection to the plaintiff's use. It appears from the testimony that in 1851 the town of Nephi was settled by nineteen families, and in the following year the water of Salt creek was diverted from its natural channel for culinary, domestic, and agricultural purposes. In 1852, one Baxter, plaintiff's predecessor in interest, built a gristmill, locating it on the stream above all the points where water had been diverted. The next year, on account of trouble with the Indians, the mill was moved into the town, and located on a ditch. In 1854, it was reconstructed, and it appears thereafter a right of way to carry water to the mill was obtained from the town, and about 1860 the mill race was moved from a ditch and connected with the stream. In this location the mill and its race have remained ever since. When the plaintiff became its owner two ditches for irrigation and culinary purposes had been taken out above the mill, but the water to supply it was permitted to flow down

the stream, and, after passing through it was diverted and used for the purpose of irrigating a large body of land. In 1863 the plaintiff became the owner of the mill property and the appurtenances by purchase. He then reconstructed the mill, as it now stands, but no particular change was made in the race, which was about 4 feet 10 inches wide on the inside, and 2 feet in depth, and the water flowing therein about 18 inches deep. The inclination of the race remained the same ever since. At no time since 1863, except within the last five or six years, when the alleged wrongful diversions were made, was there more than one third of the water of the stream diverted above the mill. Up to the time of such diversions there was always more water in the stream, except during July, August, and September of each year, than was necessary to run the mill. At least 15 inches in depth of water, flowing in the race, is required to operate it at full capacity. Prior to the alleged wrongs, the owner could always run his mill to advantage, in the manufacture of flour, chop, etc., except that in some seasons, from July to October, a portion of the irrigation season, he could not run it at full head on account of scarcity of water. Before the commission of the alleged wrongs the defendant, it appears, never disputed the plaintiff's right to the water, nor refused him water for mill purposes. During the last five or six years, before the commencement of this action, however, the defendant not only refused to permit the plaintiff to use the water to which he claimed to be entitled, but asserted the right to change the place of use, and to divert such water above the mill whenever it chose to do so, although the effects of such change and diversion would be to prevent the operation of the mill to the plaintiff's injury. Respecting the taking of the water and its effect on his manufacturing business, the plaintiff testified: "They haven't taken much notice of me the last few years. They would take all the water sometimes, and sometimes they would not, just as it would suit them. The effect of this taking water, on the mill, was that it would drive customers away. I have been deprived of water to the extent that, where I used to run about a hundred bushels, the capacity of the mill in a day and a night, for these last five or six years I could not run ten. This last fall I could not grind ten." It further appears that since the commission of the acts complained of much more land has been irrigated from ditches taken out above the mill than was irrigated from the same sources before. For many years the gristmill in question was the only one in that vicinity, and it appears, after plaintiff had purchased it, in consequence of his objections to diverting water above it, a large portion thereof was turned down the stream, and, after flowing through the mill, was diverted below it, for the purposes of irrigation. The mill was built in the center of the town in 1854, and was afterwards, in 1862, rebuilt at or near the same place. It was operated regularly and profitably before the alleged wrongful diversion of the water, and the mill race has had, at all times, about the same capacity for carrying water, and no controversy arose over the plaintiff's right to the use of water for his manufacturing purposes

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until the defendant diverted it so as to prevent it from flowing through the mill. This suit was brought to ascertain and determine the plaintiff's right to the use of the water, to have his title thereto quieted, and to have the defendant and its agents restrained from diverting away from his mill any portion of the water to which he may be entitled. The defendant filed a demurrer to the complaint, but it was overruled, and at the trial the court by decree granted to plaintiff the relief asked. Thereupon the defendant appealed.

Messrs. F. W. Chappell and Moyle, Zane, & Costigan, for appellant:

The inhabitants of Nephi appropriated all the stream. When did plaintiff's adverse use accrue?

The use must be adverse; that is to say, inconsistent with the rights of him against whom the claim is made. There must be a clear invasion of the rights of the party against whom the claim is made; that is, an invasion of his rights which would have entitled him to an action, or which he could have prevented.

28 Am. & Eng. Enc. Law, p. 1005, and cases cited in notes; *Cox v. Olough*, 70 Cal. 345; *Alta Land & Water Co. v. Hancock*, 85 Cal. 219.

Such use must not be permissive.

Ball v. Kehl, 95 Cal. 608; *Boynton v. Longley*, 19 Nev. 69; *Feliz v. Los Angeles*, 58 Cal. 73; *Bell v. Sausalito Land & Ferry Co.* (Cal.) 83 Pac. 449; *Coalter v. Hunter*, 4 Rand. (Va.) 58, 15 Am. Dec. 726.

Unless acquiescence is shown, no adverse use can arise.

12 Am. & Eng. Enc. Law, pp. 1007-1009.

Where water is used for domestic and irrigation purposes, the place of diversion can always be changed.

Last Chance Min. Co. v. Bunker Hill & S. Min. & C. Co. 49 Fed. Rep. 430; *Fuller v. Swan River Placer Min. Co.* 12 Colo. 12; *Greer v. Heiser*, 16 Colo. 308; *Hamelt v. Irish*, 96 Cal. 214; *Woolman v. Garringer*, 1 Mont. 535; *Kidd v. Laird*, 15 Cal. 161, 76 Am. Dec. 472; *Davis v. Gale*, 32 Cal. 28, 91 Am. Dec. 554.

It is the duty of the court to find upon all issues in the cause, and its failure to do so is error.

Phipps v. Harlan, 53 Cal. 87; *Swift v. Canavan*, 52 Cal. 417; *Billings v. Everett*, 52 Cal. 661; *Baggs v. Smith*, 53 Cal. 88; *Roeding v. Perasso*, 62 Cal. 515.

The decree is absolutely uncertain and indefinite. It is made dependent upon a mill race which may be burned down to-morrow, and another litigation would be necessary to determine the slope of this race.

Nephi Irrig. Co. v. Vickers, 15 Utah, 374; *Smith v. Phillips*, 6 Utah, 376; *Holman v. Pleasant Grove City*, 8 Utah, 78; *Lakeside Ditch Co. v. Crane*, 80 Cal. 181.

Messrs. Rawlins, Thurman, Hurd, & Wedgwood and John B. Milner, for respondent:

The ultimate fact of ownership and continuous use was alleged clearly and explicitly. This is all that is required in pleading ownership.

Campbell v. Taylor, 3 Utah, 325; *Parley's Park Silver Min. Co. v. Kerr*, 130 U. S. 256, 32 L. ed. 906; *Ely v. New Mexico & A. R. Co.*

129 U. S. 291, 32 L. ed. 888; *Turner v. White*, 78 Cal. 299; *Garwood v. Hastings*, 38 Cal. 216; *Payne v. Treadwell*, 16 Cal. 242; 2 *Estee*, Pl. p. 178.

If defendant had desired a more specific allegation as to the character of plaintiff's ownership it should have been demurred specially.

Heiser v. Miller, 77 Cal. 192.

The appropriation may be for agriculture, or it may be for domestic use, or it may be for manufacturing purposes. The act of Congress passed July, 1866, places appropriations for these purposes upon an equal footing.

1 Comp. Laws 1888, § 407, p. 210; *Kinney, Irrigation*, § 150, and cases cited.

The appropriator of water to be used at a specified place for the purpose of operating machinery and other works, after so using and returning it to its original channel, cannot change the place of use to the damage of a subsequent appropriator lower down the stream.

Last Chances Min. Co. v. Bunker Hill & S. Min. & C. Co. 49 Fed. Rep. 430; *Proctor v. Jennings*, 6 Nev. 83, 3 Am. Rep. 240; *Ortman v. Dixon*, 13 Cal. 36; *Butte Table Mountain Ditch Co. v. Morgan*, 19 Cal. 609; *Junkans v. Bergin*, 67 Cal. 287; *Loddell v. Simpson*, 2 Nev. 278, 90 Am. Dec. 537; *Kinney, Irrigation*, §§ 154, 336, and cases cited; *Black's Pomeroy, Water Rights*, § 74; *Columbia Mining Co. v. Holter*, 1 Mont. 298.

A finding is not necessary unless the issue is material.

Hayne, New Trial & Appeal, § 240, and cases cited; *Louvall v. Gridley*, 70 Cal. 507.

A conveyance of the mill conveyed the water right as appurtenant.

McDonald v. Bear River & A. Water & Min. Co. 18 Cal. 220; *Gnocchio v. Amador Canal & Min. Co.* 67 Cal. 493.

Bartch, J., delivered the opinion of the court:

It is insisted by the appellant, at the outset, that the complaint fails to state a cause of action, and that its demurrer, by which this point was raised, ought to have been sustained. The objection seems to be that it does not plead the acquisition of any right in the stream, on the part of the plaintiff, either by appropriation or by adverse user. It is alleged, in effect that, for a period of more than thirty years prior to the commencement of this action, the plaintiff, his grantors and predecessors in interest, operated and were the owners of a grist mill, located in Nephi, on Salt creek, and during such period were the owners of a sufficient water right in the stream to operate it; that they had the free and uninterrupted use of the water during that period, except the interference therewith by the defendant since 1894; that during 1894, and since, the defendant wrongfully and unlawfully diverted water from the mill which was necessary to operate it, causing injury to the plaintiff; and that it threatens to continue to do so. Ownership, invasion of right, and injury are clearly and distinctly alleged, and a cause of action is stated, at least, in general terms, although there is no distinct allegation as to how the plaintiff became the owner of the water right, 41 L. R. A.

—whether by appropriation, adverse user, or purchase. Under the general allegations, this could be shown by proof. If the defendant desired a more specific and definite allegation of ownership, showing the nature thereof, its remedy was by proper pleading. Having failed in this, it cannot now be heard to complain. *Mangum v. Bullion Beck & C. Min. Co.* 15 Utah, 535. We are of the opinion that the allegations of the complaint are sufficient to withstand a general demurrer.

Counsel for the appellant next insists that the findings and decree are "wholly wrong in basing the plaintiff's rights upon his adverse use of the water," there being no evidence showing such use. This assumption that the plaintiff's rights are based on adverse user is warranted neither by the pleadings nor by the findings and decree. In his complaint his rights are based upon ownership since about 1852, the time Nephi was settled and the first mill erected. From the findings of fact it appears that, by certain conveyances, executed to him by persons owning a right to use of water of Salt creek for milling purposes, and by actual appropriation and use thereof, the plaintiff became the owner of the right to use a portion of the waters of that stream, and ever since has been the owner thereof, and used the same to operate his gristmill, and so used it until interrupted by the acts of the defendant of which he complains. The decree on this point is in harmony with the findings. Thus plaintiff's right is evidently based upon appropriation, purchase, and use.

But it is contended that all the water of Salt creek was appropriated for irrigation, domestic, and culinary purposes by the first settlers of Nephi, in 1852, before the first mill was built, and from this it is argued there was no water flowing in the stream which was subject to appropriation by the owners of the mill, and that consequently their use of the water was simply permissive, and ripened into no right which the owner could enforce in law. It may be that the nineteen families, who in 1851 or 1852 first settled the town of Nephi, in beginning to reduce a few arid acres of land to a state of cultivation and productiveness, appropriated, as stated by some of the witnesses, or attempted to do so, for agricultural, domestic, and culinary purposes, all the waters of Salt creek, a stream which has since been found to be amply sufficient to supply a town of considerable population,—hundreds of families,—for the same purposes, and, in addition thereto to irrigate large bodies of arid lands. Possibly with the limited knowledge of irrigation in those days, those few people, in an attempt to irrigate their lands, turned all the water of the stream out of its natural channel, and thought they appropriated it; but even if such be the fact, it does not necessarily follow that it was all "appropriated," within the legal sense of the term. Appropriation of water does not mean merely the diverting of it, but includes its use for some beneficial purpose. The appropriation, intention of the appropriator, use, and beneficial purpose, are the tests which determine the rights acquired by the diversion of a stream. This is so under the statutes, and the use may be for domestic purposes, irrigating lands, propelling machinery, and the

like; that is, the water may be applied to any useful purpose. Utah Comp. Laws 1888, § 2780 (14 Stat. at L. 253).

The object and intention, under the law, in diverting water, must be to apply it to some useful purpose, and, if by means of ditches more is diverted than is necessary for such purpose, the excess cannot be regarded as a diversion for a useful purpose; for, as matter of fact, such excess merely runs to waste, and its diversion cannot result in a vested right. If, therefore, A, who owns and intends to irrigate but 1 acre of land, diverts all the water of a natural stream, which is sufficient to irrigate 2 acres, he obtains a right only to sufficient water to irrigate his 1 acre, and B, who also owns an acre, may appropriate the excess. If, in this arid region, the law were otherwise, it would be a menace to the best interests of the state as well as to its citizens, because it would enable a few individuals, or association of individuals, by diversion of water in excess of use, to greatly limit the area of the public domain which could be cultivated, and thus deprive the state of its revenue, and citizens of homes within its borders. This is exemplified in the case at bar, where nineteen families settled upon public lands, and are now represented as then having, in cultivating a comparatively few acres of land, diverted all the water of the stream, which was then and is now sufficient to irrigate thousands of acres, and to supply the inhabitants of the city of Nephi with water for culinary and domestic purposes. No such extravagance in the use of water was ever intended by the enactment of the laws relating to the appropriation and use of water in the arid belt of the country. The extent of the appropriation is limited, no matter how much water may have been diverted, to the quantity necessary for the purposes for which the appropriation is made, and the intention to apply it to some useful purpose, without unnecessary delay, must also appear, in order to confer upon the appropriator a vested right thereto. If there is no intention on the part of the appropriator, to apply the water to such purpose, within a reasonable time, there is no valid appropriation, and the water remains subject to appropriation by others. So, where there is more diverted than is necessary for the object of the appropriation, there can be no intention to apply the excess to a useful purpose, and such excess remains subject to appropriation. In *Kinney, Irrigation*, § 150, it is said: "This intention goes to the very foundation of the act of appropriation, and must be evidenced by a constancy, or steadfastness of purpose or labor, as is usual with men engaged in like enterprises, who desire a speedy accomplishment of their designs." In *Ortman v. Dixon*, 18 Cal. 84, it was said: "The measure of the right, as to extent, follows the nature of the appropriation or the uses for which it is taken. The intent to take and appropriate and the outward act, go together. If we concede that a man has right by mere priority to take as much water from a running stream as he chooses, to be applied to such purposes as he pleases, the question still arises, What did he choose to take? And this depends upon the general and particular uses he makes of it. If, for instance, a man takes up water to irrigate his meadow at

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certain seasons, the act of appropriation, the means used to carry out the purpose, and the use made of the water would qualify his right of appropriation to a taking for a specific purpose, and limit the quantity to that purpose, or to so much as necessary for it." So, in *Nevada County & S. Canal Co. v. Kidd*, 87 Cal. 282, Mr. Chief Justice Sawyer, after reference to a number of cases, observed: "The doctrine is that no man shall act upon the principle of the dog in the manger, by claiming water by certain preliminary acts, and from that moment prevent others from enjoying that which he is himself unable or unwilling to enjoy, and thereby prevent the development of the resources of the country by others. Anybody else may divert and use all the water be it more or less, that a prior claimant is not in a present condition to use, and by lack of diligence on his part in pursuing and perfecting a prior inchoate right, many acquire rights even superior to his." *Kinney, Irrigation*, §§ 151, 153; *McKinney v. Smith*, 21 Cal. 374; *Combs v. Agricultural Ditch Co.* 17 Colo. 146; *Maeris v. Bicknell*, 7 Cal. 262, 68 Am. Dec. 257; *Nevada Water Co. v. Powell*, 34 Cal. 110, 91 Am. Dec. 685; *Simpson v. Williams*, 18 Nev. 432.

The principles thus referred to apply with much force to the case at bar, where it is manifest from the testimony that, if the first settlers diverted all the water of Salt creek, they diverted vastly more than was necessary for the uses intended, and therefore the respondent and his predecessors in interest had a right to appropriate, for the purposes of the mill, what was not applied to some useful purpose by the settlers within a reasonable time after their diversion. If they only appropriated a portion of the stream, which seems to be the case indicated by the circumstances disclosed in the record, then the owners of the mill could appropriate the remainder, or so much thereof as was necessary for the use intended by them. In either event their appropriation was lawful. From these considerations, and in view of the testimony in the record, it is quite clear that the findings and decree of the trial court are substantially correct, being fair and proper deductions from the evidence.

It is also insisted that the mill was built subject to the right of the appellant to change its place of diversion. This is conceded by counsel for the respondent as to the quantity of water which had been appropriated above the mill and used by the appellant and its predecessors in interest prior to the appropriation for mill purposes by the owners, and we do not see that this concession can injuriously affect the rights of the respondent, because he does not claim that the water to which he is entitled for his manufacturing purposes had been appropriated and used by the appellant, and then returned to the stream, but that the appellant had no right to divert it above the mill, and never did appropriate it, except below the mill, after it had answered his purpose. Where a prior appropriator of water merely changes the place of diversion without causing injury to a subsequent appropriator, the subsequent appropriator has no cause of complaint. It may be otherwise, however, when the subsequent appropriator is injuriously affected by the change. In the case at bar, the appellant can-

not change the place of diversion of water, which it appropriated subsequently to the location and erection of the mill, in such a manner as to prevent the water, to which the respondent is entitled, from flowing through his mill. The appellant and the respondent are each entitled to the use of a certain portion of the stream, and neither can change the place of diversion so as to injuriously affect the rights of the other. The law, however, is well settled that one who is entitled to the use of water flowing in a stream may change the place of diversion if such change causes no injury to the rights of others previously acquired. In *Kinney, Irrigation*, § 154, the author says: "When water has been lawfully appropriated, the priority thereby acquired is not lost by changing the use for which it was first appropriated and applied, or the place at which it was first employed, provided that the alterations made from time to time shall not be injurious to the rights acquired by others prior to the change." In *Butte Table Mountain Ditch Co. v. Morgan*, 19 Cal. 609, it was held that, where a person appropriated and diverted water of a stream at a certain point, he could not afterwards change the place of diversion to the prejudice of the rights of a subsequent appropriator. The court said: "The rule is that the change must not injuriously affect the rights of others." In *Junkans v. Bergin*, 67 Cal. 267, it was observed: "Undoubtedly one entitled to divert a quantity of water from a stream may take the same at any point on the stream and may change the point of diversion at pleasure, if the rights of others be not injuriously affected by the change." So, in *Proctor v. Jennings*, 6 Nev. 83, it was said: "The rights of each successive person appropriating water from a stream are subordinate to all those previously acquired, and the rights of each are to be determined by the condition of things at the time he makes his appropriation. So far is this rule carried that those who were prior to him can in no way change or extend their use to his prejudice, but are limited to the rights enjoyed by them when he secured his." *Black's Pomeroy, Water Rights*, § 69; *Fuller v. Swan River Placer Min. Co.* 12 Colo. 12; *Kidd v. Laird*, 15 Cal. 162, 76 Am. Dec. 472; *Ramelli v. Irish*, 96 Cal. 214; *Lobdell v. Simpson*, 2 Nev. 274, 90 Am. Dec. 587; *Columbia Mining Co. v. Hotter*, 1 Mont. 296. The cases of *Fuller v. Swan River Placer Min. Co.*, *Kidd v. Laird*, and *Ramelli v. Irish*, were cited by counsel for the appellant in support of their contention here under consideration. Upon examination, however, it will be found that they all support the doctrine, above stated, that one who is entitled to the use of water of a stream may change the place of diversion if the rights of subsequent appropriators are not affected by the change. Counsel for the appellant also cited the case of *Last Chance Min. Co. v. Bunker Hill & S. Min. & C. Co.* 49 Fed. Rep. 430, and maintain that it illustrates the proposition that, "where water is used for domestic and irrigation purposes, the place of diversion can always be changed." That portion of the opinion quoted in their brief, and on which they rely as illustrating their position, appears to be simply *dictum*. The portion

which is authoritative is covered by the syllabus, which is by the court, as follows: "The appropriator of water, to be used at a specified place for the purpose of operating machinery and other works, after so using it and returning it to its original channel, cannot change the place of use, to the damage of a subsequent appropriator lower down on the stream." The proposition of the appellant in the case at bar, that it has the right to change the place of diversion, must therefore be limited to instances where the change does not injuriously affect the rights of respondent.

It is further contended for the appellant that an affirmative issue of equitable estoppel was set up in the answer, and that the failure of the court to find upon such issue was error. If it were conceded that such an issue was contained in the pleadings, still the failure to make a finding thereon would not be reversible error, because such finding, under the facts and circumstances disclosed by the evidence, would necessarily have been prejudicial to the appellant, and the facts found are sufficient to sustain the decree. *Maynard v. Locomotive Engineers' Mut. L. & A. Ins. Assn.* 16 Utah, 145; *Groome v. Ogden City*, 10 Utah, 54.

The appellant also complains of the admission of certain oral evidence relating to the grant of a right of way to convey water to the mill in 1854, to a municipal record, and to ownership of a mill by repute. Inasmuch, however, as there is ample proof in the record, unassailed, to support and justify the findings and decree, and as this was a cause in equity, we do not regard it important to determine the competency of the evidence to which the objection refers.

It is further urged in behalf of the appellant that the findings respecting the quantity of water to which the respondent is entitled during the several periods of the year are not justified by the proof, and that such quantity was decreed to him without any basis therefor in the evidence. It appears in the testimony that the declination of the mill race or flume has not been changed since 1862; that the size of the flume is the same as it was before; that it required about 15 or 16 inches in depth of water, running in the flume, to operate the mill at its full capacity; and that during the winter months the mill was always run at its full capacity. There is also evidence showing the condition of the stream, and how the mill race was operated during the other seasons of the year; and, without further reference in detail, we are of the opinion that the findings are not subject to the objections thus interposed, in view of the fact that provision is made for a division of the water between the parties, within a given time, after notice of the decree, and, in case they cannot agree, then for determining by measurement the quantity of water to which each party is entitled. We do not deem it important to discuss the other questions presented, although they have not escaped our notice. We find no reversible error in the record.

The judgment is affirmed.

Zane, Ch. J., and Miner, J., concur.

WISCONSIN SUPREME COURT.

Tabor THURSTON, *Recept.*,
v.
BURNETT & BEAVER DAM FARMERS'
MUTUAL FIRE INSURANCE COM-
PANY, *Appt.*

(.....Wis.....)

- *1. Under the rule that where the language of a contract is plain and unambiguous, and where words or terms in a contract may be reasonably construed in either of two ways but extrinsic evidence is not resorted to for the purpose of aiding in the construction, the proper construction of the contract is for the court. The proper construction of language in an insurance policy, to the effect that "fires caused by the use of steam engines on the premises insured, other than threshing-machine engines using coal for fuel with sufficient wood to kindle or start the fire," was a question solely for the court.
2. Such clause prohibited the use of wood, except to efficiently start combustion in the coal; the use of wood thereafter was within the excepted risk; and when wood was so used, up to a short time before the fire occurred, such fire was not caused by an engine "using coal for fuel with sufficient wood to kindle or start the fire," because coal was the last fuel put into the firebox before the fire occurred.
3. The evidence being to the effect that wood was used to make power for a considerable length of time, and then coal was put into the furnace as needed, and as a helper, for about fifteen minutes, which disappeared before the fire occurred, such fire was clearly within the excepted risk, and there was no question on the subject to be left to the jury.

(February 8, 1898.)

APPEAL by defendant from a judgment of the Circuit Court for Dodge County in favor of plaintiff in an action to compel payment of the amount alleged to be due on a policy of fire insurance. *Reversed.*

Statement by Marshall, J.:

Action to recover on two policies of fire insurance. The property destroyed was grain in stacks. The fire was started by sparks from a threshing machine engine in operation on the premises. A by-law formed a part of each contract of insurance, which was as follows: "This company will not hold itself liable for loss caused by the use of steam engines on the premises, except steam threshing engines using coal as fuel, with sufficient wood to kindle or start the fire." The principal disputed question on the pleadings and evidence was whether the fire occurred through a cause not covered by the contracts of insurance, by reason of the by-law referred to. A special verdict was ordered, containing questions covering the subject in dispute, such questions being as follows: "(1) What was being used for fuel in the engine when the stacks of wheat were destroyed? (2) Was more wood used in

*Headnotes by MARSHALL, J.

NOTE.—For insurance on threshing machines, see also *Minneapolis Threshing Mach. Co. v. Firemen's Ins. Co.* (Minn.) 23 L. R. A. 576.

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the engine than was sufficient to kindle or start the fire in the engine? (3) At the time of the fire, was wood being used to produce power to run the engine?" The court instructed the jury, among other things, that there is not any great conflict in the evidence. "The question is, Do you find for the plaintiff or the defendant? If the plaintiff was using, at the time the fire occurred, wood, for the purpose of producing power to do the threshing, he cannot recover. If he was only using wood for the purpose of kindling or starting the fire, if it had got down, he can recover." In respect to the second question the court said: "You are to determine from the language what was intended,—what is the fair, reasonable, ordinary meaning of the language used? You are to say as to what it means,—the ordinary signification among men. What does it mean to kindle or start a fire?" In regard to the first question the court said it was the only vital question in the case. "What was being used when the stacks of wheat were destroyed,—wood, coal, or both? That second question presents the subject more decidedly; and the next question throws some light on the dispute." The court later said, "The meaning of the first question is, What was in the fire box at the time the fire occurred?"—and, generally, said that the three questions were practically the same. "Were they using wood to kindle or start up the fire, or to produce power?" That the jury should first determine in their minds, as if there was no special verdict, whether the machine, under the evidence, was being run in accordance with that provision of the policy, or in violation of it. And further said, "When you get the question settled, reduce your answers to writing, to the questions, so they will conform to the real spirit of the contract." All the questions, and those upon which the right to recover depended, were answered in favor of the plaintiff. Numerous exceptions were filed to the charge, and there was a motion to set aside the verdict as contrary to the evidence and to grant a new trial, made, denied, and the ruling duly excepted to. Judgment was rendered in plaintiff's favor, from which this appeal was taken.

Messrs. Sawyer & Sawyer and H. K. Butterfield, for appellant:

The court erred in submitting to the jury the construction of the policies. Where the terms of a written instrument are clear and unambiguous, it is the duty of the court to construe it, and its submission to the jury is reversible error.

Farnsworth v. Brunquest, 36 Wis. 203; *Barton v. Gray*, 57 Mich. 622; *Home Mut. Ins. Co. v. Roe*, 71 Wis. 33; *James v. Carson*, 96 Wis. 632; *Dwight v. Germania L. Ins. Co.* 103 N. Y. 341, 57 Am. Rep. 729.

In giving a construction to the policy, the court should be guided in view: (1) Of giving to the words their popular, ordinary meaning, according to the common and approved use of language; (2) of giving effect to the intention of the parties adopting it, provided it can be done consistent with the rules of language and of law.

2 Parsons, Contr. 5th ed. 494; *Mugat v. Pampelly*, 46 Wis. 680; *Monitor Iron Works Co. v. Ketchum*, 44 Wis. 126.

Of support, rather than defeating its provisions.

2 Parsons, Contr. 503; *Redman v. Hartford F. Ins. Co.* 47 Wis. 89, 32 Am. Rep. 751.

Messrs. Malone & Bachhuber, for respondent:

The policy must be liberally construed in favor of the assured, so as not to defeat, without a plain necessity, his claim for indemnity.

Goodwin v. Provident Sav. L. Assur. Assn. 97 Iowa, 226, 32 L. R. A. 473; *Thompson v. Phenix Ins. Co.* 136 U. S. 297, 34 L. ed. 418; *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 678, 24 L. ed. 563; *Moulou v. American L. Ins. Co.* 111 U. S. 842, 28 L. ed. 450; *Home Mut. Ins. Co. v. Roe*, 71 Wis. 83.

The charge of the court on appeal is to be considered as a whole.

Hinkley v. Rosendals, 95 Wis. 271; *Wadsworth v. Jewelers & T. Co.* 132 N. Y. 543; *Fitch v. American Popular L. Ins. Co.* 59 N. Y. 572, 17 Am. Rep. 372; *Garretson v. Equitable Mut. L. & E. Assn.* 74 Iowa, 419; *Meyer v. Fidelity & O. Co.* 96 Iowa, 378; *Collins v. Merchants & B. Mut. Ins. Co.* 95 Iowa, 540.

When a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful, it is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself.

Grace v. American C. Ins. Co. 109 U. S. 282, 27 L. ed. 934; *Redman v. Hartford F. Ins. Co.* 47 Wis. 89, 32 Am. Rep. 751; *Moulou v. American L. Ins. Co.* 111 U. S. 842, 28 L. ed. 450; *Wadsworth v. Jewelers & T. Ins. Co.* 132 N. Y. 540; *Hoffman v. Aetna F. Ins. Co.* 32 N. Y. 405, 88 Am. Dec. 337.

Policies are to be liberally construed for the insured, and strictly construed with respect to the insurance company.

Prieger v. Exchange Mut. Ins. Co. 6 Wis. 89; *Sawyer v. Dodge County Mut. Ins. Co.* 37 Wis. 503; *Hull v. Northwestern Mut. L. Ins. Co.* 39 Wis. 397; *Wakefield v. Orient Ins. Co.* 50 Wis. 532; *Redman v. Hartford F. Ins. Co.* 47 Wis. 89, 32 Am. Rep. 751.

Marshall, J., delivered the opinion of the court:

Fires caused by the use of steam engines on the premises insured by the defendant, other than threshing-machine engines using coal as fuel, with sufficient wood to kindle or start the fire, were excepted out of and not covered by the contracts of insurance. Such excepted fires cannot be included by judicial construction or by the verdict of a jury, without reading into the contract language the parties clearly did not put there. Neither courts nor juries are permitted to do that. The meaning of the term "coal as fuel, with sufficient wood to kindle or start the fire," was the important question on the trial; such meaning appears to be plain and unambiguous; no extrinsic evidence was admissible to explain it, nor was any such evidence received or offered. The case comes clearly within the rule, that where language is plain and unambiguous the apparent

import of the words must govern, and the rule that where there is no uncertainty as to the meaning of the words used in the contract and where such uncertainty exists, but there is no extrinsic evidence or circumstance bearing on the subject to be considered in determining the meaning attributed to them by the parties when the contract was made, the proper interpretation of the words and construction of the contract are solely for the court. *Ganson v. Madigan*, 15 Wis. 146; *Murphy v. Weil*, 92 Wis. 467. Therefore the trial court erred in leaving the construction of the contract to the jury.

As indicated, no difficulty is perceived in determining the meaning of the term in question, when it is kept in mind that plain language, used in such connection as to leave no room to say, reasonably, that the parties might have intended either of two meanings, the apparent import of the words as generally understood must govern. *Story, Contr. § 780; Mississippi River Logging Co. v. Wheelihan*, 94 Wis. 96. In such cases, the rule that all ambiguities, obscurities, and uncertainties in a policy of fire insurance are to be resolved most favorably to the assured, has no application whatever.

The words "coal for fuel, with sufficient wood to kindle or start the fire" meant that wood was permitted to be used, only with coal, and for the one purpose of igniting the coal by aid of the more combustible quality of the wood, and that when the coal was once sufficiently ignited the use of wood was no longer allowed. The clause did not permit the use of wood exclusively for a considerable period of time to produce power, or at all for that purpose, and if wood was nevertheless used to produce power, either alone or with coal, for two or three hours or for half an hour, and then only coal was fed into the fire box for fifteen or twenty minutes, the latter circumstance did not render the engine, one using coal for fuel, with sufficient wood to kindle or start the fire, within the meaning of the policy. Such a construction would do violence to the language used by the parties. It would not be construction at all, but the making of a contract not contemplated by the parties at the outset. If, after sufficient wood was used to kindle or start the fire, wood was used to operate the engine, in whole or in part, even though coal was the last fuel fed into the fire box before the loss occurred, the engine was manifestly not one using coal for fuel, with sufficient wood to kindle or start the fire, but was an engine using wood and coal for fuel to produce power.

With the foregoing construction of the contract of insurance, we turn to the consideration of the exception to the ruling of the trial court, refusing to set aside the verdict and grant a new trial.

The evidence is practically undisputed that in the forenoon, and for a short time after the noon hour, the engine was operated by the use of wood exclusively as fuel. It was then moved to the place where the fire occurred, by the use of wood as fuel. During the day, up to the time of the fire, the engine stack was guarded by a screen on account of the use of wood for fuel. The machine was started and run at the setting where the fire occurred, for half an hour, with wood for fuel exclusively.

A man was then sent for coal to the coal wagon, which had not been moved up from a previous setting. He brought one lump. Part of that was used before the fire occurred, which happened from fifteen to twenty minutes thereafter. The engineer testified that he sent for the coal because he thought it would be a helper; that he could keep up steam with wood, but thought that it was nice to have a little coal as there was plenty of it; that there was always some wood in the fireplace. There was much other evidence, but none to materially vary the foregoing. True, the engineer said that when he got the fire fit to burn coal he burned coal exclusively, but it is undisputed that he kept up steam with wood thirty minutes, or thereabout, before any coal at all was used; in fact, that he had been using wood exclusively during the whole day, up to the time that the one lump was brought to him about fifteen minutes before the fire occurred; that the coal wagon was left back at another setting; that the only fuel at the scene of operations for use, except that carried on the engine, none of which was used, was a pile of

wood; and that there was some wood in the fire box all the time down to the instant the fire occurred.

In the light of the foregoing, and the correct construction of the contract of insurance, argument is unnecessary to show that the finding of the jury, that no more wood was used with the coal than was sufficient to kindle or start the fire, was contrary to the undisputed evidence. The fire was started in the engine before it was moved to the setting; power was produced by the use of wood exclusively in moving the engine and in operating it till a few moments before the fire occurred, and coal was then used, broken off of the one lump, as a helper. Plaintiff failed to establish any liability on the policies. When the evidence was closed there was no question, really, for submission to the jury. The inferences from the evidence, that more wood was used than was necessary to kindle or start the fire, were all one way.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

NEW YORK COURT OF APPEALS.

Otis CORBETT, *Reept.*,

v.
SPRING GARDEN INSURANCE COMPANY, *Appt.*

(155 N. Y. 389.)

1. **The total destruction of a building within the meaning of an insurance policy** means its complete destruction as a building, but not necessarily the absolute extinction of all its materials, or even that no part of it can be left standing.

2. **Insurance on a leasehold interest against the total destruction of a building** which will terminate the lease gives no right of recovery when the roof is burned off, the interior destroyed, and the woodwork, sashes, and glass gone, while the iron front is considerably damaged, but the foundation and four walls remain substantially intact, and the building can be repaired for but little more than one third its value.

(*Haight and Martin, JJs., dissent.*)

(April 19, 1898.)

A PPEAL by defendant from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the New York County Circuit in favor of plaintiff in an action brought to enforce payment of the amount alleged to be due on a policy of fire insurance. *Reversed.*

The facts are stated in the opinion.

Messrs. Michael H. Cardoso and Edgar J. Nathan, for appellant:

The contract of insurance was enforceable only in the event of the "total destruction" of

the premises, and there was no total destruction within the meaning of the policy.

A judgment for the tenant, necessarily involving and absolutely dependent upon an adjudication of the fact of total destruction, cannot be sustained, and the case was improperly submitted to the jury.

Cadwell v. Arnheim, 152 N. Y. 182; *Hudson v. Rome, W. & O. R. Co.* 145 N. Y. 408; *Lane v. Hancock*, 142 N. Y. 510; *Hemmens v. Nelson*, 138 N. Y. 517, 20 L. R. A. 440; *Linkauf v. Lombard*, 187 N. Y. 417, 20 L. R. A. 48.

Total loss means, not that the materials of which it is composed were annihilated, but that the building, though some part of it may remain standing, has lost its identity and specific character as a building, and instead thereof has become a disintegrated mass, or so far disintegrated that it cannot be properly designated as a building.

Wood, Fire Ins. § 107; 2 *May, Ins.* § 421a, p. 967; *Ostrander, Fire Ins.* 2d ed. § 310, p. 670; *Biddle, Ins.* § 1875; *Joyce, Ins.* §§ 3025, 3030; *Beach, Ins.* § 890; *Black, Law Dict.* title, *Total Loss*; *Judah v. Randal*, 2 Cal. Cas. 325; *Williams v. Hartford Ins. Co.* 54 Cal. 442, 35 Am. Rep. 77; *Seyk v. Millers' Nat. Ins. Co.* 74 Wis. 67, 3 L. R. A. 523; *Harriman v. Queen Ins. Co.* 49 Wis. 71; *Hamburg-Bremen F. Ins. Co. v. Garlington*, 66 Tex. 103, 59 Am. Rep. 618; *Oshkosh Pkg. & P. Co. v. Mercantile Ins. Co.* 31 Fed. Rep. 200.

The like doctrine has been applied in cases arising between landlord and tenant.

Vanderpool v. Smith, 2 Daly, 185; *Hoeceler v. Fleming*, 91 Pa. 322.

Even assuming that the doctrine of abandonment existing in the law of marine insurance were to be applied here, the right to abandon upon the facts in this case would not exist.

Wallerstein v. Columbian Ins. Co. 44 N. Y.

NOTE.—For total loss of building, see also *Royal Ins. Co. v. McIntyre* (Tex.) 35 L. R. A. 672; also *Seyk v. Millers' Nat. Ins. Co.* (Wis.) 3 L. R. A. 523, and *German Ins. Co. v. Eddy* (Neb.) 19 L. R. A. 707, 41 L. R. A.

205, 4 Am. Rep. 664; *Great Western Ins. Co. v. Fogarty*, 19 Wall. 640, 22 L. ed. 216; *Burt v. Brewers & M. Ins. Co.* 9 Hun, 383, Affirmed, 78 N. Y. 400; *Carr v. Providence Washington Ins. Co.* 88 Hun, 86, Affirmed, 109 N. Y. 504. *Messrs. Lenehan & Dowley*, for respondent:

The building as a building ceased to exist by reason of the fire.

A building is a fabric constructed for use.

McGary v. People, 45 N. Y. 156; *Truesdell v. Gay*, 13 Gray, 812; *Huck v. Globe Ins. Co.* 127 Mass. 306, 84 Am. Rep. 373; *Judah v. Randal*, 2 Cal. Cas. 324.

When the building as a building ceased to exist by reason of the fire there was total destruction within the intent of the lease and the policy.

Anderson, Law Dict. (1889) 639; *May, Ins.* (1891), § 421a; *Wood, Fire Ins.* § 107; *Biddle, Ins.* (1893), § 1375; *Joyce, Ins.* (1897), § 3025; *Oshkosh Pkg. & P. Co. v. Mercantile Ins. Co.* 31 Fed. Rep. 204; *Hamburg-Bremen F. Ins. Co. v. Garlington*, 66 Tex. 103, 59 Am. Rep. 613; *Williams v. Hartford Ins. Co.* 54 Cal. 442, 35 Am. Rep. 77; *Nate v. Home Mut. Ins. Co.* 37 Mo. 430, 90 Am. Dec. 394; *Hecht v. Commercial Assur. Co.* N. Y. Cir. Ct. March 5, 1894; *New York Real Estate & B. Improv. Co. v. Moiley*, 16 N. Y. Supp. 209.

Loss of identity and specific character is the equivalent of demolition or total destruction.

Huck v. Globe Ins. Co. 127 Mass. 306, 84 Am. Rep. 373.

O'Brien, J., delivered the opinion of the court:

The defendant insured the plaintiff's leasehold interest in a building in the city of New York in the sum of \$2,500 for three years against total destruction of the building by fire. The premium charged was \$18.75. The plaintiff's right to recover depended upon the fact alleged that the building was totally destroyed within the meaning of the policy. The following is the condition of the policy which described and limited the defendant's liability in case of fire: "It is a condition of this insurance that, in case of such destruction by fire of the above-named premises, that the lease held by the assured shall be by its terms and in fact canceled, this company shall be liable to pay an amount not exceeding the sum hereby insured." This condition limits the plaintiff's right of action to a case where the lease becomes canceled by its own terms in consequence of the destruction of the building by fire. In order to see when and under what circumstances the plaintiff's estate terminated, we must have recourse to the lease of the premises between himself and his landlord. It contains the following stipulation: "And it is further agreed between the parties to these presents that, in case the building or buildings erected on these premises hereby leased shall be partially damaged by fire, the same shall be repaired as speedily as possible at the expense of the party of the first part; that, in case the damages shall be so extensive as to render the building untenable, the rent shall cease until such time as the building shall be put in complete repair; but, in case of the total destruction of the premises by fire or otherwise,

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the rent shall be paid up to the time of such destruction, and then and from thenceforth this lease shall cease and come to an end: provided, however, that such damage and destruction be not caused by the carelessness, negligence, or improper conduct of the parties of the second part, their agents or servants." The lease contemplates and provides for three contingencies which might occur during the term: (1) Partial damage by fire, (2) such extensive damage as to render the building untenable, and (3) the total destruction of the premises by fire. In the latter case only does the estate of the tenant, which was the subject of the insurance, come to an end. Hence the learned counsel for the plaintiff is obliged to concede that there can be no recovery on the policy in this case unless the building was in fact totally destroyed within the meaning of the policy. The learned trial judge submitted that question to the jury as one of fact, and a verdict was found for the plaintiff.

The only question in the case necessary for us to consider is whether this finding is sustained by any evidence, or, rather, whether there was any evidence given which warranted the submission of the question to the jury as one of fact. The building was six stories high in front and five in the rear, with an iron front, the side and rear walls being of brick. It was about 72 feet wide and 90 feet deep. It was practically an entirely open building inside, used for warerooms and upholstery and furnishing department. The lease was dated February 8, 1888, and ran to the plaintiff for ten years, the annual rental being fixed at \$8,867.30. The fire occurred on the 23d of November, 1892. The plaintiff had a stock of furniture in the building at the time, which was insured for \$73,500. There is no substantial dispute in the evidence with respect to the condition in which the building was left by the fire. The roof was burned off, and the interior destroyed; woodwork, sashes, and glass were gone; the iron front was considerably damaged; but the foundation and the four walls remained substantially intact. It was shown that the sound value of the building before the fire was about \$90,000; that the expense of repairing the building, putting it in at least as good condition as it was before the fire, was about \$32,000; and the estimate of mechanics who offered to repair the building was considerably less than the latter sum. The inside of the building was to be rebuilt. There were some holes in the rear wall, and the brick in some places was somewhat damaged. In order to make the repairs, a few courses of brick had to be taken from the top of the rear wall, probably about 15 or 16 inches. A new cornice was put on, and some of the arches over the windows had to be repaired. Without going into minute details, it may be stated that the owner put this building in substantially as good condition as it was before the fire for the sum of \$31,905. This included plumbing, gas fitting, heating, two elevators, ironwork for the front, plastering, repairing the brickwork, removing rubbish, and taking down such parts of the walls as had been injured. A building worth about \$90,000 before the fire was thus restored for something more than one third of that amount.

The question is whether, upon this state of facts, the jury could have made a finding that the building was totally destroyed. We think that, under the circumstances, the case should not have been submitted to the jury, but that the court should have held, as matter of law, that there was not a total destruction of the building by fire within the true intent and meaning of the policy. A total destruction, within the meaning of the policy, must mean the complete destruction of the insured property by fire, so that nothing of value remains of it as distinguished from a partial loss, where the property is damaged, but not entirely destroyed. This does not mean that the materials of which the building was composed were all utterly destroyed or obliterated, but that the building, though some part of it may be left standing, has lost its character as a building, and, instead thereof, has become a broken mass, or so far in that condition that it cannot properly any longer be designated as a building. When that has occurred, then there is a total destruction or loss. A total loss does not mean an absolute extinction. It is not necessary that all the parts and material composing the building are absolutely and physically destroyed, but the inquiry always is whether after the fire the thing insured still exists as a building. Wood, Ins. §107; 2 May, Ins. p. 967, § 421a; Ostrander. Ins. 2d ed. p. 670, § 610; Biddle, Ins. § 1875; Joyce, Ins. §§ 3025, 3030; Beach, Ins. § 890; Black, Law Dict. *Total Loss*; *Judah v. Randal*, 2 Cal. Cas. 325; *Williams v. Hartford Ins. Co.* 54 Cal. 442, 35 Am. Rep. 77; *Seyk v. Miller's Nat. Ins. Co.* 74 Wis. 67, 3 L. R. A. 523; *Harriman v. Queen Ins. Co.* 49 Wis. 71; *Hamburg-Bremen F. Ins. Co. v. Garlington*, 66 Tex. 103, 59 Am. Rep. 613; *Oshkosh Pkg. & P. Co. v. Mercantile Ins. Co.* 81 Fed. Rep. 200, 204.

In this case it is undoubtedly true that the building was damaged to such an extent as to render it untenable, but to say that it was totally destroyed, when the owner restored it for about one third of its original value, would be to entirely disregard controlling facts. Some just or reasonable principle must be applied to the facts in this case in order to determine whether there was, as the plaintiff claims, a total destruction of the building, and it is not unreasonable to apply the doctrine which prevails in marine insurance with respect to the total loss of the ship or vessel insured. There it is held that the ship is a total loss when she has sustained such extensive damage that it would not be reasonably practicable to repair her. The

ordinary measure of prudence which the courts have adopted is this: If the ship, when repaired, will not be worth the sum which it would be necessary to expend upon her, the repairs are, practically speaking, impossible, and it is a case of total loss. This is said to be the English rule. *Moss v. Smith*, 9 C. B. 103; *Manning v. Irving*, 1 C. B. 176; *Rossetto v. Gurney*, 11 C. B. 186, 187; *Grainger v. Martin*, 2 Be-t & S. 487, 488; *Adams v. Mackenzie*, 13 C. B. N. S. 442. The American rule recognizes the same principle, but fixes upon a different amount of expense as giving the right to abandon. If the expense of repair will exceed half the value of the ship when repaired, she is considered a total loss, and may be abandoned. *Great Western Ins. Co. v. Fogarty*, 19 Wall. 640, 22 L. ed. 216; *Wallerstein v. Columbian Ins. Co.* 44 N. Y. 205, 4 Am. Rep. 664. A total loss or a total destruction takes place when the subject insured wholly perishes, or its recovery is rendered irretrievably hopeless. *Burt v. Brewers' & M. Ins. Co.* 9 Hun, 383, Affirmed 78 N. Y. 400. A constructive total loss, which enables the owner to abandon the ship, takes place when the subject insured is not wholly destroyed, but its destruction is rendered highly probable, and its recovery, though not hopeless, yet exceedingly doubtful. *Burrill*, Law Dict. *Total Loss*; *Arnold*, Ins. 990; 8 Kent, Com. 818, 820, 821. The jury could not be permitted to find, in a case like this, that the building had been totally destroyed because the interior and the roof were gone. Those parts of the building could be readily supplied. Nor is the verdict for the plaintiff warranted by the fact that the ironwork, cornice, and some of the brick walls had been damaged. The important and fundamental fact still remained to confront the jury at every stage of its investigation that the foundation and four walls of the building were still substantially intact, and that it was possible, by the expenditure of less than \$32,000, to make it as good a building as it was before the fire had occurred. So we think that the facts in this case required the learned trial judge to direct a verdict in favor of the defendant, and the exception to his refusal of the defendant's request to that effect was well taken.

The judgment should therefore be reversed, and a new trial granted; costs to abide the event.

All concur (Gray, J., in result), except Parker, Ch. J., not sitting, and Haight and Martin, JJ., dissenting.

MINNESOTA SUPREME COURT.

City of RED WING, *Appt.*,

v.

Oliver M. GUPTIL, *Resp't.*

(.....Minn.....)

The city of Red Wing is authorized by its charter to maintain an action to com-**Headnote by START, Ch. J.****NOTE.**—*Injunctions by municipal corporations against nuisances affecting public morals, peace, and good order, and health and safety.*

- I. Public morals, peace, and good order.
 - a. Intoxicating liquors.
 - b. Public amusements.
- II. Public health and safety.
 - a. In general.
 - b. Burial grounds, etc.
 - c. Hospitals, etc.
 - d. Garbage, etc.
 - e. Sewers and drains.
 - f. Trade or business.
 - g. Buildings and other structures.

Upon the question of municipal power over nuisances affecting public morals, decency, peace, and good order, see note to *State v. Kerstendiek* (1.a.) 39 L. R. A. 520.

The question of municipal control over nuisances relating to public health and safety will be found in note to *Harrington v. Providence* (R. 1.) 38 L. R. A. 305.

Jurisdiction in equity in suits by municipalities against nuisances in general will be the subject of a subsequent note.

L. Public morals, peace, and good order.**a. Intoxicating liquors.**

The keeping of a saloon contrary to law is generally punishable as a criminal or quasi criminal offense against the state or local laws, and its suppression is therefore not generally a matter of equitable relief, yet it has been stated that the fact that the keeping of a saloon contrary to the provisions of the statute is a criminal offense does not take away the jurisdiction a court of equity might otherwise exercise. *State, Vance, v. Crawford*, 28 Kan. 726, 42 Am. Rep. 182. In this case the suit was brought by the state at the relation of the county attorney.

So, it has been further stated that the fact that public nuisances, with all their constituent effects, are public offenses, is a very strong reason why courts of equity should take jurisdiction of such nuisances, and suppress and enjoin them, provided no other adequate remedy exists. *State, Vance, v. Crawford*, 28 Kan. 726, 42 Am. Rep. 182.

In this case, the court refused an injunction in the name of the state at the relation of the county attorney to restrain the defendant from the further continuance of a certain illegal liquor saloon, upon the ground that the statute declaring the offense to be a nuisance provided a complete and adequate remedy, and not upon the ground that the question involved the commission of the criminal offense, but at the same time the court admitted that there might be instances where the statutory abatement might not be sufficient, in which cases the remedy by way of injunction might be resorted to.

In *Carleton v. Rugg*, 149 Mass. 550, 5 L. R. A. 193, the proceedings were instituted under Mass. Stat. 1887, chap. 880, § 1, which gives

pel the owner of any building or place, which is a nuisance affecting the comfort and convenience of the public, to remove or abate the same, although such nuisance is not injurious to the public health.

(May 13, 1898.)

A PPEAL by plaintiff from a judgment of the District Court for Goodhue County in favor of defendant in an action brought to enjoin

the supreme judicial court, and superior court, jurisdiction in equity upon information filed by the district attorney, or upon petition of not less than ten legal voters of any town or city, setting forth the fact that any building, place, or tenement therein is resorted to for prostitution, lewdness, or illegal gaming, or used for the illegal keeping or sale of intoxicating liquors, power to restrain, enjoin, or abate the same as a common nuisance, and also power to either of said courts to issue an injunction for that purpose. The court held the statute to be constitutional, and not in conflict with article 12 of the Declaration of Rights, as the mere fact that the keeping of a nuisance is a crime does not deprive a court of equity of the power to abate the same. The above statute only sanctions proceedings in equity at the suit of the attorney general, or of not less than ten legal voters of the town or city, and it would therefore appear that all proceedings in equity under such statute would have to be taken in the manner therein declared, and that a municipality could not proceed thereunder except in the name of the attorney general or of ten legal voters of the city or town.

In *State, Circuit Attorney, v. Uhrig*, 14 Mo. App. 413, the proceeding was in the nature of an information in equity on behalf of the city to procure an injunction against the keeping of an unlicensed dramshop, on the ground that it was a public nuisance, but the court refused the injunction upon the ground that the proceedings were to restrain an offense of a criminal nature to which jurisdiction in equity had never attached.

The New Hampshire Laws of 1887, chap. 77, enact, § 1: "Any building, place, or tenement, in any town or city that is resorted to for prostitution lewdness, or illegal gaming, or that is used for the illegal sale or keeping for sale of spirituous or malt liquors, wine, or cider, is declared to be a common nuisance," and, § 2: "The supreme court shall have jurisdiction in equity, upon information filed by the solicitor for the county or upon petition of not less than twenty legal voters of such town or city setting forth any of the facts contained in § 1 of this act, to restrain, enjoin, or abate the same, and an injunction for such purpose may be issued by said court or any justice thereof."

In *State, Blaupied, v. Currier*, 86 N. H. 622, the court refused an injunction, sought under the above-mentioned statute at the instance of twenty legal voters, as the defendant denied the alleged nuisance, and claimed a trial by jury to which he was entitled upon the question whether he made use of the building described for the illegal sale or keeping for sale of spirituous or malt liquors, wine, or cider. It will be observed that the above statute gives the right to proceed in equity to the solicitor of the county, or upon petition of not less than twenty legal voters of the town or city, but does not give the right to proceed in equity to

the operation of a slaughterhouse and rendering establishment. *Reversed.*

The facts are stated in the opinion.

Mr. J. C. McClure, for appellant:

It makes no difference in this case whether the stenches and smells are injurious to the public health or not. "It is sufficient if they are materially offensive, and render the use of that part of the highway within the sphere of

its effects materially offensive or uncomfortable."

1 Wood, Nuisances, 3d ed. § 299.

In this class of cases the city can maintain an action the same as a private individual.

New Orleans v. Lambert, 14 La. Ann. 247; *Pine City v. Munch*, 42 Minn. 342, 6 L. R. A. 763; *Hutchinson Twp. v. Filk*, 44 Minn. 536.

Mr. T. M. Wilson for respondent.

the municipal authorities themselves; and it may therefore be doubted whether a municipality could proceed thereunder except by proceeding instituted in the manner pointed out, and not in the name of the municipal authorities.

The case of *State, Rhodes, v. Saunders*, 66 N. H. 30, 18 L. R. A. 648, was also brought by twenty legal voters under the above statute, and upholds the constitutionality of the statute, and also the jurisdiction of the court of chancery in such matters.

So, in *Hartley v. Henrietta*, 35 W. Va. 223, the plaintiff, on behalf of himself and all other citizens, under a state statute giving equity jurisdiction over nuisances in the sale of intoxicating liquors upon conviction of the owner or keeper thereof, sought an injunction to restrain the defendant from selling intoxicating liquors contrary to law, and to abate the sale thereof. The court held that under chapter 32, § 18, of the West Virginia Code, such proceedings could not be maintained until it was shown that the party so charged had been convicted of the offense named in the bill. Section 18 of the Code in question provides that all houses, buildings, and places of every description where intoxicating liquors are sold or vended contrary to law shall be deemed and taken to be common and public nuisances, and abatable as such upon the conviction of the owner or keeper thereof as thereafter provided, and the courts of equity have jurisdiction by injunction to restrain and abate any such nuisance upon bill filed by any citizen. The right to proceed in equity only accrues under such section after it has been shown by conviction that such place is a nuisance. In that case, however, the court was equally divided in opinion. The express question of the right of a municipality to proceed in equity, or the validity of the proceeding therein taken on behalf of all the citizens, did not arise in this case, the only question before the court being the right to so proceed prior to conviction.

b. Public amusements.

The question whether a merry-go-round is a public nuisance or not, restrainable by the municipal authorities, depends upon the place, the time, the circumstances, and the manner in which it is operated, and the effects it produces, and if the noise, crowd, and other effects of such riding gallery invade any public or private right, and materially interfere with and impair the ordinary physical comfort of anyone of normal sensibility, and ordinary mode of living in his home or place of business. *Davis v. Davis*, 40 W. Va. 464.

The petition and information of the common council in the above case was signed by fifty residents, supported by affidavits, suggesting the location of the alleged nuisance, and prayed that defendant be summoned to show cause why the same should not be declared to be a nuisance, and abated as both a public and a private nuisance. A summons, signed by the mayor, in the nature of a *scire facias* or rule to show cause, issued, giving the defendant no-
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tice of the injury and annoyance suggested and commanding him to appear and show cause against the abatement. The court held that such signature was sufficient, and it was not necessary for it to be signed by the members of the council, and therefore upheld the method of the procedure used, looking upon the same as short and simple and efficient for the purposes. The court further stated that it was not necessary in such case for the corporation to proceed by way of injunction in equity.

Where a merry-go-round is erected on a vacant lot in a populous part of a town near to dwellings, and is operated by steam with a whistle blowing every few minutes, and is accompanied by music up to ten o'clock and after in the night, and tends to prevent and disturb sleep, and is kept continuously for six days, drawing large crowds of noisy and boisterous people, the crowd hallooing until ten o'clock at night, the same is properly restrainable by the public authorities as a public nuisance after due inquiry, as it is a mere idle amusement, although perfectly legitimate in a proper place or at a proper time. *Davis v. Davis*, 40 W. Va. 464.

In the above case, however, there were two dissenting opinions by Justices Dent and Brannon, upon the ground that the same did not constitute a public nuisance, and that the act of the public authorities in relation thereto should be by means of regulation, and not an absolute prohibition.

The West Virginia Code of 1891, p. 426, chap. 47, § 28, defines the powers and duties of the council and, among them, the power to prevent injury and annoyance to the public or to individuals, and to abate, or cause to be abated, anything which, in the opinion of the majority of the whole council, shall be a nuisance, but does not prescribe the forms and methods of procedure, and the council is therefore allowed a wide discretion within the limits of reasonable fairness. *Davis v. Davis*, 40 W. Va. 464. It would therefore seem to be within the power of the municipal authorities to seek relief in equity in proper cases.

Public health and safety.

a. In general.

Municipal power over nuisances affecting safety, health, and personal comfort forms the note to *Harrington v. Providence* (R. I.) 38 L. R. A. 305.

Where health is exposed, if there is a nuisance, it should be abated, even though the remedy by injunction must be resorted to for its abatement. *Board of Health v. Maginnis Cotton Mills*, 46 La. Ann. 806, 814.

And upon the general question of equitable jurisdiction in nuisances relating to health and safety, the court in *Rowe v. Granite Bridge Corp.* 21 Pick. 344, 347, said that, where there is immediate danger to the health or safety of the community, and where it is obviously necessary that a nuisance should be immediately

Start, Ch. J., delivered the opinion of the court:

This was an action by the city of Red Wing to enjoin the defendant from operating a slaughterhouse and rendering establishment within the corporate limits of the city, and to require him to abate the same as a nuisance. Judgment was entered, upon the special verdict of the jury, dismissing the action on the

suppressed, equity may interfere, until the slower process of indictment can be put in motion. This, however, was a private action to abate a public nuisance.

And in *Atty. Gen., Raleigh, v. Hunter*, 16 N. C. (1 Nev. Eq.) 12, the court, at the instance of the city, through the attorney general, perpetuated an injunction to restrain the defendant from operating his mill dam so as to injure the public health, even though he had been indicted for the same as a nuisance.

The power of a municipality to proceed by way of injunction to restrain a public nuisance injurious to health is further upheld in the case of *Pine City v. Munch*, 42 Minn. 342, 6 L. R. A. 763. In this case the court restrained the defendant from committing a nuisance in opening the gates and sluices of a dam in hot weather, and drawing the water from the pond, thereby converting the land into marshes and swamps, causing the vegetable matter therein to decay and become decomposed, thus producing malaria, sickness, and death.

In *Bice v. Jefferson*, 50 Mo. App. 464, 471, it is said that even if a municipality may resort to a court of equity to aid it in enforcing public duties to preserve the health and property of its inhabitants, in those cases which fall under some recognized head of equity jurisdiction, yet even those would seem to be an encroachment on the one settled general rule, denying to courts of equity the power to restrain the threatened violation of a municipal ordinance, unless the act threatened be a nuisance *per se*. In this case, however, the action was by a private individual, and the court refused the relief.

Section 28, New Jersey Laws 1887, Pamph. Laws, p. 80, provides "that any such local board of health, instead of proceeding in a summary way to abate a nuisance hazardous to the public health, may file a bill in chancery, in the name of the state, on the relation of such board of health, for an injunction to prohibit the continuance of such nuisance, and such actions shall proceed [in the courts of chancery] according to the rules and practices in such cases on the relation of individuals."

In *State, Hamilton Twp. Bd. of Health, v. Neidt* (N. J. Eq.) 19 Atl. 318, the bill was filed under the above act to abate a public nuisance hazardous to the public health. It was contended, upon the part of the defendant, that the plaintiffs had not proceeded so as to give the court jurisdiction, inasmuch as they had not given the notice required by the statute to the person creating such nuisance. The court held that, under the provisions of such statutes, notice was only required in those cases where the board of health sought to proceed in a summary manner, and that the provisions of the statute relating to notice did not apply to proceedings to abate the nuisance by way of injunction in equity.

Sections 28 and 29 of the New Jersey Public Laws of March 31, 1887, p. 80, giving power to a local board of health to enjoin nuisances, only apply to nuisances arising and maintained within the jurisdiction of such board, and 41 L. R. A.

merits, from which the plaintiff appealed. The special verdict was to the effect that the defendant used and maintained the slaughterhouse in question without any authority or license from the city of Red Wing, and conducted the business therein in such a manner as to be offensive, disagreeable, and annoying to persons residing in the vicinity of his premises, and to persons traveling along the public

therefore where the nuisances arise without the territorial limits, their redress must be sought under the New Jersey statute of 1894, May 24. *State, Vailsburgh Bd. of Health, v. East Orange Twp.* 53 N. J. Eq. 498.

The New York statute of May 5, 1884, which gives county boards power, in their own name, to maintain a bill in equity for the abatement of either a public or private nuisance where it is apparent that the nuisance is of such a character that a private individual, living in the vicinity and affected by it, can maintain a like suit, does not clothe the local board of health with the functions of the attorney general in cases of public nuisances, but authorizes them in their own names to secure for individuals that protection which equity affords to those persons upon their own suit. *Hudson County Bd. of Health & Vital Statistics v. New York Horse Manure Co.* 47 N. J. Eq. 1.

Where action was commenced by the board of health for an injunction under N. Y. Laws 1885, chap. 270, but before the trial such act had been repealed by chap. 661 of the New York public health act of 1893, which took effect immediately, the effect of the repeal of such act upon the action was held to carry with it a repeal of the remedy also, and the suit for injunction was therefore dismissed. *Schœpflin v. Calkins*, 5 Misc. 163, following *Hughson v. Rochester*, 49 Hun. 45.

b. Burial grounds, etc.

Upon municipal control over nuisances relating to the burial of the dead, see note to *Harrington v. Providence* (R. I.) 38 L. R. A. 305, II. c.

Cemeteries and burying grounds are not only recognized as necessary, but are otherwise provided for, and protected, by humane laws, yet it may be that a burying ground in the limits of a city, where the population is dense, may become a nuisance: but cemeteries and burying grounds are not *per se* nuisances, nor is the naked averment that they are such, without the statement of sufficient reasons to render them so, sufficient to authorize proceedings for their abatement or suppression. *Beglein v. Anderson*, 28 Ind. 79, 80, wherein the city sought to abate or enjoin the cemetery as a public nuisance.

So, as a general rule, it may be said that equity will not interfere by way of injunction to restrain the location of a cemetery, where the purposes for which it is located are performed in a careful manner, although such relief might be granted in cases where the burying of the dead is done in a careless and improvident manner. *Ellison v. Washington Comrs.* 58 N. C. (5 Jones, Eq.) 57, 75 Am. Dec. 430.

A mere problematical averment, in a complaint by a municipality seeking to restrain a cemetery, that the establishment of a cemetery on the ground prescribed would materially retard the advance of improvements in all that portion of the city, can afford no ground for an injunction at the instance of the public authorities, and the mere fact that the act of incor-

highway past them, by reason of the smells and stenches emitted therefrom, but such house and business have not been so conducted as to be injurious to the public health. This is, in its legal effect, the equivalent of a finding that the defendant is maintaining a public nuisance, although it is not injurious to the public health. Wood, Nuisances, §§ 299, 571; Gen. Stat. 1894,

§ 5881. A municipal corporation, which by its charter is authorized to abate or to compel the abatement of public nuisances, may maintain an action in equity to secure such result. *Pine City v. Munch*, 42 Minn. 342, 6 L. R. A. 763, and notes; *Buffalo v. Harting*, 50 Minn. 551. The only question in this case is, Can the city of Red Wing maintain such an

poration of the city provides for the removal and abatement of nuisances to carry out and enforce sanitary regulations, and gives the common council jurisdiction 2 miles beyond the city limits, does not aid the public authorities in seeking such relief. *Begeln v. Anderson*, 28 Ind. 79, 80.

Under subdivision 5 of § 34 of the act of Indiana, Spec. Sess. 1865, p. 15, the common council have power to establish cemeteries or burial places within or without the city, and to provide for the sanctity of the dead, and to prohibit interments except in cemeteries theretofore established by law. Under this provision power is conferred on the city authorities to establish cemeteries outside of the city limits, and when this power is exercised the common council is authorized, by proper ordinance, to regulate and control such cemeteries. Such power does not, however, authorize the common council to prohibit the establishment of cemeteries or burial grounds by others without the corporate limits, nor give the city any jurisdiction or control over such when established, and such an act, therefore, only relates to interments within the city limits, and therefore where the city does not show that such a cemetery is a nuisance *per se*, it cannot enjoin its use by proceedings in equity. *Begeln v. Anderson*, 28 Ind. 79, 80.

In the above case the grounds upon which it was proposed to establish a cemetery were situated at least $\frac{1}{4}$ of a mile beyond the city limits, and it was not easily seen how it could be or become a nuisance to the city with its then present limits were its population never so dense, and there was no averment in the complaint that the nuisance would result from the fact of the crowded state of the city's population, nor was it shown to be so even historically. The court held that, even though the city council had jurisdiction to declare the establishment of a cemetery within 2 miles, or any less distance, of the city limits to be a nuisance, and restrain or abate it as such, yet a complaint which failed to show the passing of any ordinance in reference thereto was defective, and therefore the injunction was refused. *Begeln v. Anderson*, 28 Ind. 79, 80.

So, in *Lake View v. Letz*, 44 Ill. 81, 84, the city authorities sought to restrain the defendants from establishing a cemetery within the limits of their town. The court refused the injunction upon the ground that it was not shown that such cemetery was necessarily a nuisance, or that it obstructed the public in the use of its streets, inasmuch as it might be so located and arranged, and so planted with trees, etc., and decorated, as to be not less beautiful than a landscape garden, and free from all reasonable objection, as the power to prohibit the establishment of cemeteries except by the authority of the trustees was not considered as failing within the power of removing and abating nuisances.

And in *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71, a bill was filed by the city to restrain the county from using certain lands owned by it for over thirteen years, for the burial of the dead, in violation 41 L. R. A.

of an act of the state legislature, and of a subsequent act. The court refused to enjoin the use of the cemetery, upon the ground that it was not a nuisance *per se*, and a subject of legislative prohibition, although the legislature had the power to regulate the use of such cemeteries for the purpose of the interment of the dead in order to protect the public health. The act of the legislature subsequently passed did not profess to correct any abuses of the uses of the property, but was an arbitrary prohibition of its use in accordance with the provisions of a charter previously granted to such cemetery. There was no pretense that the cemetery as conducted was a nuisance, nor was there any charge that the health or comfort of the people in the vicinity had been, or would be, affected in the near, or even in the distant, future.

c. Hospitals, etc.

In *Atty. Gen. v. Manchester* [1893] 2 Ch. 87, an injunction was sought by the attorney general at the relation of a district local board, restraining defendant from establishing hospitals, for the reception of persons suffering from smallpox or other infectious diseases, so as to cause a nuisance to the inhabitants of the neighborhood. The court, however, refused the relief sought, as the plaintiff failed to show that there was a probability that the apprehended danger would in fact ensue, and stated that if, in such a case, the evidence showed that the maintenance of a smallpox hospital was on the whole more beneficial to the health of the public at large than the leaving of the persons suffering from the disease scattered in their own homes, it was a question whether some weight might not properly be allowed to such circumstances.

As to municipal control over nuisances arising from persons and things affected with disease, see note to *Harrington v. Providence* (R. I.) 88 L. R. A. 306, II. e.

d. Garbage, etc.

In *Philadelphia v. Lyster*, 3 Pa. Super. Ct. 475, the bill prayed for an injunction, at the instance of the city authorities to prevent defendant from collecting garbage in the city, carrying it through the streets, feeding it to the hogs, or spreading it upon the land in the city or adjoining thereto, and for general relief. An ordinance of the city made it unlawful for any person or persons, other than contractors with the city, to collect such material without having first obtained a permit from the board of health. The defendant admitted the ordinance, but denied the right of the board of health to determine the question, and also that the act complained of was a nuisance or prejudicial to public health, although he admitted that the garbage was collected without a permit, but contended that he collected it in a kind of wagon provided by the ordinance. The court refused the injunction, stating that the extraordinary powers claimed by the board of health had been misapprehended, as the power to declare the acts in question nuisances in fact and in law had not been delegated by the legislature to the board of health, and that therefore

action to compel the abatement of a public nuisance which is not injurious to public health? It cannot do so unless its charter confers upon it authority to remove or abate public nuisances which affect the comfort and convenience of the public, but not the public health. But if it has such power under its charter it may maintain this action. The nuisance in question is

the remedy for the unlawful acts alleged rested with the legislative branch of the city government, and if an adequate remedy had not been provided, that fact would not give a court of equity jurisdiction to supply a defect in the ordinance by injunction, in the absence of proof of an honest effort to enforce its provisions, and its inadequacy being demonstrated.

Although, in dealing with the evil complained of in a suit to restrain the acts of the defendant in removing his garbage from a city contrary to the provisions of the city ordinance, a large discretion is vested in the board of health, and while the board has the discretionary power to declare the keeping of garbage, offal, and refuse matter upon the streets, alleys, and the premises of individuals a nuisance, that discretion is not sufficiently far reaching to declare the act of a defendant in removing garbage from a city in carts or wagons of the construction claimed by the ordinance, and depositing it upon his own farm, to be a nuisance, when he has adopted the precise means for that purpose prescribed by the ordinance of the city. *Philadelphia v. Lyster*, 3 Pa. Super. Ct. 475, 480.

In *Butterfoss v. State*, *Lambertville Bd. of Health*, 40 N. J. Eq. 325, an injunction was granted at the instance of the public authorities to restrain the defendant from creating a nuisance, by depositing refuse from his business of a tomato canning factory into a reservoir which communicated with a covered sewer which ran into a natural stream, as the same was a source of foulness hazardous to the public health.

A contract entered into by a board of health for a garbage crematory will not be enjoined on the ground that a nuisance will be created, where it expressly provides for a plant the operation of which will not prove a nuisance. *Deysher v. Reading*, 18 Pa. Co. Ct. 611.

As to municipal control over nuisances affecting health in the removal of filth, etc., see note to *Harrington v. Providence* (R. I.) 38 L. R. A. 805, 11. b.

Upon the question of municipal control over nuisances affecting highways in the removal of garbage, see note to *Hagerstown v. Witmer* (Md.) 39 L. R. A. 640, 11.

e. Sewers and drains.

Where a board of health has power, by act of legislation, upon notice of a nuisance existing, to examine the same in a summary way, and order or cause the same to be abated, instead of proceeding in such manner, it also has the power to file a bill in the name of the state to prohibit the continuance of such nuisance, such power comprehending every nuisance or source of foulness hazardous to the public health. *State, Trenton Bd. of Health, v. Hutchinson*, 39 N. J. Eq. 218.

In *Board of Health v. Maginnis Cotton Mills*, 46 La. Ann. 806, 810, an injunction was granted at the instance of the public authorities to restrain the defendant from maintaining outlets from the privies and cesspools of its factory into the public gutters of the city, through which outlets fecal and other offensive, dead

and injurious, matter flowed, thereby imperiling the public health and creating a nuisance. Where it was sought to restrain the defendant from partially draining a certain pond, and exposing its shores so as to endanger the public health and create a public nuisance, it was held that, as neither the remedy by indictment, nor the proceedings under the Massachusetts statutes for the abatement of nuisances by a board of health, was a complete remedy for the whole mischief, as neither could be invoked until a part of the mischief was done, and could not, in the nature of things, restore the pond, the land, and the underground currents to the same condition to which they were before, the preventive force of a decree in equity, restraining the illegal act before any mischief was done, was a more efficacious, complete, and proper remedy. *Atty. Gen. v. Jamaica Pond Aqueduct Corp.* 133 Mass. 361, 363. In this case, however, it does not appear that the proceedings were at the relation of the municipality.

A drain pipe, laid by permission of the common council upon certain conditions relating to its removal upon becoming a nuisance, upon notice to the owner, his heirs or assigns, and by the council in case of his refusal or neglect, may be enjoined by the city as a public nuisance, even though the city does not revoke such ordinance or permission. *State, Trenton Bd. of Health, v. Hutchinson*, 39 N. J. Eq. 218.

In *Hutchinson v. State, Trenton Bd. of Health*, 39 N. J. Eq. 509, the defendants sought to justify their acts in causing and maintaining a nuisance injurious to health by discharging, into a certain run through a certain pipe laid in the street, filth and offensive matter, under power given by the public authorities of the city, but relief by way of injunction was granted to the board of health properly organized under the state statute, the court upholding the right of a board of health to maintain the bill in the name of the state.

So, in *New York Health Department v. Lalor*, 38 Hun. 542, the court granted an injunction restraining the defendant from executing the plumbing and drainage from his houses in violation of the directions of, and the conditions imposed by, the board of health act of 1881, § 5, giving the court power, upon affidavit of the commissioner of health, to restrain by injunction any violation of the act, or any work upon or about buildings or premises whereon the violation exists, the power of the board being in the nature of a police regulation for the purpose of protecting the public health and preventing nuisances.

And in *Gould, Brighton Bd. of Health, v. Rochester*, 105 N. Y. 46, the court granted relief in equity to enforce an order of the board of health of a town calling upon the defendant city to abate a nuisance by reason of the discharge of sewage upon and over the lands of the town belonging to such board of health, thereby creating a nuisance, and restrained the same, as, under N. Y. Laws 1850, chap. 324, as amended by the Laws of 1882, chap. 351, the board of health could not summarily execute its orders abating a nuisance outside of its

"Sec. 5. The city council shall have full power and authority to make, ordain, adopt, establish, publish, enforce, alter, amend, or repeal all such ordinances, rules, and by-laws for the government and good order of the city and for the prevention of crime, as they shall deem expedient and in and by the same to declare

and impose penalties and punishment by fine, imprisonment, or both, and for these purposes the said city council shall have authority by such ordinance, by-law, or resolutions.

"Subsec. 5. To compel the owner or occupant of any cellar, tallow chandler shop, soap factory, tannery, barn, stable, privy, sewer, or

jurisdiction, although it might invoke the aid of a court of equity to abate a nuisance arising outside of its boundaries or jurisdiction.

Again, in *Bell v. Rochester*, 33 N. Y. S. R. 739, the action of the board of health of a town against a city, to restrain the discharge of sewage by such city upon the lands of the town, and praying an injunction to restrain such nuisance, was upheld, as an action in equity may be maintained to enforce the order of a board of health, and to restrain the continuance of a nuisance maintained by an adjoining town or city, upon the premises under or within the jurisdiction of such board of health, as, although such board would not have the power to go into the city and interfere with its premises and summarily enjoin or abate the nuisance, it could enforce its orders and prevent the nuisance.

And a board of health is entitled to a perpetual injunction restraining defendants from draining privies, sewer pipes, and closets into a brook, and from connecting any privies, closets, or sewer pipes with such brook, or with any pipes or drains leading into the said brook and from violating in any manner an order made by such board relating to the abatement of the nuisance, as the draining of such privies into a brook constitutes a public nuisance detrimental to life and to public health. *New Brighton Bd. of Health, v. Casey*, 18 N. Y. S. R. 251, 253.

The question of municipal control over nuisances affecting health arising from water-closets and privies, and drains and drainage, will be found in note to *Harrington v. Providence* (R. I.) 38 L. R. A. 306, II. c. d.

f. Trade or business.

The question of municipal power over nuisances relating to trade or business will be found in note to *Ex parte Lacey* (Cal.) 38 L. R. A. 640.

In *Atty. Gen. v. Steward*, 20 N. J. Eq. 415, 417, wherein the attorney general joined with the inhabitants in restraining the defendant's business upon the ground that it was a nuisance affecting the schools owned by the state, it is said that any trade or business however lawful, which from the place or manner in which it is carried on, materially injures the property of others, or affects their health, or renders the enjoyment of life physically uncomfortable, is a nuisance which it is the duty of a court of equity to restrain.

So, in *State, North Brunswick Twp. Bd. of Health, v. Lederer*, 52 N. J. Eq. 675, wherein the board of health of the township sought to restrain the defendant from exercising his business of a fat rendering establishment so as to create a nuisance, and to abate the same, it was held that the board of health in the township in which a nuisance exists or is carried on has the authority, and it is its duty, to abate such nuisance, either on its own motion or by the aid of the court, though it is only hazardous to the health of individuals residing in another township.

And, in *People v. Detroit White Lead Works*, 82 Mich. 471, 480, 9 L. R. A. 722, wherein the defendants were prosecuted for infringing a

city ordinance declaring certain business carried on in a certain manner to be public nuisances, the court stated that it considered the course pursued in the earlier case of *Robinson v. Baugh*, 31 Mich. 290, wherein numerous residents sought to enjoin the carrying on of the business by bill in equity, a proper one as being much fairer to those occupied in a legitimate business than proceeding by way of indictment.

Under Mass. Gen. Stat. chap. 26, § 55, the board of health has the power to take all the necessary measures to prevent the exercise of any trade in violation of its order, and for that purpose it may, by special authority, bring a suit in the name of the city, and in such suit the bill may be properly signed by the mayor. *Taunton v. Taylor*, 116 Mass. 254, 262. In this case it was sought to restrain the exercise of an offensive trade in violation of an order of the board of health of the city.

A suit in equity to restrain a public nuisance consisting of an offensive trade, originally brought in the name of the selectmen as a board of health of the town, may be amended by substituting the inhabitants of the town as plaintiffs, after the term of office of such selectmen has ended. *Winthrop v. Farrar*, 11 Allen, 398.

In *New Orleans v. Lambert*, 14 La. Ann. 244, an injunction was granted at the instance of the municipality, restraining the defendant from operating a blacksmith shop, which created a nuisance and became dangerous to public health and safety, by reason of the noise, odor, and smoke therefrom, the ordinance of the city ordering such shop to be closed as a nuisance. In this case it was shown that the nuisance rendered living in the neighborhood inconvenient and unpleasant, and was a direct violation of a city ordinance.

In *Com. v. Snyder*, 2 Pa. Co. Ct. 260, the complaint charged the defendant with conducting his business of a butcher in the borough so as to constitute a public nuisance, and a true bill was found against him. A bill in equity for an injunction to restrain him from continuing the same nuisance was also filed, and a temporary injunction was granted, but it was subsequently dissolved, the affidavit failing to establish that the alleged nuisance was either existing or pending at the time the bill was brought. Both proceedings were pending, and the defendant sought to be discharged from the criminal prosecution until the bill in equity was disposed of. The court held that while a criminal prosecution and a common-law action growing out of the same transaction were both pending at the same time, the practice was well established to try the civil cause first, although even then it was entirely within the discretion of the court, yet that such rule was without reason or force when applied to proceedings in equity, whose courts were armed with full power to compel discovery without the aid of the common-law courts. It does not clearly appear in this case whether the party prosecuting and bringing the civil action was a private individual or not.

So, in *Helcher v. Farrar*, 8 Allen, 325, the selectmen of the town sought to restrain the

other unwholesome nauseous house or place, to cleanse, remove, or abate the same from time to time as often as may be necessary for the health, comfort, and convenience of the inhabitants of said city."

"Subsec. 31. To remove and abate any nuisance injurious to the public health, and to pro-

vide for the punishment of all persons who shall cause or maintain such nuisance.

"Subsec. 32. To remove or abate any nuisance, obstruction, or encroachment upon the streets, alleys, public grounds, or highways of the city."

"Sec. 12. The power conferred upon the

defendant operating his works in the manufacture of kerosene oil so as to create a nuisance, pursuant to an order of the selectmen requiring him to abate it. The court stated that there was no violation of principle in suspending the appropriation of private property to a particular use, alleged to be hurtful and injurious to others, until it could be ascertained judicially whether such allegation was well founded, and that it was upon that ground that courts of equity were empowered to issue injunctions to restrain the use of property, such process being only preliminary not concluding the rights of the parties, as, if the alleged offensive and noisome trade were carried on in the meantime, a great injury to health would be occasioned, and it would be impossible to prevent the evils which were most manifestly the object of Mass. Stat. chap. 26, which gave the board of health, or selectmen of the town, power over nuisances, and to suppress them. The court therefore upheld the order of the board of selectmen acting as a board of health, which prohibited the manufacture of such oils within the town as nuisances dangerous to public health, as valid and legal under § 52, chap. 26, General Statutes, and binding upon the defendant, although passed without previous notice.

And, in *New Orleans v. Stafford*, 27 La. Ann. 417, 21 Am. Rep. 563, an injunction was granted restraining the defendant from opening, conducting, carrying on, or continuing any private market or place of business for the sale of fresh meats, fresh fish, poultry, game, vegetables, etc., in the city, within the space or distance of twelve squares of any public market, under the jurisdiction and authority of the administrator of the commerce of the city, and otherwise violating in any manner the provisions of an act entitled "An Act to Regulate the Private Markets in the City of New Orleans, and for Other Purposes," passed on the 26th of January, 1874, which act abolished all private markets located within such distance of a public market. The court stated that the legislature had power to make such regulations under the police power, and that the authority sprang from the principle *salus populi suprema est lex*. The defendant had no vested private right to the privilege, even if he really possessed it, as it was acquired subordinately to the right existing in the sovereign to exercise the police power to regulate the peace and good order of the city, and to provide for and maintain its cleanliness and salubrity.

So, it is said that as a general rule, equity has jurisdiction to enjoin the erection and establishment of slaughterhouses in such a way as to become a public nuisance, either to individuals, or to the public. *Reichert v. Geers*, 98 Ind. 75, 49 Am. Rep. 736.

In *Watertown v. Mayo*, 100 Mass. 318, 12 Am. Rep. 634, the city authorities sought to restrain by injunction the defendant from occupying and using the building, or carrying on the business of slaughtering cattle and other animals therein, without the written consent of the selectmen, under Mass Stat. 1871, chap. 167, relating to slaughterhouses and noxious and offensive trades. The court held that the defendant's

business, so carried on by him without the written consent and permission of the selectmen, was a plain violation of the provisions of the statute, and, therefore granted an injunction, as, by § 3 of the same, power was given to prevent by injunction the erection, use, or enlargement of buildings in violation of its provisions.

In *Atty. Gen. v. Steward*, 20 N. J. Eq. 415, 417, it was sought to restrain the defendants from erecting in the city a slaughterhouse and pork-packing house, and pens for keeping cattle and hogs, upon the ground that the same would be a nuisance. The attorney general joined with the inhabitants to enjoin the business as a nuisance to the state schools. The court refused the injunction so far as the alleged nuisance was said to affect, and be detrimental to, the owners of adjoining vacant lots, inasmuch as it was not shown that the business was intended to be erected thereon, and that the question whether or not the slaughterhouse intended to be erected was a nuisance injurious to the sale of such lots, for which the law would provide a remedy before the buildings were erected, was one of law, in which equity could not, in the first instance, interfere, especially where the party about to erect such slaughterhouse showed that the same would be conducted so as not to constitute a nuisance, equity withholding its jurisdiction until it became apparent that the same would constitute a nuisance.

So, in *Grand Rapids v. Weiden*, 97 Mich. 32, an injunction was granted at the instance of the city authorities restraining defendant from conducting a rendering establishment which, by reason of intolerable stench therefrom, permeated the neighborhood causing nausea, debility, and discomfort, and compelling people to shut their doors and windows in order to avoid it, and created an intolerable nuisance.

In the above case the alleged nuisance was in a growing section of the city, and arose from the trying of tallow, and from offal and bones stacked away for shipment, hair put into barrels, and accumulated blood thrown into a dirt pile which was removed once a week, numerous hogs being kept about the premises running in an inclosure and fed on a mixture of meat from the bones, and corn meal or bran, the only ventilation in the building on the premises being a small hole in the chimney. The court restrained the prosecution of the business in that section of the city after a given date, and required the defendant in the meantime to observe certain suggestions made with reference to the accumulation of offal, and the daily cleansing of the establishment, and the removal of all filth.

So, where it appeared that the odors and gases from a fat rendering establishment produced headache, nausea, vomiting, and compelled citizens to close their doors and windows both by day and at night, and interfered with them in the enjoyment of their meals, and of sleep, such establishment was held to be a nuisance for the abatement of which it was the duty of the board of health to take proper measures, the board of health seeking the aid of the court by virtue of the New Jersey statute, which extends its power so far as to inquire

city council to provide for the abatement or removal of nuisances shall not bar or hinder suits or proceedings under any general law of this state."

It is obvious from the reading of these pro-

visions that a distinction is made in nuisances, and that the city is not authorized to deal with all alike. Those which jeopardize the public health or obstruct the public streets and grounds, the city itself may proceed summarily

whether the nuisance, sources of foulness, or causes of sickness hazardous to the public health exist or not, the interpretation given to the statute by numerous cases showing that the inquiry was limited to the determination of questions relative to the public health, and that in order to give the court jurisdiction there must be proof of danger, peril, or risk, or something equivalent thereto, to justify the court in lending its aid, and that when such a case was made manifest the statute prescribes what the court should do. *State, North Brunswick Twp. Bd. of Health, v. Lederer*, 52 N. J. Eq. 675.

In *Schoepflin v. Calkins*, 5 Misc. 159, action was brought by the board of health of the town to have the defendants' rendering works declared a nuisance, and their continued use restrained by injunction. The defendants objected to the enforcement of the order, upon the ground that it was invalid because no notice had been given, so that they might be heard in their own behalf before the order was made by the board for the abatement of such nuisance. It was insisted by the plaintiffs that such notice was not requisite for the reason that the action was an equitable one, and simply sought to restrain the continuance of a nuisance. The court held that the mere fact that the action was in equity did not affect the defendants' right to notice and opportunity to be heard, as, if the action was maintained, and the relief sought by it secured, its effect would be to render valueless, or substantially so, the structures erected by the defendants to carry on their business, and destroy their business, and that such far-reaching consequences could not be imposed upon them by an order of the board of health without notice to them, or an opportunity, before the order was made, to be heard as against the complaints upon which the board were acting.

Where the city sought to restrain the defendants from erecting a building in the city intended to be used as a hay press, but it was not alleged that the manufacture of pressed hay, within the compact parts of the city, was in itself a nuisance, the court refused the injunction. *Hudson v. Thorne*, 7 Paige, 261, 264.

So, in *Green v. Lake*, 54 Miss. 544, 28 Am. Rep. 378, it was sought to abate and perpetually enjoin the defendant from carrying on and continuing the use of his corn and flour mill, upon the ground that the same was a public nuisance, but, inasmuch as it was not shown that such mill was a nuisance *per se*, the court refused to perpetually enjoin the defendant in its use, and added, that before the court would abate a nuisance by way of injunction, it must be satisfied that the grievance was serious and well founded, and that no remedy short of the cessation of such use existed. In this case the business was claimed to be a nuisance to the whole community and the plaintiff with others sought to enjoin it as such, but it does not appear that the municipal authorities were parties.

In *Daw v. Enterprise Powder Mfg. Co.* 160 Pa. 479, it was sought to restrain the defendants from constructing a powder magazine near the settled portion of the borough adjoining a railroad, to be used for storing powder, dynamite, and other explosives, and inflam-

mable substances. The defendants admitted the construction of such building, but denied that they intended to put it to such uses, or that the uses to which they intended to put it would in any manner endanger life or property or affect the neighborhood unfavorably in any way, and contended that the same was only to be used for storing blasting powder, which was not a high explosive, and also declared that no objection had been taken by the public authorities to other premises in the built-up portion of the city which were used for storing powder of the same kind. The court refused the preliminary injunction, stating that when the facts were developed the question could be more intelligently disposed of.

In *Atty. Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371, 380, 390, the court refused an injunction, at the instance of the attorney general *ex officio*, restraining the defendants from carrying on a banking business contrary to the statutes, upon the ground that it was not such a mischief or public nuisance as the court would grant an injunction to restrain, even if it had jurisdiction over public nuisances, and stated that it must be an extremely rare case for the court of equity to interfere at all, much less preliminarily by injunction to put down as a public nuisance that which did not violate the rights of property, but only contravened the general policy, the exercise of the banking power not being a public nuisance, and, even if it were a nuisance, it would be a public offense over which courts of law had uniform and undisputed cognizance.

g. Buildings and other structures.

An injunction against the unlawful use of buildings as a nuisance is not beyond the jurisdiction of equity, on the ground that it is in the nature of a punishment for a criminal offense. *State, Rhodes, v. Saunders*, 66 N. H. 39, 18 L. R. A. 646.

So, where a frame building is erected in a closely built-up part of the town, and is in fact a nuisance, it may be abated by the public authorities, in a clear case, by proceeding in equity. *Wilkes-Barre v. Frauenthal*, 6 Kulp, 444.

Yet, in the case of *First Nat. Bank v. Sarila*, 129 Ind. 201, 203, 13 L. R. A. 481, it is stated that, as a rule, a court of equity will not, at the suit of the city, restrain by injunction the threatened violation of an ordinance of such city regulating the erection of buildings, for the purpose of greater security against damage by fire, and that the application of the restraining power to prevent the erection of buildings in violation of such ordinances should be confined to cases where the act sought to be restrained would be a nuisance in fact, and not one created solely by statutory enactment or municipal ordinance.

The following authorities also support the doctrine that equity will not interfere to enforce by injunction the observance of city ordinances prohibiting the erection of buildings not nuisances *per se*: *Sheldon v. Weeks*, 51 Ill. App. 314, 315; *Waupum Trustees v. Moore*, 34 Wis. 450, 17 Am. Rep. 446; *Hudson v. Thorne*, 7 Paige, 261; *St. Johns v. McFarlan*, 33 Mich. 72, 20 Am. Rep. 671; *Williamsport v. McFadden*, 15 W. N. C. 209.

to remove or abate, as provided in subsections 81 and 82. This power is conferred upon the city because of the character and consequences of such nuisances. The cases are extreme, and will brook no delay. When the public health

is imperiled or public travel is obstructed by the existence of a nuisance, the city may act promptly, and not wait for the slow process of securing its abatement by enforcing the penalties of an ordinance. But as to nuisances which

And a state statute declaring the use of a building for either of several unlawful purposes to be a nuisance abatable in equity, does not introduce an exceptional mode of trial, or change the ordinary course of proceedings on questions properly triable by jury. *State, Rhodes, v. Saunders*, 66 N. H. 39, 18 L. R. A. 644.

In *New York Fire Department v. Beaudet*, 21 Abb. N. C. 164, plaintiff sought to enjoin the defendant from continuing work on premises alleged to be erected in violation of the plans and specifications approved by the fire department, by reason of a bay window projecting into the public street for the distance of about 2 feet, in violation of law, the injunction being asked for, pending an action to recover penalties for violation of the ordinance. The court held that, under § 81, chap. 566, New York Laws 1887, such injunction should be confined to restrain the progress of any violation named, and not so as to enjoin the future progress of the work.

So, relief was denied in *Watertown v. Sawyer*, 109 Mass. 320, wherein it was sought to restrain, by injunction, the defendant from occupying and using a building for slaughtering cattle contrary to Mass. Stat. 1871, chap. 167. The defendant alleged that the buildings were erected on the site of a former building used and occupied by him for the same purposes, before the passing of the statutes, and was not a public or private nuisance, as the old building was destroyed by fire, and the new one was erected in its place, which, although different in construction and arrangement, was no larger in extent and capacity. The court refused the injunction as the accidental destruction of the building by fire was no intention on the part of the owner to abandon the use to which he had devoted the premises, and did not, under the statutes, involve the forfeiture of the right to continue without license the same business on the same place in a new building of no larger capacity erected on the same site, the language of the statute being "building or premises not occupied."

So, if the building sought to be repaired or altered has existed for years, and the proposed alteration and repairing does not create a nuisance in fact, or occasion irreparable mischief or injury, and the case does not show that the proposed change either increased or diminished the danger of fire, equity will not interfere by way of injunction to restrain the same. *Manchester v. Smyth*, 64 N. H. 380. In this case plaintiff sought the extraordinary remedy of a perpetual injunction against the defendant's proposed erection and enlargement of his building in violation of a penal ordinance of the city against fire.

So, where a village ordinance prohibits the erection of wooden buildings within certain specified limits, imposes a penalty for violation thereof, and provides that the president and trustees of the village shall cause any person violating the ordinance to be enjoined by a court of competent jurisdiction, an injunction will not be granted to prevent the erection of wooden buildings in violation of the ordinance. And the provision in the ordinance directing the officers to proceed by injunction, in such a case, in no manner extends or enlarges the jurisdic-

tion of the court, and the municipal authorities will be left to seek their remedy at law for a violation of the ordinance. *Ogden v. Weiden*, 40 N. Y. S. R. 235.

So, the court refused an injunction to restrain the defendant from erecting, within the fire limits, a wooden building in violation of a city ordinance, as the building was not completed, and the defendant and the contractors asserted positively that there was no intention to violate the ordinance,—especially as the evidence showed that when completed the outer walls and roof would be constructed wholly of incombustible materials, and raised a substantial doubt as to the facts essential to the jurisdiction. *Wilkes-Barre v. Frauenthal*, 6 Kulp, 444.

And, in *Honesdale v. Weaver*, 2 Pa. Dist. R. 344, the court refused relief at the suit of the chief burgess, assistant burgess, and town council of the borough against the defendants from erection of a wooden building in the borough contrary to an ordinance thereof, as the wooden building complained of was not a nuisance in itself, and for the further reason that the proceeding to enjoin such an erection was one to enforce a municipal ordinance, for which a suit in equity was not the proper remedy, as without express legislative authority, the by-laws of a municipal corporation could only be enforced by a pecuniary penalty which must be certain.

Again, in a case where defendants erected a frame barn on land owned by them, contrary to the provisions of a town ordinance prescribing fire limits and creating a penalty, which building was destroyed by fire, and was threatened and intended to be re-erected contrary to the provisions of such ordinance, the court refused relief upon the ground that the bill was not to restrain a nuisance, and contained no allegation that such building was a nuisance, its only purpose being to aid the city in enforcing its ordinance in respect to the establishment of such fire limits, and also upon the ground it was not shown that the penalties fixed were inadequate for the purpose, and even if it were so shown the power to make such penalty sufficient was vested in the city itself. *Williamsport v. McFadden*, 15 W. N. C. 269.

In *Ellwood City v. Manl*, 16 Pa. Co. Ct. 474, the borough sought to restrain defendant from constructing and erecting a frame building within the fire limits, as regulated by the borough ordinance, and the questions raised were, whether the borough had authority to pass such ordinance, and whether the court had jurisdiction or authority to enforce it. Upon the first question the court held that the legislature had undoubtedly power to prohibit the erection of wooden buildings within the limits of a borough or city, and also the power to confer that right or authority upon municipal corporations, such as boroughs and cities, which were subdivisions of the state created by the state for the comfort and convenience of the citizens, although it refused the injunction upon the ground that such wooden buildings, although erected contrary to law, were not nuisances *per se*, even though they might become a nuisance by reason of the ordinance passed by the municipal authority, which authority also provided a remedy which must be followed, and upon

affect the comfort or convenience of the public, but not the public health, the city is only authorized to compel the owners of the buildings or places which constitute the nuisances to remove or abate them as provided by subsection 5 of its charter. There is no occasion for immediate action in such cases. The literal reading of this subsection 5 would indicate that the city could not compel the owner of such a building or place to cleanse, remove, or abate the same unless it affected the public health as well as the comfort and convenience of the public, the words of the statute being "health, comfort, and convenience." But, clearly, such is not the intention of the statute, and the word "and" should be read "or," in accordance with the rule that "or" may be read

for "and" in a statute, and conversely, as the clear intent of the statute may require. *Weston v. Loyhed*, 30 Minn. 226; *Sutherland, Stat. Constr.* § 252.

It follows from our construction of its charter that the city of Red Wing has the power to compel the abatement of a nuisance affecting the comfort or convenience of the public, although it is not injurious to the public health, and therefore it may maintain an equitable action to aid in compelling an abatement of such a nuisance. It also follows that the trial court erred in entering judgment upon the special verdict for the defendant dismissing the action.

Judgment reversed, and cause remanded for further proceedings in accordance with this opinion.

the ground that the fact that it had neglected to provide the remedy, or that the remedy was not sufficient, was no ground for the interference of a court of equity, as the borough authorities still had the power to make an adequate remedy and means to enforce the ordinance. In this case the court followed the prior decisions in *Williamsport v. McFadden*, 15 W. N. C. 269, and *Houesdale v. Weaver*, 2 Pa. Dist. R. 344.

So, relief was refused in a case where the defendant was erecting a two-story brick stable fronting the same upon another street than that mentioned in his permit, which street was wholly unimproved by brick or stone buildings prior to the passing of Pa. act April 21, 1855. The city authorities claimed that the stable as fronting on such street was erected in direct violation of the act (Pamph. Laws, 265, § 6), which provides as follows: "No new dwelling house, or other buildings within said city, shall front upon any street, alley, or court which shall be of less width than 20 feet, or without being made to recede, so that such street, alley, or court shall be of that width, the buildings on each side equally receding, the damages for which widening shall be assessed and paid to the owner in the manner provided by law in case of opening new streets; every new dwelling house shall also have an open space attached to it, in the rear or at the side, equal to at least 12 feet square; and no building of any kind shall be permitted to be erected on any street, court, or alley hereafter to be laid out, or if laid out, and wholly unimproved by brick or stone buildings before the passage of this act, of a less width than 25 feet; and every builder or owner who shall hereafter build otherwise than aforesaid shall pay to the said city \$100, to be recovered with costs, as debts of that amount may by law be recovered, and shall be restrained by injunction." The court held that the act should be read as an entirety, and that the clause "or without being made to recede so that such street, alley, or court shall be of that width, the buildings on either side equally receding," referred to 25-foot streets as

well as to 20-foot streets, and that the terms of the statute had been substantially complied with by the defendant. The injunction was therefore refused, the street by the receding of the building being practically made of the width of 25 feet as required by the statute. *Philadelphia v. Wall*, 134 Pa. 557.

So, in *Daw v. Enterprise Powder Mfg. Co.*, 160 Pa. 479, the court refused to restrain the erection of a powder-house in the borough adjoining a railroad, which was to be used for the purpose of storing powder and explosives and inflammable substances, as the affidavits filed by way of answer were clear, positive, and unequivocal denials of the material allegations of the bill and there was no evidence in rebuttal, the court stating that if, on a final hearing, the contrary should be shown, or if at any time the building should be put to a use constituting a nuisance, it could still be enjoined.

Again, in *Waupun Trustees v. Moore*, 34 Wis. 450, 17 Am. Rep. 446, the court refused to enjoin the defendant from erecting a wooden building within the limits of a village, where the ordinance prohibited the erection of such building within a specified area, the erection of such wooden building not being unlawful outside of such village ordinance, the mere erection of a wooden building not being a nuisance *per se*.

In the above case, while the court did not decide whether the village board had power under its charter to pass the ordinance in question, yet it stated that it had disposed of the case on the hypothesis that the charter conferred such power on the board.

The question of municipal power to enjoin buildings, fences, and other structures as nuisances affecting highways and streets will be the subject of a subsequent note.

The general question of municipal control over buildings, fences, and other structures is treated of in note to *Evansville v. Miller* (Ind.) 38 L. R. A. 161. M. W.

ALABAMA SUPREME COURT.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, *App't.*,

v.

Jim NASH.

(.....Ala.....)

1. **Payment by a garnishee of a judgment which was void** for want of jurisdiction over the nonresident creditor will not be a defense to an action by the latter.
2. **The situs of a debt** is at the domicile of the creditor for the purpose of garnishment.
3. **Due process of law is not furnished by garnishment** of a debt due to a nonresident who is not personally served within the state, and does not voluntarily appear.

(June 16, 1898.)

A PPEAL by defendant from a judgment of the City Court of Birmingham in favor of plaintiff in an action brought to recover wages alleged to be due and unpaid which defendant claimed to have paid under garnishment proceedings in another state. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. Thomas G. Jones for appellant.

Mr. S. L. Weaver for appellee.

Brickell, Ch. J., delivered the opinion of the court:

The appellee, a resident of this state, and an employee of appellant, brought this action against appellant, the Louisville & Nashville Railroad Company, a corporation organized under the laws of the state of Kentucky, and doing business in that state, and also in Alabama and Tennessee, to recover the amount of wages earned and due him for work and labor done here for appellant. In defense of the action, appellant set up the payment by it, previously to the commencement of this suit, of a judgment rendered against it in a justice's court in the state of Tennessee in an attachment suit, founded on a debt due in Tennessee, wherein appellee was defendant and appellant was summoned to answer as garnishee. Appellee was a resident of Alabama at the time of the commencement, and during the pendency, of said attachment suit, was not personally served with notice thereof, had no actual notice, and did not voluntarily appear, but service was had by publication, in accordance with the laws of Tennessee. The questions presented by this appeal are, therefore—First, whether the courts of one state have, or can acquire, jurisdiction to attach and condemn a debt due to a nonresident, and payable in the state of his residence, by service of process on his debtor as garnishee, in the absence of personal service within the state of suit on the creditor or his voluntary appearance; and, second, whether, if such courts are without juris-

diction for this purpose, the payment by the garnishee of a judgment rendered against him as garnishee, under such circumstances, will constitute any defense to a subsequent suit by his creditor to recover the debt.

The case presented is ruled, with respect to both questions, by the cases of *Louisville & N. R. Co. v. Dooley*, 78 Ala. 524, and *Alabama G. S. R. Co. v. Chumley*, 93 Ala. 317. In the former case it was held that a debt due by a foreign corporation to an employee in the state of its creation, although it was doing business in this state also, could not be subjected by a creditor in this state by attachment against the nonresident creditor and garnishment against the corporation. In the latter we decided that the payment by a railroad corporation created by the laws of this state, but doing business also in Tennessee, of a judgment rendered against it in Tennessee under a garnishment issued on a judgment recovered in that state against an employee resident in this state, was no defense to an action by the employee to recover the wages due him for work done in this state, in the absence of evidence showing that, by the statutes of Tennessee, the court had acquired jurisdiction of the debt sought to be reached and subjected. In both of the above cases it was expressly decided that the situs of a debt, for the purpose of garnishment, is at the domicile of the creditor, and not that of the debtor; and this fact is the true foundation for the proposition that a state has no jurisdiction over a debt due to a nonresident, and payable without the state of suit, in the absence of personal service on the creditor within the state, or his voluntary appearance in a proceeding in which jurisdiction over it is sought to be exercised. If it be conceded that a debt due by a resident of, or a corporation doing business in, one state, to a resident in another state, is not properly within the state of the debtor's residence, no legislation by the latter state can give it a situs there for the purpose of enabling its citizens, or other persons resorting to its courts, to subject it to the payment of claims against the creditor by garnishing the person or corporation from whom it is due. If it has no situs within the debtor's state, in the absence of legislation, any legislation attempting to give it such situs, or to prescribe the manner of service on either the debtor or the nonresident creditor, by which jurisdiction over it may be acquired, unless by personal service on the creditor within the state, or his voluntary appearance, would be as nugatory and ineffectual to dispose of the creditor's property in the debt as would be legislation attempting to acquire jurisdiction over tangible property situated without the state. The subject-matter of such legislation, namely, the property over which it is attempted to acquire jurisdiction, is entirely beyond the power and control of the state. In the view we take of the question, the

NOTE.—As to protection of nonresident creditor against garnishment, see also *Illinois C. R. Co. v. Smith* (Miss.) 19 L. R. A. 577, and note; *Missouri P. R. Co. v. Sharitt* (Kan.) 8 L. R. A. 385; *Reimers v. Sentoo Mfg. Co.* (C. C. App. 6th C.) 30 L. R. A. 364; *Wyeth Hardware & Mfg. Co. v. Lang* (Mo.) 27 L. R. A. 41 L. R. A.

A. 651; *Neufelder v. German-American Ins. Co.* (Wash.) 23 L. R. A. 237; *Bragg v. Gaynor* (Wis.) 21 L. R. A. 161; *Douglas v. Phenix Ins. Co.* (N. Y.) 20 L. R. A. 118; *Lancashire Ins. Co. v. Corbetta* (Ill.) 33 L. R. A. 640; and *Virginia F. & M. Ins. Co. v. New York Carousal Mfg. Co.* (Va.) 40 L. R. A. 237.

victing it of receiving an excessive amount for baggage transportation. *Reversed.*

The facts are stated in the opinion.

Messrs. J. McD. Trimble, John A. Easton, and C. M. Rice for appellants.

Mr. E. B. Kinsworthy, for appellee:

Appellant is estopped from denying that these trunks were the baggage of Lincoln.

Hoeger v. Chicago, M. & St. P. R. Co. 68 Wis. 100, 53 Am. Rep. 271; *Strouss v. Wabash, St. L. & P. R. Co.* 17 Fed. Rep. 209.

Appellant cannot set up that it carried these trunks as freight, having accepted the same as baggage and knowing the contents thereof.

Waldron v. Chicago & N. W. R. Co. 1 Dak. 341; *Chicago, R. I. & P. R. Co. v. Conklin*, 82 Kan. 55; *Perley v. New York C. & H. R. R. Co.* 65 N. Y. 375; *Kansas City, Ft. S. & G. R. Co. v. Morrison*, 34 Kan. 502, 55 Am. Rep. 252; *Ft. Worth & R. G. R. Co. v. I. B. Rosenthal Millinery Co.* (Tex. Civ. App.) 29 S. W. 196; *Kansas City, Ft. S. & M. R. Co. v. McGahey*, 68 Ark. 344, 36 L. R. A. 781; *St. Louis S. W. R. Co. v. Berry*, 60 Ark. 435, 28 L. R. A. 501.

The title to these samples was in the house for which Lincoln traveled, but his interest in the same and his possession of the same was such as to make them his property, for the purpose for which they were carried, and the title is such that they could well be considered his baggage and his property.

4 Elliott, Railroads, § 1649; *Ft. Worth & R. G. R. Co. v. I. B. Rosenthal Millinery Co.* (Tex. Civ. App.) 29 S. W. 196.

Battle, J., delivered the opinion of the court:

An act entitled, "An Act to Regulate Charges on Excess Baggage on All Railroads Propelled by Steam or Electricity in This State over Five Miles in Length," approved April 19, 1895 [act 143, p. 210, §§ 1, 2], provides:

"Sec. 1. It shall be unlawful for any railroad in this state, over 5 miles in length, run by steam or electricity, to charge more than 12½ per cent of the cost of a first-class fare between all points in this state, per 100 pounds, for excess of baggage, over (150 lbs.) one hundred and fifty pounds: provided, that the minimum charge for excess, where the same does not exceed 200 pounds, shall not be less than 25 cents.

"Sec. 2. Any such railroad violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction be fined in any sum not less than \$10 nor more than \$25."

The Kansas City, Pittsburg, & Gulf Railroad Company was indicted for, and convicted of, a violation of this act, and was fined in the sum of \$10.

The facts upon which the conviction was based are as follows: George T. Lincoln, a traveling salesman, purchased of the Kansas City, Pittsburg, & Gulf Railroad Company a ticket for transportation over its road from Siloam Springs, in Benton county, in this state, to Gentry, a station in the same county, and paid 20 cents for the same, the price of first-class fare. He had with him four trunks, which contained clothing of various kinds, and weighed in the aggregate 970 pounds. He carried this clothing with him, and used it as

samples in making sales of the same description. The railroad company allowed him transportation for 150 of the 970 pounds free of additional expense, and charged and received from him \$1.25 for the transportation of the remaining 820 pounds from Siloam Springs to Gentry. The sum received was the amount charged for like articles when shipped as first-class freight, was a freight rate, and not an excess baggage rate. The trunks were checked like baggage, and accompanied Lincoln upon the same train. The defendant's railroad exceeded 5 miles in length, and was operated by steam.

Were the four trunks and their contents "baggage" within the meaning of the act of April 19, 1895?

What is baggage, within the rule of the carrier's liability, depends much upon the reason why the passenger is allowed transportation for it as such. There can be but one, and that is because it is necessary or conducive to his convenience and comfort. It is necessary to him, and for that reason it is impliedly, if not expressly, included in every contract of the carrier to transport passengers. "The impossibility of traveling," says Chief Justice Cockburn, "without the accompaniment of a certain quantity of luggage for the personal comfort and convenience of the traveler has led from the earliest times to the practice, on the part of carriers of passengers for hire, of carrying, as a matter of course, a reasonable amount of luggage for the accommodation of the passenger, and of considering the remuneration for the carriage of such luggage as comprehended in the fare paid for the conveyance of the passenger." Hence courts and authors in defining what is baggage have embraced this idea in their definitions. Judge Story says that "by baggage we are to understand such articles of necessity or personal convenience as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use, but for other purposes, such as a sale and the like." Story, Bailm. § 499. Baggage, says Chief Justice Cockburn, in *Macrou v. Great Western R. Co.* L. R. 6 Q. B. 612, is "whatever the passenger takes with him for his personal use or convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate purpose of the journey." Mr. Justice Field, in *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. 274, 20 L. ed. 429, said that the contract of the carrier to carry a passenger, as to baggage, "only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of the journey, and many other considerations." Upon the same principle, the statutes of this state provide: "Each passenger who shall pay fare . . . shall be entitled to have transported along with him, on the same train, and without additional charge, 150 pounds of baggage to consist of such articles as are usually carried by ordinary persons when traveling." [Sands & H. Dig. § 6215.]

Accordingly, it has been frequently held, as we do now, that merchandise carried for sale, or samples of merchandise carried for the purpose of making sales of goods of the same class do not come within the description of baggage. *Humphreys v. Perry*, 148 U. S. 627, 37 L. ed. 587; *Alling v. Boston & A. R. Co.* 126 Mass. 121, 30 Am. Rep. 687; *Mississippi C. R. Co. v. Kennedy*, 41 Miss. 671, 678; *Macrow v. Great Western R. Co.* L. R. 6 Q. B. 612; *Hawkins v. Hoffman*, 6 Hill, 589, 41 Am. Dec. 767; *Hutchings v. Western & A. R. Co.* 25 Ga. 61, 71 Am. Dec. 156; *Texas & P. R. Co. v. Capps* (Tex.) 16 Am. & Eng. R. Cas. 118; *Michigan C. R. Co. v. Carrow*, 73 Ill. 348, 24 Am. Rep. 248; *Strouss v. Wabash, St. L. & P. R. Co.* 17 Fed. Rep. 209; *Pennsylvania Co. v. Miller*, 35 Ohio St. 541, 35 Am. Rep. 620; *Southern Kansas R. Co. v. Clark*, 52 Kan. 398; *Hutchings v. Western & A. R. Co.* 25 Ga. 61, 71 Am. Dec. 160; *Hutch. Carr.* §§ 679, 685; *Thomp. Carr.* p. 510.

It is true that it is said in *Kansas City, Ft. S. & M. R. Co. v. McGahey*, 63 Ark. 348, 36 L. R. A. 781: "When a passenger presents to the carrier for transportation his goods and chattels, and makes known what they are, or exposes them to view, or packs them in a way to give to anyone concerned good reason to un-

derstand and know that they are not usually carried as baggage, and demands transportation of them as his luggage, and the carrier receives and carries them accordingly, he will be responsible for them as baggage, notwithstanding he was not bound to accept and transport them as such. If he wishes to avoid responsibility for them as baggage, he must refuse to receive them in that way." But the act of April 19, 1895, does not apply to goods and chattels which do not come within the description of baggage. The carrier becomes liable for them as baggage by accepting them as such, by his own acts, and not from any obligation to transport them as baggage which the law imposes upon him. Such property he is not bound to receive, except upon the payment of the rates he is allowed to charge for the transportation of the same as freight.

In this case the railroad company was not bound to receive and transport Lincoln's trunks as baggage. It was entitled to compensation for carrying them at the rate it is lawful to charge for the transportation of such property as freight. It received nothing more, and is not guilty of violating the act of April 19, 1895.

Reversed, and remanded for a new trial.

CALIFORNIA SUPREME COURT (In Banc).

CITY AND COUNTY OF SAN FRANCISCO, *Resp't.*,

v.

Ellen GROTE, *Appt.*

(.....Cal.....)

1. A city may maintain ejectment for the possession of land dedicated for use as a street, although it does not own the fee.
2. A man cannot dedicate for street purposes land upon which he has placed a homestead so as to divest the rights of his wife therein.
3. Dedication of land for a highway is not shown by the fact that for eight years the land was used by the public generally for travel without either consent or objection on the part of the owner.

(February 9, 1896.)

A PPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco in favor of plaintiff in an action brought to recover possession of certain real estate alleged to have been dedicated for street purposes. *Reversed.*

The facts are stated in the opinion.

See also report of case in Division 1, 36 L. R. A. 502.

Mr. T. Z. Blakeman, for appellant:

The action of the board of supervisors in 1887 upon the petition of certain property owners in said block to have Garden avenue "surveyed, delineated, and described," and obstructions removed, is conclusive upon the

plaintiff and the public that Garden avenue at rear of defendant's lot was only 12½ feet wide.

The board of supervisors had "full power and authority" to close up in whole or in part any street, lane, or alley within the city.

Cal. Stat. 1863, p. 560; *Brook v. Horton*, 63 Cal. 556.

No special order of discontinuance was necessary.

Brook v. Horton, 68 Cal. 558.

A right of way or other easement over or upon land cannot be recovered in an action of ejectment.

Wood v. Truckee Turnp. Co. 24 Cal. 487, citing *Child v. Chappell*, 9 N. Y. 251, and *Washb. Easem.* § 568; *San Francisco v. Culderwood*, 81 Cal. 589, 91 Am. Dec. 542; *Southern P. Co. v. Burr*, 86 Cal. 283; *San Francisco v. Sullivan*, 50 Cal. 603; *Visalia v. Jacobs*, 65 Cal. 434, 52 Am. Rep. 803; *Fitzell v. Leaky*, 72 Cal. 482; *Savannah v. Steam Boat Co. R. M. Charl't.* (Ga.) 842; *Racine v. Crotzenberg*, 61 Wis. 481, 50 Am. Rep. 149; *West Covington v. Freking*, 8 Bush. 121; *Terre Haute & S. E. R. Co. v. Rodol*, 89 Ind. 128, 46 Am. Rep. 164; *Grand Rapids v. Whittlesey*, 33 Mich. 109; *Bay County v. Bradley*, 39 Mich. 168, 33 Am. Rep. 367; *Child v. Chappell*, 9 N. Y. 246; *Pomeroy v. Mills*, 8 Vt. 279, 23 Am. Dec. 207; and *Sarnia v. Great Western R. Co.* 21 U. C. Q. B. 62.

The owner of the fee of land subject to an easement for a public highway may maintain ejectment against one who takes possession of the land and uses it for other than road purposes.

NOTE.—As to ejectment for land in highway, see notes to *Harrington v. Port Huron* (Mich.) 13 L. R. A. 664, and *Hancock v. McAvoy* (Pa.) 18 L. R. A. on 41 L. R. A.

page 787; also the cases of *Thomas v. Hunt* (Mo.) 38 L. R. A. 867, and *Montgomery v. Santa Ana & W. R. Co.* (Cal.) 25 L. R. A. 664.

Obburn v. Ames, 52 Cal. 394, 28 Am. Rep. 634.

The declaration of homestead embraced the entire lot of defendant, and the wife never consented that any part thereof be dedicated for a street.

Monterey v. Malarin, 99 Cal. 290; *Dunn v. Tozer*, 10 Cal. 167; *Marshall v. Anderson*, 78 Mo. 86.

The evidence falls far short of proof of that clear and unequivocal intention to dedicate which is required in such cases.

Eureka v. Oroghan, 81 Cal. 524; *Latham v. Los Angeles*, 87 Cal. 514; *Huffman v. Hall*, 102 Cal. 80.

Not one of the general public uninterested in the immediate locality was called as a witness to prove that the public had ever even heard of "Garden avenue."

The city cannot maintain such an action to vindicate private rights.

People v. Dreher, 101 Cal. 274.

Mr. H. T. Creswell for respondent.

Garoutte, J., delivered the opinion of the court:

This action is brought by the city to recover the possession of a small tract of land 124 by 85 feet, being a strip, of the aforesaid dimensions, forming the rear end of the lot of defendant. It is claimed by the city, and found as a fact by the trial court, that such strip had been dedicated by the owner to the public as a highway or street. Two material questions are raised by this appeal: (1) Can the city and county of San Francisco maintain ejectment for the recovery of the possession of a public street, without showing ownership of the land in fee? (2) Does the evidence show a dedication of the strip of land in dispute to the use of the public for street purposes?

While there may be a difference of opinion existing in the courts of other states upon the question, we think the doctrine should be held settled in this state that ejectment can be maintained for the recovery of the possession of a street dedicated to the public use by the owner of the fee. In *Vtsalka v. Jacob*, 65 Cal. 434, 52 Am. Rep. 308, this court declared: "It is true an action of ejectment may be maintained by a municipal corporation for the recovery of the possession of a street wrongfully possessed by an individual, whether the corporation owns the fee or the adjoining proprietor retains it. In the latter case the right of the municipality to regulate the public use, and for that purpose to possess, use, and control the property, is treated by the courts as a legal, and not merely an equitable, right." The same doctrine is reiterated *in extenso* in *Southern P. Co. v. Burr*, 86 Cal. 238. Although the facts there presented were somewhat different, the principle of law involved was the same, and the case is direct authority upon the legal issue here raised. In *Eureka v. Armstrong*, 83 Cal. 623 and 624, ejectment was successfully maintained to secure the possession of streets dedicated to the use of the public by the owner in fee, opposing counsel not even raising the objection that the remedy pursued was not authorized by the law. The same conditions are presented in *Eureka v. Fay*, 107 Cal. 166. In *Napa v. Howland*, 87 Cal. 84, 41 L. R. A.

the right of recovery in ejectment was sustained, and a rehearing was denied, although at all stages of the litigation it was insisted by defendant that the proper remedy for plaintiff was not ejectment. 2 Dill. Mun. Corp. 3d ed. § 662, and Elliott, Roads & Streets, pp. 321, 322, fully support the doctrine of the California cases we have cited. *Wood v. Truckee Turnp. Co.* 24 Cal. 487, is not in point, and especially is this true after the limitations and construction placed upon it by the decision in *Southern P. Co. v. Burr*, 86 Cal. 238. It may be conceded that a naked right of way, an easement in its simplest form, a mere right to pass over the land of another, is a thing so intangible and unsubstantial as to be insufficient to support an action of ejectment. But here the right of the city goes far beyond that. The city has the right of exclusive possession; a right to disturb the soil; a right to grade and otherwise improve the street in many ways. In other words, more than a mere right to the use of a street passes to the public by dedication. In addition to the right of use, there passes such an interest in the land as is necessary for the enjoyment of that use by the public.

In 1871, when the title to this land passed from the city to defendant's husband, he placed a homestead upon the lot. The defendant was at that time his wife. Grote died in the year 1889. During this period of eighteen years he did and said various things indicating to some extent an intention upon his part to dedicate the tract of land in dispute to the public for street purposes. But during all this period the declaration of homestead rested upon the premises, and under such circumstances the wife at all these times had an interest in the realty which the husband could not take away from her by any act of dedication upon his part. By reason of the prohibition declared by § 1242 of the Civil Code, the husband could neither convey nor encumber this land. It may at least be said that, if a dedication by the husband was established, an encumbrance thereafter rested upon the land. Indeed, if the city by acts of dedication upon the part of the husband can be vested with an interest in the realty so substantial as to support an action in ejectment, and the court so holds, then we have no doubt that such interest is so substantial as to form a burden upon the wife's rights which are extended to her by the aforesaid section of the Code. For these reasons there was no dedication of this land for a public use prior to the husband's death, for it was not in his power to dedicate, however clear his intention so to do may appear.

It is further claimed that a dedication occurred as evidenced by the acts of the wife subsequent to the death of the husband. We fail to find any evidence justifying such a conclusion. It is not a trivial thing to take another's land, and for this reason the courts will not lightly declare a dedication to public use. It is elementary law that an intention to dedicate upon the part of the owner must be plainly manifest. Here there is no such manifest intention. No single act of the defendant can be pointed out so indicating. For a period of about eight years, without either consent or objection upon her part, the land

was used by the public generally for travel, and this was all. During his lifetime the husband erected a tenement upon the rear of the lot fronting upon the strip of land in dispute, the steps occupying 4 feet thereof. This house remained in the same position during the ownership and possession of the defendant, but there is nothing in these facts indicating dedication upon her part.

For the foregoing reasons *the judgment is reversed*, and the cause remanded.

We concur: **Van Fleet, J.; Harrison, J.**

McFarland, J.:

I concur in the judgment of reversal upon the second point discussed in the leading opinion relative to the homestead right. I think, however, that the case is within the old and well established rule that ejectment will not lie for the disturbance of a right of way or other easement. Two decisions of this court are mainly relied on: *Visalia v. Jacob*, 65 Cal. 484, 52 Am. Rep. 308; *Southern P. Co. v. Burr*, 86 Cal. 285. In the *Visalia* case the only question before the court was whether a private citizen can acquire title by adverse

possession to land which had been dedicated to public use as a street. Counsel there made no question as to the proper remedy, and what the court said about ejectment was incidental and unnecessary, and was not the result of the consideration of a point raised and argued by counsel. In *Southern P. Co. v. Burr*, the decision evidently went upon the theory that the estate which the railroad company had in the strip of land 200 feet wide granted by Congress was something more than a mere right of way. The point is not discussed or referred to in the opinion in either *Eureka v. Armstrong*, 83 Cal. 623, 624, and *Eureka v. Fay*, 107 Cal. 166, or *Napa v. Howland*, 87 Cal. 84. If, in the latter case, the point was made on petition for rehearing, the court may have refused to consider it because not made at the proper time. If a public street or road be unlawfully obstructed there are ample remedies for the wrong, and in such case there is no necessity of trying to use the action of ejectment for purposes, to which, in its very nature, it is not applicable.

I concur: **Henshaw, J.**

INDIANA SUPREME COURT.

City of INDIANAPOLIS, *Appt.*,

v.

John N. NAVIN.

(.....Ind.....)

1. A municipal corporation has no power to make a contract with a street railroad company which will prevent the legislature from regulating its rates of fare.
2. In order to exempt a common carrier from legislative control over its rates of fare the exemption must be made by clear and unmistakable language inconsistent with the exercise of such power by the legislature.
3. The right to regulate fares on street railroads does not include the power to require passengers to be carried without reward or for such sum as will amount to confiscation or the taking of property without compensation or due process of law.
4. The exercise by the legislature for forty-five years, with the acquiescence by the people, of the power to regulate corporations by special acts, is influential in determining the construction of a constitutional provision against creating corporations by special acts.
5. The mere regulation of the maximum rate of fare to be collected by street-railroad companies in cities of a population of 100,000 or more according to the census of 1890 is not within the prohibition of Const. art. 11, § 13, against the creation of corporations by special act.

NOTE.—As to legislative power to fix tolls, rates, or prices, see note to *Winchester & L. Turnp. Road Co. v. Croxton* (Ky.) 83 L. R. A. 177.

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6. The enactment of a local or special law on a subject not enumerated in Const. art. 4, § 22, is an expression of the opinion and judgment of the legislature that a general law cannot be made applicable, and this judgment is not subject to be reviewed by the courts.

On rehearing.

7. On questions of the requirements of the state Constitution the supreme court of the state is not at liberty to set aside or discard its own views because of different conclusions by the Federal courts.

(June 11, 1897.)

APPEAL by plaintiff from a judgment of the Circuit Court for Marion County in favor of defendant in an action brought to recover the penalty for violation of a municipal ordinance against refusing to pay fare on street cars. *Affirmed.*

The facts are stated in the opinion.

Mr. James B. Curtis, for appellant:

The ordinance upon which the complaint is based, providing that no one shall ride on a car without paying fare of not in excess of five cents, is a valid one.

The legal fare of the company was, previous to the time of the act complained of, fixed at five cents, and the attempt to regulate the fare by the legislature was unconstitutional.

Const. art. 1, § 28, Rev. Stat. 1894, § 68; Const. art. 4, § 28, Rev. Stat. 1894, § 119; Const. art. 2, § 81, Rev. Stat. 1894, § 212.

The act, although general in form, applies only to the Citizens' Street Railroad Company of the city of Indianapolis, and is, therefore, local and special as applying to cities having a population of 100,000 according to the census of 1890.

Mode v. Beasley, 143 Ind. 306; *Com. v. Fertig*, *v. Patton*, 88 Pa. 258; *State, Harris, v. Herrmann*, 75 Mo. 340; *State, Richards, v. Hammer*, 42 N. J. L. 435; *Edmunds v. Herbrandson*, 2 N. D. 270, 14 L. R. A. 725; *Gibbs v. Morgan*, 89 N. J. Eq. 126; *Boyd v. Milwaukee*, 92 Wis. 456; *State, Columbus, v. Mitchell*, 81 Ohio St. 592; *Devine v. Cook County Comrs.* 84 Ill. 590; *Topeka v. Gillett*, 32 Kan. 481; *Central Trust Co. v. Citizens' Street R. Co.* 80 Fed. Rep. 218.

Corporations cannot be created by special act, and a corporation cannot be given special power or deprived of rights by special legislation.

San Francisco v. Spring Valley Waterworks Co. 48 Cal. 493; *Welsh v. Bramlett*, 98 Pac. 219; *Gray v. Crockett*, 80 Kan. 138; *Robinson v. Perry*, 17 Kan. 248; *Darling v. Rodgers*, 7 Kan. 592; *Travelers Ins. Co. v. Oswego Twp.* 55 Fed. Rep. 361; *Green v. Knife Falls Boom Corp.* 85 Minn. 155; *Ex parte Pritz*, 9 Iowa, 81; *Davis v. Woolnough*, 9 Iowa, 104; *McGregor v. Baylies*, 19 Iowa, 48; *State v. Squires*, 26 Iowa, 340; *Atkinson v. Marietta & C. R. Co.* 15 Ohio St. 21; *State, Atty. Gen., v. Cincinnati*, 20 Ohio St. 18; *Pittsburgh, Ft. W. & C. R. Co. v. Martin*, 53 Ohio St. 336; *State, Broerman, v. Hamilton County Comrs.* 54 Ohio St. 338; *Hamilton County Comrs. v. State, Brockman*, 50 Ohio St. 653; *German-American Invest. Co. v. Youngstown*, 68 Fed. Rep. 452; *State, German-American Invest. Co. v. Bargas*, 53 Ohio St. 94; *Foster v. Wood County Comrs.* 9 Ohio St. 540; *School Dist. No. 56 v. St. Joseph F. & M. Ins. Co.* 108 U. S. 707, 26 L. ed. 601; *Clegg v. School Dist. No. 56*, 8 Neb. 178; *Jefferson County Comrs. v. People, Griggs*, 5 Neb. 127; *Thomas v. Wabash, St. L. & P. R. Co.* 40 Fed. Rep. 126, 7 L. R. A. 145; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 840; *Re Constitutionality of Senate Bill No. 293*, 21 Colo. 38; *Re Extension of Boundaries of Denver*, 18 Colo. 288; *Murnane v. St. Louis*, 123 Mo. 479; *Denver v. Spokane Falls*, 7 Wash. 226; *Weinman v. Wilkinsburg & E. L. Pass. R. Co.* 118 Pa. 192; *Scranton v. Whyte*, 148 Pa. 419; *Reeves v. Philadelphia Traction Co.* 152 Pa. 153; *Philadelphia v. Westminster Cemetery Co.* 162 Pa. 105; *Chalfant v. Edwards*, 173 Pa. 246; 1 Thomp. Corp. §§ 574, 576, 577, 588.

The act authorizing the incorporation of street-railroad companies is a general law, and, as required by the Constitution, is "of uniform operation throughout the state." Its uniformity of operation will be destroyed by the act of 1897. Acts relating to corporations must be general, and the Constitution forbids special or local legislation on the subject of either in the form of independent or mandatory acts.

School Dist. No. 56 v. St. Joseph F. & M. Ins. Co. 103 U. S. 707, 26 L. ed. 601; *Gray v. Crockett*, 80 Kan. 138; *Robinson v. Perry*, 17 Kan. 248; *Darling v. Rodgers*, 7 Kan. 592; *San Francisco v. Spring Valley Waterworks Co.* 48 Cal. 493; *State, Keenan, v. Milwaukee County Supers.* 25 Wis. 339; *State, Peck, v. Riordan*, 24 Wis. 484; *State, Walsh, v. Dousman*, 28 Wis. 541.

As the subject of legislation of the act of 1897 is a matter which is susceptible of general legislation which will be uniform throughout the state, it must be presumed that the act was 41 L. R. A.

intended to be general in fact. As it is in fact special and local, it is therefore void. As the question as to whether the subject is one which in respect of the matter to which it relates, is susceptible of general legislation, its consideration is, therefore, judicial, and not legislative.

State, Keenan, v. Milwaukee County Supers. 25 Wis. 339; *State, Peck, v. Riordan*, 24 Wis. 484; *State, Walsh, v. Dousman*, 28 Wis. 541; *Sutherland, Stat. Constr.* § 118.

The incorporation of the Citizens' Street Railroad Company under the general laws of the state, and the ordinance upon which the prosecution is based, created a contract, and the act of 1897 impaired the obligation of the same, being in contravention of both the Constitution of the United States, and the state of Indiana.

U. S. Const. art. 1, § 10; Ind. Const. art. 1, § 24; Rev. Stat. 1894, §§ 10-69.

An amendatory act must be germane to the subject.

Blakemore v. Dolan, 50 Ind. 194; *Travelers Ins. Co. v. Oswego Twp.* 55 Fed. Rep. 361; *Gray v. Crockett*, 80 Kan. 138; *Robinson v. Perry*, 17 Kan. 248; *Darling v. Rodgers*, 7 Kan. 592.

The act as passed grants "privileges and immunities which, upon the same terms, do not equally belong to all citizens," because it applied to street railroad companies in the city of Indianapolis alone, leaving all other companies of the state to be governed exclusively by the general statute.

Gray v. Crockett, 80 Kan. 138; *San Francisco v. Spring Valley Waterworks Co.* 48 Cal. 493; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225; *Re Converse*, 187 U. S. 624, 34 L. ed. 796; *Caldwell v. Texas*, 187 U. S. 692, 34 L. ed. 816.

Messrs. William A. Ketcham and Frederick E. Matson, for appellee:

The right of the state to provide by amendment of § 9 of the act of 1861 for the regulation of fares to be charged by street-railway companies is reserved by the provision in § 11 of the act, that the act may be amended by the general assembly.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Covington v. L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560.

The act of March 6, 1897, amending § 9 of the act of 1861, does not impair the obligation of a contract.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560.

Nor is it in violation of § 22 of art. 4 of the Constitution, for the reason that it is not one of the subjects mentioned in the section, nor does it violate § 28 of article 4, for the reasons, (a) that it is general, and (b) if special, the discretion of the legislature to enact a special law in that case cannot be reviewed by the courts.

Gentile v. State, 29 Ind. 409; *Clem v. State*, 38 Ind. 418; *State, Pitman, v. Tucker*, 46 Ind. 355; *Vickery v. Chase*, 50 Ind. 462; *Kelly v. State, First Nat. Bank*, 92 Ind. 286; *Johnson v. Wells County Comrs.* 107 Ind. 15; *Wilkins v. State*, 113 Ind. 518; *State, Terre Haute, v. Kolsem*, 130 Ind. 434, 14 L. R. A. 566; *State*

v. *Lewis*, 134 Ind. 250, 20 L. R. A. 52; *Bell v. Marsh*, 187 Ind. 226; *Marks v. Purdue University*, 87 Ind. 155; *Young v. Tipton County Comrs.*, 187 Ind. 323; *Pennsylvania Co. v. State*, 143 Ind. 428.

The courts will not adjudge an act unconstitutional where there is any doubt whatever upon the subject of the validity of the act. But in all cases of doubt the benefit thereof will be given to the act of the general assembly.

Robinson v. Schenck, 102 Ind. 319; *Sinking Fund Cases*, 99 U. S. 718, 25 L. ed. 501; *State, Duensing, v. Roby*, 142 Ind. 168, 33 L. R. A. 213.

Section 13 of art. 11 is, (1) An inhibition upon the legislature to create a corporation by special enactment; (2) a direction that corporations shall only be formed in general laws; and neither this inhibition nor direction extends beyond the limitation contained in the section, and does not prevent an amendment to a general law authorizing the formation of corporations unless (a) it is an attempted evasion of the constitutional provisions, or (b) amounts to the creation of an entirely new corporation.

For definition of "create," see *Abbott, Bouvier, Anderson*, and the *Century Law Dictionary*.

Clark, Corp. pp. 43-45; *Morawetz, Priv. Corp.* § 12; *Atty. Gen. v. North America L. Ins. Co.* 82 N. Y. 172; *Southern P. R. Co. v. Orion*, 83 Fed. Rep. 457; *St. Paul P. & M. Ins. Co. v. Allis*, 24 Minn. 75; *Cotton v. Mississippi & R. River Boom Co.* 23 Minn. 372; *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895.

Where courts actually find language in an act which it was not the intention of the legislature to use, and which, if it remain in the act, will vitiate it, and if eliminated will leave it so that it will accomplish the purpose which the legislature intended it should, the courts should eliminate it.

Shoemaker v. Smith, 87 Ind. 123; *Edwards v. Denver & R. G. R. Co.* 13 Colo. 59; *Vattel's Rule 16*, as given at page 128 in *Potter's Dwarries on Statutes*; *United States v. Stern*, 5 Blatchf. 512; *Chapman v. State*, 16 Tex. App. 76; *State v. Beasley*, 5 Mo. 91; *Parlon & H. Irrig. Canal & L. Co. v. Farmers' & M. Irrig. & L. Co.* 45 Neb. 884, 29 L. R. A. 858; *State v. Acuff*, 6 Mo. 54; *Leavitt v. Lovering*, 64 N. H. 607, 1 L. R. A. 58; *United States v. Rosavally*, 3 Ben. 157; *Gus v. Kline*, 18 Pa. 64; *Lyde v. Barnard*, 1 Mees. & W. 115; 23 Am. & Eng. Enc. Law, p. 420; *Black, Interpretation of Laws*, pp. 83, 84; *Sutherland, Stat. Constr.* §§ 660, 661; *Endlich, Interpretation of Statutes*, § 302; *Sedgwick, Stat. Const. & L.* p. 201, note; *Pond v. Maddox*, 88 Cal. 572; *State, Rosenblatt, v. Homan*, 70 Mo. 441; *Harper v. State*, 109 Ala. 28; *Henderson v. Wabash, St. L. & P. R. Co.* 81 Mo. 605.

The Federal courts will follow the decision of state courts in questions as to the constitutionality of statutes under state Constitutions.

Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 869; *Noble v. Mitchell*, 164 U. S. 367, 41 L. ed. 472; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. ed. 1165; *Dibble v. Bellingham Bay Land Co.* 163 U. S. 63, 41 L. R. A.

41 L. ed. 72; *Bauserman v. Blunt*, 147 U. S. 647, 37 L. ed. 816; *Andrews v. National Foundry & P. Works*, 46 U. S. App. 281, 76 Fed. Rep. 166, 36 L. R. A. 139, 22 C. C. A. 110, *Reversing National Foundry & P. Works v. Oconto Water Co.* 68 Fed. Rep. 1006; *Charnley v. Sibley*, 34 U. S. App. 705, 73 Fed. Rep. 980, 20 C. C. A. 705; *McClaskey v. Barr*, 79 Fed. Rep. 408; *First Nat. Bank v. Glass*, 49 U. S. App. 228, 79 Fed. Rep. 706, 25 C. C. A. 151; *Elder v. McClaskey*, 37 U. S. App. 1, 70 Fed. Rep. 529; *Rothchild v. Hasbrouck*, 72 Fed. Rep. 813; *Rice v. Alder-Goldman Commission Co.* 36 U. S. App. 266, 71 Fed. Rep. 151, 18 C. C. A. 15.

Monks, J., delivered the opinion of the court:

This action was brought by appellant to collect the penalty provided for the violation of an ordinance, in refusing to pay the fare of five cents prescribed by said ordinance for riding upon a car of the Citizens' Street Railway Company. Appellee filed an answer admitting the passing of an ordinance, and its validity, and that he had ridden as alleged, and had refused to pay the fare of five cents demanded, but justified such refusal under the act approved March 6, 1897 (Acts 1897, p. 201), amending § 9 of the law providing for the incorporation of street railways, and adding a supplemental section thereto, alleging that he had tendered the full fare of three cents provided by said act, but the conductor in charge of the car refused to receive the same; appellee claiming that after the passage of said act the ordinance was of no validity, except so far as it required the payment of three cents in place of five cents as prescribed by said ordinance. To this answer appellant replied, denying the validity of the act in question, for the reason that the legislation was purely local and special, and therefore invalid, because in violation of the constitutional provision on that subject. Appellee's demurrer to this reply was sustained. Appellant refusing to plead further, judgment was rendered in favor of appellee. The only error assigned calls in question the action of the court in sustaining the demurrer to said reply. If said act of March 6, 1897, is unconstitutional, the judgment of the court below must be reversed; but, if constitutional, the judgment must be affirmed.

The act authorizing the incorporation of street railway companies was approved June 4, 1861 (Acts Special Sess. 1861, p. 75); Rev. Stat. 1894, §§ 5450 *et seq.*; (Rev. Stat. 1881, §§ 4143 *et seq.*) Section 9 of said act, being § 5458, Rev. Stat. 1894 (Rev. Stat. 1881, § 4151), provides that "the directors of such company shall have power to make by-laws . . . for regulating . . . the fare . . . of said road or roads." In this act the legislature made no provision for the regulation of fares, but left the same to the discretion of the board of directors until the legislature should see fit to make other provisions. The act of 1897 reenacts said section, with a proviso "that in cities in the state having a population of 100,000 or more according to the United States census of 1890, the cash fare shall not exceed three cents for any one trip or passage upon

the street railroad or roads," with transfer. It is insisted by appellant that the act of 1897 is unconstitutional because it impairs the obligation of a contract. Counsel for appellant do not point out any contract, the obligation of which is impaired by said act. If it is the contract under which the street railway company took possession of the streets of Indianapolis and constructed its tracks, it is sufficient to say that the city was not authorized to enter into any contract which would prevent the legislature from legislating upon the subject of fares. It is settled law that the legislature has the power to reasonably regulate the rates of fare for the transportation of passengers within the state on street railways. *Hockett v. State*, 105 Ind. 250, 258, 259, 55 Am. Rep. 201; *Central U. Teleph. Co. v. Bradbury*, 106 Ind. 1; *Central U. Teleph. Co. v. State*, *Falley*, 118 Ind. 194; *Rugles v. Illinois*, 108 U. S. 526, 531, 27 L. ed. 813, 815; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 325, 29 L. ed. 636, 641; *Dow v. Beidelman*, 125 U. S. 680, 688, 31 L. ed. 841, 843, 2 Inters. Com. Rep. 56; *Covington & L. Turnp. Road Co. v. Sandford* (Oct. term, 1896) 164 U. S. 578, 41 L. ed. 560; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 213-215, 38 L. ed. 962, 967, 4 Inters. Com. Rep. 649; *Wellman v. Chicago & G. T. R. Co.* 88 Mich. 592; *St. Louis & S. F. R. Co. v. Gill*, 54 Ark. 101, and 11 L. R. A. 453, and note. Besides § 11 of said act of 1861, being § 5463, Rev. Stat. 1889 (Rev. Stat. 1881, § 4153) expressly reserves to the legislature the right to amend or repeal said act at its discretion. The right of the legislature, however, to regulate the fare upon street railroads organized under the act of 1861, does not depend upon the reservation of the right to amend or repeal the act in § 11 of the act. That power would exist even if the right to amend or repeal the act had not been reserved. In order to exempt a common carrier from legislative control over its rates of fare, it must appear that the exemption was made in its charter by clear and unmistakable language inconsistent with the exercise of such power of the legislature. *Covington & T. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 877; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94. Appellant had the power to prescribe the terms upon which, and the time for which, a street-railroad company organized under said act of 1861 should occupy the streets of said city; but such contract, when made, was subject to the right of the legislature to amend or repeal said act at its discretion, and no contract made by the city with a street-railroad company could prevent the exercise of such power by the legislature. It is clear, therefore, that said act of 1897 does not impair the obligation of any valid contract of either the state or appellant. The right to regulate the fares on street railroads, however, does not include the power to require said companies to carry passengers without reward, or for such sum as would amount to confiscation or the taking of property without compensation or due process of law. A statute containing such requirement would be in violation of the provisions of the Constitution of the state, as well as the provisions of the Constitution of the United

States. *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 325, 29 L. ed. 636, 641; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 877; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45; *Brass v. North Dakota*, *Stoeser*, 158 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 213, 214, 38 L. ed. 962, 967, 4 Inters. Com. Rep. 649; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560; *Atty. Gen. v. Old Colony R. Co.* 160 Mass. 62, 86-91, 96, 97, 23 L. R. A. 112, and cases cited; *State, Board of Transp., v. Fremont, E. & M. Valley R. Co.* 23 Neb. 117; note to *Cleveland, C. C. & I. R. Co. v. Closser* (Ind.) 9 L. R. A. 754 (126 Ind. 848, 3 Inters. Com. Rep. 387). No facts alleged in either the complaint or reply show that the act of 1897, fixing the fare at three cents, by its necessary operation deprives any street-railway company of its property without compensation or due process of law. Therefore that question is not presented for our determination. *Dow v. Beidelman*, 125 U. S. 680, 688, 31 L. ed. 841, 843, 2 Inters. Com. Rep. 56; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560.

It is next insisted by counsel for appellant that said amendment is a local and special act, and is therefore in conflict with § 18 of article 11 of the Constitution, which provides that "corporations, other than banking, shall not be created by special act, but may be formed under general laws." The power to declare a statute unconstitutional is one of the highest entrusted to a judicial tribunal, and is only to be exercised with the greatest care, and only when there is no doubt of the unconstitutionality of the law. If there is any doubt in the mind of the court as to the constitutionality of a law, it must be resolved in favor of its validity. To doubt is to resolve in favor of the constitutionality of the law. *Citizens' Street R. Co. v. Haugh*, 142 Ind. 254, and cases cited; *State, Duensing, v. Roby*, 143 Ind. 168, 33 L. R. A. 213. It is not necessary, under the provisions of § 23 of article 4, declaring that all laws shall be general and uniform throughout the state, that legislation concerning cities should operate uniformly on all cities in the state, to make it general. A law which applies to cities having a population of 100,000 or more, when there is but one such city, but is so framed as to operate on all other cities in the state as they acquire the necessary population, is a general law, because it operates upon all cities alike, under the same circumstances. *Pennsylvania Co. v. State*, 142 Ind. 428. Neither is it necessary that a law concerning the fares to be collected by street-railroad companies shall operate uniformly on all street railroads in the state. It is sufficient if it operates alike upon all such companies under the same circumstances and conditions. Such a law is general within the meaning of the Constitution. *Pennsylvania Co. v. State*, 142 Ind. 428; and cases cited; *Bell v. Maish*, 137 Ind. 228; *Young v. Tipton County Comrs.*

187 Ind. 323; *Gilson v. Rush County Comrs.* 128 Ind. 65, 69, 11 L. R. A. 835, and cases cited; *Elder v. State*, 96 Ind. 162; *Heanley v. State*, 74 Ind. 99; *State, Hargrave, v. Reits*, 62 Ind. 159; *Hanton v. Floyd County Comrs.* 53 Ind. 123; *Groesch v. State*, 43 Ind. 547; note to *State v. Ellet* (Ohio) 21 Am. St. Rep. 780-789 (47 Ohio St. 90).

Counsel for appellant seem to understand that this court held in *Mode v. Beasley*, 143 Ind. 306, that the words "last preceding census" refer only to the last census taken before the passage of the act, and not to any census that may be taken after the act was passed. The rule is otherwise. Such words in a statute refer to the census last taken, whether before or after the passage of an act, unless the contrary appears in the act itself. So that, although a city or town may not have had the required population when the act was passed, yet at any time in the future when any census taken after the passage of the act shows that the necessary population has been acquired, such city is governed by the provisions of the act; that is, when a statute provides that all cities or towns of a named population "according to the United States census," or "according to the last preceding United States census," shall be governed by the provisions of the act, then all cities or towns, as they acquire the requisite population as shown by any census thereafter taken, will be governed by the act, the same as if they had the required population as shown by the last preceding census when the law was enacted. What was said in *Mode v. Beasley*, 143 Ind. 306, in regard to the city of Indianapolis and the charter by which it was governed, was by way of illustrating what constituted a local or special law, and the difference between such laws and a general law; and any statements concerning the act approved March 6, 1891, (Acts 1891, pp. 187-197), being a local law, or that municipal corporations are not within the prohibition of said § 13, art. 11, Const., were not necessary to the determination of said cause, and were *obiter dicta*. Section 18 of article 11 of the Constitution means that after it took effect on November 1, 1851, the legislature should have no power or authority to create, originate, or bring into existence by special act a new corporation where none had previously existed. *Wiley v. Bluffton*, 111 Ind. 152, 155. When the present Constitution of 1851 went into effect on November 1, 1851, there were a great number of corporations in this state which had been created by special acts. The legislature, commencing with its first session of 1852, after the Constitution took effect, again and again, by special acts, enlarged the powers and privileges of such corporations, but in no instance created a corporation by special act, thus recognizing the difference between the creation of a corporation and the regulation of a corporation already in existence. There sat as members of the legislature passing such acts many persons who had been members of the constitutional convention, and who were familiar with the provisions of the Constitution and its intended reforms and changes. No one questioned the right of the legislature to pass such special acts, and for over forty-five years the power 41 L. R. A.

assumed by the legislature has never been challenged, but has been acquiesced in by the state and people. This practical construction is influential. *French v. State, Harley*, 141 Ind. 618, 623, 29 L. R. A. 118; *Hovey v. State, Riley*, 119 Ind. 386; *Terre Haute v. Evansville & T. H. R. Co.* 149 Ind. 174, 87 L. R. A. 189 (last term), and cases cited. It is one thing to create a corporation, bring it into existence, and quite another, as an existing corporation, to regulate its conduct and relations as to other corporations and persons. It has been decided in many cases that, when a corporation has been created, a special act regulating it, without changing the organization of the corporate body, is not within the prohibition. *Wilkins v. State*, 118 Ind. 514; *Central Agri. & M. Asso. v. Alabama Gold L. Ins. Co.* 70 Ala. 120; *Atty. Gen. v. North America L. Ins. Co.* 82 N. Y. 172; *Re New York Elev. R. Co.* 70 N. Y. 327, 337, 338; *Re Church*, 92 N. Y. 1, 4; *Syracuse City Bank v. Davis*, 16 Barb. 188; *Southern P. R. Co. v. Orton*, 32 Fed. Rep. 457; *Green v. Knife Falls Boom Corp.* 85 Minn. 155; *St. Paul F. & M. Ins. Co. v. Allie*, 24 Minn. 75; *Cotton v. Mississippi & R. River Boom Co.* 23 Minn. 372; *St. Joseph & I. R. Co. v. Shambaugh*, 106 Mo. 557; *State, Circuit Atty., v. Cape Girardeau & S. L. R. Co.* 48 Mo. 463; *Atty. Gen. v. Joy*, 55 Mich. 94, 106, 107; *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895; 1 Morawetz, Priv. Corp. 2d ed. § 12; Clark, Corp. pp. 49-45.

In *Wilkins v. State*, 118 Ind. 514, this court, by Elliott, J., said: "The provision which it is asserted the act violates is this: 'Corporations other than banking shall not be created by special act, but may be formed under general laws.' It cannot with the faintest tinge of justice be affirmed that the simple delegation of authority to appoint three men to perform duties affecting the public is the creation of a new corporation. Changes of infinitely more importance have been held not to create a new corporation. *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895; *Atty. Gen. v. North America L. Ins. Co.* 82 N. Y. 172; *Southern P. R. Co. v. Orton*, 6 Sawy. 157, 32 Fed. Rep. 457. The general rule is thus stated by a late writer: 'A special act of the legislature regulating an existing corporation, or granting to it new privileges, without altering its character or affecting the charter contract, would not be in violation of the letter nor of the spirit of a constitutional prohibition of this description.' 1 Morawetz, Priv. Corp. 2d ed. § 12. The case of *Wiley v. Bluffton*, 111 Ind. 152, declares a similar doctrine." It was held in *Re New York Elev. R. Co.* 70 N. Y. 327, 337, 338; and in *Re Church*, 92 N. Y. 1, 4, that where a local act merely confirms and regulates franchises previously possessed by a corporation, and does not confer any new franchises, it is not obnoxious to the provisions of the Constitution, which provides that "the legislature shall not pass a private or local act granting any corporation, association, or individual the right to lay down any railroad tracks," or that prohibits the legislature from "granting to any private corporation, association, or individual any exclusive privilege, immunity, or franchise whatever." The North America Life Insurance Company was formed under general laws. In 1866 (2

Sess. Laws 1866, p. 1237, chap. 576) it was enacted by the legislature that the company might make special deposits of its securities in the insurance department, and in the case of *Atty. Gen. v. North America L. Ins. Co.* 82 N. Y. 172, the validity of § 1 of article 8 was in question, but the act was held constitutional, the court (Earl, J.) saying at page 182: "The plain answer to this contention is, that the act did not create a corporation, but simply regulated a corporation previously in existence." In *Southern P. R. Co. v. Orton*, 82 Fed. Rep. 457, the legislature of California had passed an act authorizing the Southern Pacific Railroad Company to change the line of its road, accept a congressional grant of land, and construct its road as provided in the act of Congress incorporating the Atlantic & Pacific Railroad Company; and it was contended that the act was unconstitutional, being in violation of the provisions of the Constitution. But this contention was not sustained by the court: Sawyer, J., saying at page 472: "But it is insisted that this act was passed in violation of the provisions of § 31 of article 4 of the Constitution of California, which reads: 'Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes.' . . . What does the constitutional prohibition relied on mean? The only prohibitory words are, that corporations of the class in question 'shall not be created by special act.' The word 'create' has a clear, well-settled, and well understood signification. It means 'to bring into being, to cause to exist, to produce, to make,' etc. To my apprehension, it appears to be one thing to create or bring into being a corporation, and quite another to deal with it as an existing entity, a person, after it is created, by regulating its intercourse, relations, and acts as to other existing persons, natural and artificial." . . . In *St. Paul F. & M. Ins. Co. v. Allis*, 24 Minn. 75, the appellant had been organized as a mutual insurance company, and afterwards a law was passed making it an exclusively stock company. It was contended that it was in violation of the clause in the Constitution prohibiting the formation of corporations by special act. But the court said: "We think it is not obnoxious to that clause of our Constitution which forbids the formation of corporations by special act. Its effect is only to authorize the company created by the acts of 1853 to exercise its subsisting franchise of carrying on the business of fire and marine insurance in a manner different from that prescribed by the original charter. This is by no means the formation of a new corporation, for both the franchise of corporate existence as well as the general business and purpose of the incorporation, as prescribed by the original charter, remain unchanged." In *Cotton v. Mississippi & R. River Boom Co.* 22 Minn. 872, the appellee had been created a corporation for a period of fifteen years. In 1867 the charter was amended by striking out the words "for the period of fifteen years," and changing the form of proceedings for condemnation. It was held that neither of the amendments violated the provision of the Constitution prohibiting the formation of corporations under special acts, the court saying at page 874: "In making these amendments the

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legislature did not, as plaintiff contends, exceed its authority, since neither of the amendments falls within that provision of our Constitution which prohibits the formation of corporations under special acts." In *Green v. Knife Falls Boom Corp.* 35 Minn. 155, the boom corporation was organized under a general law. Soon after its organization the legislature passed a special act conferring enlarged powers upon the corporation within the St. Louis river, and over the navigation and use thereof, as respects the passage of logs, including the right of eminent domain; the right to charge compensation for boomage, in the nature of tolls, prescribed by the act, upon all logs passing through their works, and to receive and take entire charge and control of all logs and timber which might run, come, or be driven within the same, and to boom, scale, and deliver them as provided in such act. The court held that, while said special act enlarged the business of the corporation, it was not in conflict with the provision of the Constitution prohibiting the formation of corporations by special act. In *Central Agri. & M. Assn. v. Alabama Gold L. Ins. Co.* 70 Ala. 120, a corporation was intended to be organized under the general law authorizing the formation of private corporations; but certain requirements of the statute had not been complied with, without which the incorporation was not lawful or complete. Subsequently the legislature passed a special act authorizing the corporation to increase its capital stock, and the board of directors to adopt rules and regulations for its government and declaring the existence of the corporation, and approving and ratifying its organization. The court held that said special act was not in conflict with the Alabama Constitution of 1868 (art. 13, § 1), declaring that "corporations may be formed under general laws, but shall not be created by special act except for municipal purposes." The court said: "The statute does not form or create a corporation. Before the time of its enactment the corporation was formed, existed, *de facto*, having color of right." In *Wallace v. Loomis*, 67 U. S. 146, 24 L. ed. 895, it was held that the provision in the Constitution of Alabama which declared that corporations may be formed under general laws, but shall not be created by special acts, except for municipal purposes, does not prohibit the legislature from passing a special act changing the name of an existing railroad corporation, and giving it power to purchase the railroad and franchise of another company; the court (Mr. Justice Bradley) saying as to this contention, at p. 154: "We are unable to see anything in this legislation repugnant to the constitutional provision referred to. That provision cannot surely be construed to prohibit the legislature from changing the name of a corporation, or from giving it power to purchase additional property; and this was all that it did in this case. No new corporate powers or franchises were created." This case is in no way overruled or modified by the case of *School Dist. No. 56 v. St. Joseph F. & M. Ins. Co.* 103 U. S. 707, 26 L. ed. 601. The case last named was governed by the Constitution of Nebraska (article 8, § 1), which provided that "the legislature shall pass no special act conferring corporate pow-

ers," and the Supreme Court of the United States followed the construction given to said provision by the supreme court of Nebraska in *Clegg v. School Dist.* No. 56, 8 Neb. 178. The case of *Wallace v. Lomis* was decided under the provision of the Constitution of Alabama, which is the same as § 18, art. 11, of the Constitution of this state, and is not the same as the provision in the Nebraska Constitution against conferring corporate powers by special act as construed by the supreme court of that state in *Clegg v. School Dist.* No. 56, 8 Neb. 178. The difference is recognized in *State, Weir, v. Dawson*, 16 Ind. 40.

It was, however, correctly said in 1 *Morawetz*, Priv. Corp. 2d ed. § 12: "But it is plain that a constitutional provision cannot be avoided and practically annulled by a subterfuge. A special law altering the charter of an existing corporation, and practically changing it, must therefore be deemed in violation of a constitutional prohibition against the creation of corporations by special act. If this were not so, organizations formed under general laws might be treated merely as the rough material out of which corporations might afterwards be fashioned at pleasure, under special acts of the legislature, and the constitutional prohibition would become an empty form." By the act in-question no new corporate power or franchise was created. The directors could regulate the fare after the amendment the same as before, subject to the common-law limitation of reasonableness, except that in cities of a population of 100,000 or more according to the census of 1890, the maximum fare could not exceed 8 cents. This is a mere regulation of an existing corporation, and even if said act is, as contended by appellant, local and special, it is not in conflict with said § 18 of article 11 of the Constitution, which only forbids the creation of corporations by special act, and provides that they may be formed under general law. No new corporation was created or formed by the act of 1897. Said act was a mere regulation fixing the maximum rate of fare to be collected by all street-railroad companies in cities of 100,000 or more population according to the United States census of 1890. Even if said act is local (which we need not and do not decide), it is not special, for the reason that it applies alike to all street railroads that are now or may hereafter be operated in such locality, whether there be one or many. Said act, by amending § 9 of the act of 1861, did not render said last-named act either local or special. Corporations may be organized under the law of 1861 for the construction of street railroads in the cities and towns within the state, the same now as before the amendment of § 9. All the cases cited by counsel for appellant in support of their contention, except *San Francisco v. Spring Valley Waterworks*, 48 Cal. 493, and *Central Trust Co. v. Citizens' Street R. Co.* 80 Fed. Rep. 218, are based upon constitutional provisions radically different from the provisions of the Constitution of this state. The cases named are against the great weight of authority, and interpolate into the Constitution words the people have not placed there. Besides the case of *San Francisco v. Spring Valley Waterworks*, 48

Cal. 493, was decided by a divided court, and is in conflict with the decision of that court in *California State Teleg. Co. v. Alta Teleg. Co.* 23 Cal. 425.

Much is said by counsel for appellant about the evils of local and special legislation, but we cannot amend or change the Constitution, or read into it what is not there written, merely to avoid either certain or supposed danger. We can only declare that the Constitution means what it says. It follows that the power to regulate existing corporations, either by amendment or independent act, is only limited by § 28 of article 4 of the Constitution, which provides that "in all cases enumerated in the preceding section [23], and in all other cases when a general law can be made applicable, all laws shall be general and uniform throughout the state." Section 23, art. 4 (the section referred to in said § 23), provides that "the general assembly shall not pass local or special laws in any of the following cases" (naming seventeen subjects). Where special laws are not forbidden by the Constitution, they may be enacted. That part of said act fixing the fare at three cents, even if local and special, is not in violation of said § 23, because that subject is not included in the enumeration found in said section. It has been uniformly held by this court, since *Gentile v. State*, 29 Ind. 409, that whether the act relating to a subject not enumerated in § 23 of article 4 can or cannot be made a general law, as required by § 23 of article 4, is a question to be determined exclusively by the legislature, and not by the courts. *Woods v. McCoy*, 144 Ind. 316, 322, 33 L. R. A. 97, and cases cited; *Mode v. Beasley*, 143 Ind. 806; *Pennsylvania Co. v. State*, 143 Ind. 428; *Young v. Tipton County Comrs.* 137 Ind. 828; *Bell v. Maish*, 137 Ind. 226; *State, Terre Haute, v. Kolsem*, 130 Ind. 484, 14 L. R. A. 566; *Hovey v. Foster*, 118 Ind. 502; *Evansville v. State, Blend*, 118 Ind. 426, 4 L. R. A. 98; *Wiley v. Bluffton*, 111 Ind. 152; *Warren v. Evansville*, 106 Ind. 106; *Johnson v. Wells County Comrs.* 107 Ind. 15; *Kelly v. State, First Nat. Bank*, 92 Ind. 236; *Mount v. State, Richey*, 90 Ind. 29, 46 Am. Rep. 192; *Vickery v. Chase*, 50 Ind. 463; *State, Pitman, v. Tucker*, 46 Ind. 355; *Clem v. State*, 33 Ind. 418. When, therefore, a local or special law is enacted upon a subject not enumerated in § 23, it is the expressed opinion and judgment of the legislature that a general law cannot be made applicable, and this judgment is not subject to be reviewed by the courts. *State, Terre Haute, v. Kolsem*, 130 Ind. 484, 14 L. R. A. 566; *Mode v. Beasley*, 143 Ind. 815; *Woods v. McCoy*, 144 Ind. 322, 33 L. R. A. 97, and cases cited. The legislature of 1861, by passing the act for the incorporation of street-railroad companies (a general law), could not and did not deprive any subsequent legislature of the right to determine whether a general law fixing the maximum fare on street railroads could or could not be made applicable. If the act in controversy is not a general law, as insisted by appellant, then, under the authorities, the enactment of the same is the expressed opinion and judgment of the legislature that a general law could not be made applicable, and this judgment cannot be reviewed by the courts. It follows that the act approved March 6, 1897 (Acts

1897, p. 201), so far as involved in this case, is constitutional and valid. Said act rendered the ordinance regulating the payment of a fare of five cents invalid and of no effect. Appellee was entitled to be carried for the fare of three cents fixed by the act in controversy, and was not liable for a refusal to pay more than that, for the reason that the ordinance requiring the payment of a fare of five cents was rendered invalid by said act.

Judgment affirmed.

A petition for rehearing having been filed, the following response was handed down July 1, 1898:

Per Curiam:

In this case the principal contention was that the act of March 6, 1897, amending § 9 of the act to provide for the incorporation of street-railroad companies, was inoperative and void, because in contravention of § 18 of article 11 of the Constitution of this state. In arriving at the conclusion reached in the original opinion, we had the benefit of the opinion of the circuit justice, delivered in the case of *Central Trust Co. v. Citizens' Street R. Co.* reported in 80 Fed. Rep. 218, and also of the very able argument addressed to the justice in that case by the eminent counsel for the complainant. After carefully considering, not only the arguments presented in this case, but also the arguments and opinion referred to, and all the light that we could obtain upon the question, we were constrained to hold that the contention that the legislation in question was in violation of the Constitution of this state was without just foundation, and that the act was in harmony therewith. The question thus presented to us was purely one arising upon the construction of the Constitution of this state. Such a question, when presented to this court, is one that it must decide upon its own judgment as to the requirements of the state Constitution. While in search of assistance and information to enable us to decide such a question correctly, it is eminently proper and necessary that we should examine, weigh, and consider, not only the arguments of counsel, but also the adjudications of courts and the opinions of judges, in other jurisdictions, upon similar or analogous provisions of this or other Constitutions, and give to them such weight as in our opinion they are justly entitled to; but, after that has been done, the responsibility rests upon us, and us alone, and that responsibility cannot be shirked, evaded, or avoided. What the Constitution of the United States, and the laws of Congress or treaties made thereunder, require, is to be finally determined by the Supreme Court of the United States; and its decisions, when made upon such questions, are binding upon the courts in every state, "anything in the Constitution or laws of any state to the contrary notwithstanding." Cooley, Const. Lim. 6th ed. pp. 18-23; Black, Interpretation of Laws, pp. 378-380, 427-429; 23 Am. & Eng. Enc. Law, pp. 37-40, and cases cited. The interpretation and construction of the statutes of this state, and whether the same have been enacted in accordance with the requirements of the Constitution of this state, and are or are not in violation of any provision

of the Constitution of this state, however, are questions to be finally determined by this court, and by this court alone. The rule is that the construction put upon the Constitution and laws of a state by the court of last resort of such state, and the decision of such court that a law has or has not been passed in conformity with the requirements of the Constitution of such state, or that the same is or is not in violation of the Constitution of such state, are binding upon the Federal courts, and will be adopted by them. Black, Interpretation of Laws, pp. 378-381, 427-429; 23 Am. & Eng. Enc. Law, pp. 37-40, and cases cited; Cooley, Const. Lim. pp. 18-23; Black, Const. Law, p. 140; 35 Cent. L. J. 322; *Goodnow v. Wells*, 87 Iowa, 654; *May v. Tenney*, 148 U. S. 60, 64, 65, 37 L. ed. 368, 370, 371; *Balkin v. Woodstock Iron Co.* 154 U. S. 177, 187-189, 38 L. ed. 953, 956, 957; *Pittsburg, O. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1081; *Leeper v. Texas*, 139 U. S. 462, 467, 35 L. ed. 225, 226; *Morley v. Lake Shore & M. S. R. Co.* 143 U. S. 162, 166-169, 36 L. ed. 925, 928, 929; *Bruserman v. Blunt*, 147 U. S. 647, 652-659, 37 L. ed. 816, 818, 320; *Oakes v. Mase*, 165 U. S. 363, 41 L. ed. 748; *Forsyth v. Hammond*, 166 U. S. 506, 518-520, 41 L. ed. 1095, 1100, 1101; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 688, 41 L. ed. 1165, 1166; *Merchants & Mfrs. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 462, 49 L. ed. 287; *St. Anthony Falls Water Power Co. v. St. Paul Water Comrs.* 168 U. S. 849, 857, 42 L. ed. 497, 500; *Backus v. Fort Street Union Depot Co.* 169 U. S. 557, 566, 42 L. ed. 853, 858; *Dibble v. Bellingham Bay Land Co.* 163 U. S. 63, 41 L. ed. 72; *Illinois C. R. Co. v. Illinois*, 163 U. S. 144, 41 L. ed. 107; *Nobles v. Georgia*, 168 U. S. 398, 42 L. ed. 515; *McCain v. Des Moines*, 84 Fed. Rep. 726; *Leighton v. Young*, 10 U. S. App. 298, 53 Fed. Rep. 489, 18 L. R. A. 268, 3 C. C. A. 170; *Western U. Teleg. Co. v. Poe*, 64 Fed. Rep. 9; *Crowther v. Fidelity Ins. T. & S. D. Co.* 42 U. S. App. 701, 85 Fed. Rep. 41, 29 C. C. A. 1; *Hill v. Hite*, 56 U. S. App. 408, 85 Fed. Rep. 268, 29 C. C. A. 549; *Hoge v. Magnes*, 56 U. S. App. 500, 85 Fed. Rep. 355, 29 C. C. A. 564.

Since the decision of this case and the filing of the petition for a rehearing, our attention has been called by appellant's brief on said petition to the decision of the United States circuit court in the case of *Central Trust Co. v. Citizens' Street R. Co.* 82 Fed. Rep. 1, in which the learned judge, who had arrived at a different conclusion before the announcement of our opinion upon the question, adhered to his original conclusion, notwithstanding the opinion announced by this court. We have also examined the opinion, upon appeal, in the circuit court of appeals (*Indianapolis v. Central Trust Co.* 53 U. S. App. 658, 83 Fed. Rep. 529, 27 C. C. A. 580), and have carefully re-examined the question presented in this regard, not simply as a matter of courtesy to a high court, but constrained thereto by the duty which is cast upon us by the presentation of the petition for a rehearing. We have done this not alone because of the importance of the question, but because of the misfortune to the community, and the parties especially interested in a correct decision of the question, that this court should differ from the circuit court of the United States

upon the question. Upon such re examination we are constrained to adhere to our original opinion, that the act in question, even if local and special, is not in contravention of any of the provisions of the Constitution of this state, as contended by the appellant. As the power to amend or repeal the act of 1861 was expressly reserved in § 11 of said act, and as the act of 1897 was a valid amendment of said act of 1861, it is not material whether or not the legislature would have had the power to regulate the fare upon street railroads organized under said act if said § 11 had been omitted therefrom. In arriving at the conclusion that the act of 1897 is not in contravention of any provision of the Constitution of this state, it has not been necessary for us to consider any questions arising under the Constitution of the

United States. As to such questions we should be constrained to follow the adjudications of the Supreme Court of the United States, if any, without in any wise considering whether such a construction should or should not commend itself to our independent judgment. But upon the requirements of the Constitution of this state we are not at liberty to set aside or discard our own views because of the fact that they do not meet with the concurrence or approbation of any other court, however high, or any judge, however eminent.

We do not deem it necessary to add anything further to what we have heretofore said upon the questions involved, but, adhering to the opinion originally pronounced in this case, *the petition for a rehearing is overruled.*

IOWA SUPREME COURT.

Mary L. SNYDER *et al.*, Appts.,

v.

FORT MADISON STREET-RAILWAY
COMPANY.

(.....Iowa.....)

1. Poles of an electric railway, if properly placed, do not give ground of complaint to an abutting owner, whether he owns the fee of the street or not.
2. Poles for an electric railway must not be so placed as to interfere unnecessarily with the right of abutting owners to use and enjoy their property.
3. A mandatory injunction to compel the removal of an electric-light pole may be granted when the pole is placed in front of the plaintiff's property without necessity therefor, for the purpose of annoying him and to injure and depreciate the value of his property.

(Deemer, Ch. J., and Waterman, J., dissent.)

(May 10, 1896.)

A PPEAL by plaintiffs from a judgment of the District Court for Lee County in favor of defendant in a proceeding to enjoin defendant from maintaining a trolley pole in front of plaintiff's premises. *Reversed.*

The facts are stated in the opinion.

Mr. T. B. Snyder, for appellants:

The fee of the streets is in the owners of the adjacent property.

Dubuque v. Maloney, 9 Iowa, 450, 74 Am. Dec. 358; *Cook v. Burlington*, 30 Iowa, 95, 6 Am. Rep. 649; *Williams v. Carey*, 78 Iowa, 194; *Cadle v. Muscatine Western R. Co.* 44 Iowa, 12.

The relation in this case being the same as that of owners of land adjacent to ordinary highways in the country, the rights of the par-

ties must be measured and judged by the same principle and standard.

In no case could such work be constructed without compensation to the owners of adjacent property.

Freidisy v. Sioux City Rapid Transit Co. 92 Iowa, 191, 26 L. R. A. 246; *Elliott, Roads & Streets*, pp. 527, 534.

If defendant had the right to erect the pole complained of in the petition in front of plaintiff's residence, at either its whim or its pleasure, then the only limit to the number of poles it might so erect would depend only on the width of plaintiff's lot and the diameter of the poles, and it might with impunity make a stockade of the plaintiff's homestead so far as the city and its streets and the outside world is concerned.

Elliott, Roads & Streets, p. 535.

Even if the defendant had the right to construct its railway on the street named, it could not in so doing disregard the rights and interests of the adjacent property owners by erecting structures, or poles, in front of the same which obstruct the "light and view" and "reduce the value" of their property, "and impair its free use and enjoyment," without having their damages assessed, and paying the same, or becoming liable for their acts under the law.

Cadle v. Muscatine Western R. Co. 44 Iowa, 12; *Postal Tele. Cable Co. v. Eaton*, 170 Ill. 513, 89 L. R. A. 723; *Board of Trade Tele. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *Elliott, Roads & Streets*, p. 534.

It is competent for the plaintiffs either to sue for damages, or they may waive their claim for damages and seek only an abatement of the nuisance, the offending obstruction.

Richards v. Holt, 61 Iowa, 529; *Bushnell v. Robeson*, 62 Iowa, 541; *Gribben v. Hansen*, 69 Iowa, 255; *Hanson v. Chicago, M. & St. P. R.*

NOTE.—For telegraph or telephone poles as an additional servitude on highway, see note to *People v. Eaton* (Mich.) 24 L. R. A. 721.

For additional burden of electric railway on 41 L. R. A.

highway, see note to *Western Railway of Ala. v. Alabama Grand Trunk R. Co.* (Ala.) 17 L. R. A. 478; also *Jaynes v. Omaha Street R. Co.* (Neb.) 39 L. R. A. 751, and other cases cited in footnote thereto.

Co. 61 Iowa, 588; *Harbach v. Des Moines & K. C. R. Co.* 80 Iowa, 593, 11 L. R. A. 113; *Cain v. Chicago, R. I. & P. R. Co.* 54 Iowa, 255; *Wilder v. DeCou*, 26 Minn. 10; *Euell v. Greenwood*, 26 Iowa, 377; *Miller v. Schenck*, 78 Iowa, 372; *Chicago, & N. W. R. Co. v. Milwaukee R. & K. E. R. Co.* 95 Wis. 561, 37 L. R. A. 856; *Barber v. Saginaw Union Street R. Co.* 88 Mich. 299.

Mr. J. D. M. Hamilton, for appellee:

The granting of a franchise to either an electric or horse street railway by any municipality within this state is not such an additional easement or servitude as that appellants in this case can have any remedy to the use or fee of the street which is superior to the public.

McClain's Code, § 623; *Damour v. Lyons City*, 44 Iowa, 276; *Sears v. Marshalltown Street R. Co.* 65 Iowa, 742.

The construction of a street-railway line operated by electricity does not impose upon the abutting property owner a servitude by which he can claim damages.

Taggart v. Newport Street R. Co. 16 R. I. 668, 7 L. R. A. 205; *Lockhart v. Craig Street R. Co.* 139 Pa. 419; *Croswell, Electricity*, §§ 107, 109; *Williams v. City Electric Street R. Co.* 41 Fed. Rep. 557; *Koch v. North Ave. R. Co.* 75 Md. 222, 15 L. R. A. 377; *Halsey v. Rapid Transit Street R. Co.* 47 N. J. Eq. 880.

As one of the necessary appurtenances for the successful maintenance and operation of the street railway is the erection of poles for the support of the trolley wire, such poles and wires erected along and over the street are not a public nuisance.

Halsey v. Rapid Transit Street R. Co. 47 N. J. Eq. 880; *State v. Laverack*, 34 N. J. L. 201; *Booth, Street Railways*, p. 137; *Lorie v. North Chicago City R. Co.* 82 Fed. Rep. 270; *Croswell, Electricity*, §§ 182, 188; *Detroit City R. Co. v. Mills*, 85 Mich. 634.

It is only when the street is subjected to a new servitude inconsistent with and subversive to its proper use as a street that the abutting landowner can complain, and the erection and maintenance of poles for telephone or other purposes consistent with the use of a street are a proper use of a street.

Julia Bldg. Asso. v. Bell Teleph. Co. 88 Mo. 262, 57 Am. Rep. 398; *Howe v. West End Street R. Co.* 167 Mass. 46; *Reid v. Norfolk City R. Co.* 94 Va. 117, 36 L. R. A. 274; *Bishop v. North Adams Fire Dist.* 167 Mass. 364.

An electric railway operated by means of an overhead wire, supported by poles, and confining its track to the surface of the street, is not an additional servitude on the fee of the street.

Cumberland Teleg. & Teleph. Co. v. United Electric R. Co. 93 Tenn. 492, 27 L. R. A. 236.

This pole is painted black about 3 or 4 feet from the ground, and the balance white, and is the usual electric pole in size and quality; and does not interfere with the free use of appellants' property, nor does it interfere with the free use of the street by the public.

Nuisances always arise from some unlawful act; and where the act itself is lawful in its character, or authorized by a lawful legislative body, it will not be a nuisance.

Wood, Nuisances, §§ 1, 6.

A property owner in order to recover for an obstruction to a highway must show that the 41 L. R. A.

property itself is directly or specially affected, or some right or easement connected therewith.

Rude v. St. Louis, 93 Mo. 415; *Gates v. Kansas City Bridge & Terminal R. Co.* 111 Mo. 28.

The erection of the pole is a necessity, therefore, an inconvenience, if at all, which people residing in a city must submit to, whether of annoyance, or discomfort, which is brought about by necessity for their existence, and outweighs any ill results, and cannot be classed as a nuisance.

Garrett v. Lake Roland Elev. R. Co. 79 Md. 277, 24 L. R. A. 896.

Whatever is authorized by statute, within the scope of legislative powers, is lawful, and therefore cannot be a nuisance.

2 Wood, Railway Law, p. 970; 1 Wait, Act. & Def. § 6, p. 145; 4 Wait, Act. & Def. § 3, p. 784; 7 Wait, Act. & Def. § 2, p. 565.

Appellants have a plain, speedy, and adequate remedy at law, relative to taking private property for works of internal improvement.

McClain's Code, §§ 1904, 1908; *Mulholland v. Des Moines, A. & W. R. Co.* 60 Iowa, 740; *Stough v. Chicago & N. W. R. Co.* 71 Iowa, 641.

The plaintiffs have not a remedy by injunction.

1 High, Inj. 2d ed. § 589; *Hogencamp v. Paterson Horse R. Co.* 17 N. J. Eq. 88; *Randall v. Jacksonville Street R. Co.* 19 Fla. 409; *Hinchman v. Paterson Horse R. Co.* 17 N. J. Eq. 75, 86 Am. Dec. 252; *Wetmore v. Story*, 22 Barb. 414; *Hamilton v. New York & H. R. Co.* 9 Paige, 171; *Drake v. Hudson River R. Co.* 7 Barb. 503; *Lorie v. North Chicago City R. Co.* 82 Fed. R. p. 270; *Waterloo v. Waterloo Street R. Co.* 71 Iowa, 196; *Cedar Rapids & St. P. R. Co. v. Spafford*, 41 Iowa, 296; *Sears v. Marshalltown Street R. Co.* 65 Iowa, 742; *Davis v. Chicago & N. W. R. Co.* 46 Iowa, 395; *Kucheman v. Chicago, C. & D. R. Co.* 46 Iowa, 366; *State v. Davenport & St. P. R. Co.* 47 Iowa, 508.

There has not been any diversion of the street to any purpose inconsistent with purposes to which it was granted to the city, and in such case injunction will not lie.

Ingram v. Chicago, D. & M. R. Co. 33 Iowa, 675; *Gay v. Mutual Union Teleg. Co.* 12 Mo. App. 490; *Irwin v. Great Southern Teleph. Co.* 87 La. Ann. 63; 1 High, Inj. § 824; *Borden v. Atlantic Highlands R. B. & L. B. Electric R. Co.* (N. J. Ch.) 23 Atl. 276; 6 Lawson, Rights, Rem. & Pr. § 2961; Wood, Nuisances, § 6; *Rhodes v. Dunbar*, 57 Pa. 274; *Ross v. Butler*, 19 N. J. Eq. 284, 97 Am. Dec. 654; *Sargent v. George*, 56 Vt. 627.

Robinson, J., delivered the opinion of the court:

The material facts alleged in the petition, and admitted by the demurrer, are as follows: The plaintiffs have owned and occupied as a homestead, since the 1st day of March, 1892, part of a lot and a dwelling house thereon situated on Broadway street, in the city of Ft. Madison. The lot is bounded on the west by that street, and the house fronts thereon, and on a public park, from which it is separated by the street. The streets, avenues, parks, and lots of the city were laid out and platted under

and by virtue of an act of Congress approved July 3, 1836, and an act amendatory thereof approved March 3, 1837, by the government of the United States, from which the title of the plaintiffs was derived. The defendant is a corporation organized under the laws of this state, and is engaged in operating a street railway, which is laid along Broadway street, in front of the premises of the plaintiffs. In the summer of the year 1895, electricity was substituted for the animal power which had been previously used to operate the railway. The trolley system was adopted, and to aid in supporting the trolley wire, a pole 20 or more feet in height was placed in front of the dwelling of the plaintiffs, in that side of the street which was next to their lot. The petition alleges that the pole is an obstruction to the enjoyment by the plaintiffs of their homestead; that it is a nuisance; that there was no necessity for placing the pole where it is; that it could have been so placed that it would not have affected the plaintiffs seriously; that, before it was erected, the plaintiffs protested against its being placed where it now is, and since its erection have offered to pay to the defendant the cost of moving it to a point near the north line of their property, but that the offer was refused; and that they have been greatly damaged by the placing of the pole where it now is, and will sustain much damage in the future if it be not removed. The petition further states that the defendant has not caused the damage which the plaintiffs have suffered, and will suffer by reason of the erection of the pole to be assessed, nor has it compensated them for such damage. The plaintiffs ask for a mandatory injunction requiring the defendant to remove the pole from their property, and particularly from the front of their dwelling house; and they ask, further, that the defendant be perpetually enjoined from erecting or maintaining the pole in front of their dwelling, and for general equitable relief. The demurrer is based upon the ground that the petition does not state facts which entitle the plaintiffs to the relief they ask.

1. The acts of Congress under which the town of Ft. Madison was platted are found on pages 962-964 of the Revision of 1860. Those acts were considered in the case of *Dubuque v. Maloney*, 9 Iowa, 450, 74 Am. Dec. 358, where it was held that the fee of the streets of a city platted and dedicated by virtue of those acts was, subject to the public easement, vested in the owners of the adjoining lots, and that the city had no right to use the streets for any purpose different from that for which they were originally designed. The same principle was approved in *Cook v. Burlington*, 30 Iowa, 94, 6 Am. Rep. 649. In *Williams v. Carey*, 73 Iowa, 196, a distinction between cases when the fee to streets is in the abutting property owners and when it is in the city was noticed. It follows that the defendant in this case could not rightfully acquire from the city nor exercise rights in the street which were not authorized by the dedication of the streets, but are inconsistent with the easement granted to the public. Section 464 of the Code of 1878 gave to cities and towns power to authorize or forbid the location and laying down of tracks for street railways on all streets, alleys, and public

places. See also *Damour v. Lyons City*, 44 Iowa, 276. It now appears to be settled that an ordinary surface street railway operated by animal power is not a new or additional burden upon the public easement in a street, but one which the right of the public to use the street authorizes for the purpose of facilitating public travel. *Citizens' Coach Co. v. Camden Horse R. Co.* 83 N. J. Eq. 267, 36 Am. Rep. 542; *Atty. Gen. v. Metropolitan R. Co.* 125 Mass. 515, 28 Am. Rep. 264; *Hobart v. Milwaukee City R. Co.* 27 Wis. 194, 9 Am. Rep. 461; *Texas & P. R. Co. v. Rosedale Street R. Co.* 64 Tex. 80, 53 Am. Rep. 739; *Elliott v. Fair Haven & W. R. Co.* 82 Conn. 579; *Carson v. Central R. Co.* 35 Cal. 325; *Merrick v. Intramontaine R. Co.* 118 N. C. 1081; *Cincinnati & S. G. Ave. Street R. Co. v. Cumminsville*, 14 Ohio St. 523; *Brown v. Duplessis*, 14 La. Ann. 854; *New Albany & S. R. Co. v. O'Daily*, 13 Ind. 551; *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* 156 Ill. 255, 29 L. R. A. 485; *Jaynes v. Omaha Street R. Co.* (Neb.) 39 L. R. A. 751; *Booth, Street Railways*, § 83.

Streets are designed for public uses, among which are the construction and operation of street railways; and if they are so constructed and operated as not to affect prejudicially the rights of the public, nor to interfere with the proper use of the street by others, no burden not contemplated by the dedication of the street is placed upon it. In such cases the kind of power used in operating the railway is wholly immaterial. It is said, however, that the erection of trolley poles, and the placing of wires upon them, is a permanent obstruction of the street for the benefit of the street railway, which necessarily interferes with the proper use of the street by others. That poles and wires might be so erected and arranged as to have that effect is undoubtedly true, but the mere fact that the spaces they occupy cannot be used for other purposes does not show an improper use of the street. They are designed to aid in the rapid, convenient, and economical transportation of persons from place to place, and thus to facilitate the use of the street by the public for whom it was intended. It is true that some authorities hold that the erection and maintenance of poles in the streets do cast a burden upon the street which it was not intended to bear. *Jaynes v. Omaha Street R. Co.* (Neb.) 39 L. R. A. 751, and cases therein cited. But the greater weight of authority appears to sustain the conclusion which we reach. *Taggart v. Newport Street R. Co.* 16 R. I. 669, 7 L. R. A. 205; *Halsey v. Rapid Transit Street R. Co.* 47 N. J. Eq. 380; *Lockhart v. Craig Street R. Co.* 189 Pa. 419; *Louisville Bagging Mfg. Co. v. Central Pass. R. Co.* 95 Ky. 50; *Detroit City R. Co. v. Mills*, 85 Mich. 634; *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* 156 Ill. 255, 29 L. R. A. 485; *Cumberland Teleg. & Teleph. Co. v. United Electric R. Co.* 93 Tenn. 492, 27 L. R. A. 236; *Croswell, Electricity*, §§ 108, 109, 182, 183; *Booth, Street Railways*, § 83. It follows from what we have said that an abutting lotowner has no sufficient ground to complain of the erection and maintenance of street railway poles in the street in front of his premises if they are properly placed, and this is true whether he owns the fee of the street or not.

Our attention is called to § 1824 of the Code of 1878, as amended by chap. 104 of the Acts of the 19th General Assembly, which relates to the erection of telegraph and telephone poles along the highways of the state, and to § 1825 of the Code of 1878, which provides for the payment of damages caused by setting poles in private grounds, but we do not find anything in these sections to conflict with what we have said. It has been held in some cases that the erection of telegraph and telephone poles in streets imposes a new burden, because they do not in any manner aid in the use of the street by the public; but, as no question of that character is involved here, we refrain from expressing any opinion in regard to it.

2. It is the duty of a street-railway company to so construct and operate its railway as not to interfere unnecessarily with the right of abutting property owners to use and enjoy their property. *Cudde v. Muscatine R. Co.* 44 Iowa, 14; *Croswell, Electricity*, 85. A private individual may maintain an action for relief from injury to himself or his property if the injury be separate and distinct from that which affects the general public. *Churchill v. Burlington Water Co.* 94 Iowa, 89. The petition in this case alleges, and the demurrer admits, that the plaintiffs have sustained serious injury from the placing and maintaining of the pole in its present location, and that the injury will continue if the pole be not removed. To show this more clearly, we set out somewhat more fully than we have already done the substance of averments contained in the petition. In addition to the platting of the town, the location of the property in question, and the adoption by the defendant of the trolley system, the petition alleges that the plaintiffs have, since the year 1892, owned and occupied as a homestead the premises described; that the defendant erected in that part of the street appurtenant to their property, and in front of their dwelling, a pole 20 or more feet in height, used in supporting its trolley wire, and similar poles at intervals on each side of the street; that the poles so erected were connected by cross wires to which the trolley wire was attached; that it was not necessary to place a pole in front of the plaintiffs' dwelling house, nor on that part of the street appurtenant to their premises; that the pole on the opposite side of the street to which the one in question is attached is from 4 to 6 feet further north than is the one in question, and, had the latter been placed 3 feet further north than is the one to which it is attached, it would still have been in front of the plaintiff's lot, but not at a place where it would have damaged the plaintiff's premises to such an extent as to be complained of; that the pole in question is a nuisance and an obstruction to the enjoyment by the plaintiffs of their premises and homestead; that it was placed where it is, not because of any necessity, but to annoy the plaintiffs, and to injure and depreciate the value of their property, and that it had had that effect; that, before it was placed where it is, the plaintiffs protested against its erection there, and, after its erection, offered to pay the defendant the cost of moving it to a point near the north line of their property, where they would not object to it, but that the defendant declined to accept the

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offer; that the plaintiffs have been greatly damaged by the placing of the pole where it now is, and will continue to suffer such damage until it is removed; and that they have not been in any manner compensated for such damage. Some of the averments of the petition are immaterial, but we are required to determine whether a cause of action is stated in the petition. If it is, the immaterial matter and the statement of legal conclusions may be disregarded. Section 2646 of the Code of 1878 required the petition in a civil action to contain "a statement of the facts constituting the plaintiff's cause of action," and the petition was demurrable if the facts stated in the petition did not entitle the plaintiff to the relief demanded. § 2648. It is well settled that, under these provisions, ultimate facts only, and not evidence of them, are to be stated in the petition. *De Lay v. Carney Bros.* 100 Iowa, 687; *Robinson v. Berkey*, 100 Iowa, 136. In *Luss v. Des Moines*, 22 Iowa, 590, it was said of a statement in the petition that the defendant "fixed and established a grade for Second street, as it was lawfully authorized to do," that it was an averment of an ultimate fact; and that it was not necessary for the petition to show how the grade was established. In *Brown v. Kingsley*, 88 Iowa, 220 (an action for seduction), it was said that the ultimate fact was the fact of seduction, and that it was not necessary to state in the petition the "acts made use of to deceive and mislead," nor certain other facts, as they were merely evidence of the ultimate fact. In *Grinde v. M. & St. P. R. Co.* 42 Iowa, 376, a petition which alleged that the "defendant by its agents and servants did run and manage one of their engines in such a grossly negligent and careless manner that the same ran against and over" a cow of the plaintiff which had casually strayed upon the track of the defendant, was held to be sufficiently specific, and it was said: "It is not allowable to plead mere abstract conclusions of law, having no element of fact; they form no part of the allegations constituting a cause of action; but if they contain the elements also of a fact, construing the language in its ordinary meaning, then force and effect must be given to them as allegations of fact;" and that to plead more than the ultimate fact would be to plead the evidence, which is not allowable. See also *Byington v. Robertson*, 17 Iowa, 562; *O'Connor v. Illinois C. R. Co.* 88 Iowa, 105; *Winter v. Central Iowa R. Co.* 80 Iowa, 443. Section 2655 of the Code of 1878 provided that an answer might contain "a statement of any new matter constituting a defense." In *Kendig v. Marble*, 55 Iowa, 386, which arose under that provision, the foreclosure of a mortgage on account of a judgment rendered by confession was asked. The answer alleged "that the confession of judgment was adopted as a fraudulent device, and is such to aid the plaintiff in evading the statute against usury, plaintiff well knowing that the contracts were usurious. That this defendant believed, at the time of the execution of the same, it was only for the amount due, without usury, as before stated." It was held by this court that a sufficient defense was pleaded, and that if a conclusion of law, and not of fact, was set out, the answer should have been as-

sailed by a motion for a more specific statement; that, "if it was sufficiently explicit to enable plaintiff to demur to it, there can be no doubt that it was fully understood and disclosed the defense intended to be made. This was all that could have been required upon the consideration of the demurrer."

The petition in this case states that the pole in question was placed in front of the property of the plaintiffs without necessity therefor, to annoy them, and to injure and depreciate the value of their property; that it is an obstruction to the enjoyment by them of their property; that it has depreciated the value of that property, and caused great damage to the plaintiffs, and will continue to cause such depreciation and damage if not removed; and that they have not been compensated for the damages received. Applying the rule of the statutes and authorities cited, we conclude that the statements of the petition are of ultimate facts, which show a cause of action, although it may be true that a motion for a more specific statement as to the manner and extent of the obstruction and its effect might have been required had it been asked. But the ultimate fact was the unnecessary obstruction of the use and enjoyment of the plaintiffs' property to their substantial damage; and that the petition showed. We do not understand the appellee to question this if it be true that the pole in question may have been so placed and maintained as to give to the plaintiffs a right of action. If the plaintiffs can prove the averments of their petition, they might recover damages for the injuries sustained; but they are not compelled to resort to that remedy. If the location of the pole is not only injurious, but unnecessary, they may have recourse to this action for the removal of the pole. *Richards v.*

Holt, 61 Iowa, 533; *Gribben v. Hansen*, 69 Iowa, 255; *Harbach v. Des Moines & K. C. R. Co.* 80 Iowa, 593, 11 L. R. A. 113.

We must not be understood as holding that a property owner may dictate the location of poles in front of his premises, nor that he may recover damages, however trivial, which may be caused by their location. The railway company has the right to so place its poles as to secure the best results for its railway, provided that it so places them as not to cause any unnecessary injury. The injurious consequences which it must guard against are those of a substantial character. The placing of poles in front of property is seldom desired by the property owner, and may in some slight degree interfere with the use of his property, as by obstructing the view from it; but for such injury alone he would rarely, if ever, be entitled to relief. The placing of a pole in a walk or roadway, however, or in front of and near to an important window, if the pole could as well be placed elsewhere, might afford ground for relief. But we cannot undertake to lay down general rules which would govern all cases. Each, of necessity, must be decided according to its own facts. It follows from what we have said that the district court erred in sustaining the demurrer, and its judgment is *reversed*.

Deemer, Ch. J., dissenting:

I do not think the petition states a cause of action, and I dissent from the second paragraph of the opinion. I especially dissent from the doctrine that a pole placed in front of a window is a nuisance. The doctrine of ancient lights does not obtain in this state. I am authorized to say that Waterman, J., joins in this dissent.

KANSAS SUPREME COURT.

Emil WERNER, *Ptf. in Err.*,

Rosa WERNER.

(..... Kan.)

"In an action wherein the marriage between two parties is found to be void because one of the parties had a husband or wife living at the time of the invalid marriage, and a decree of nullity is entered, the court, while it cannot grant alimony as such, has authority to make an equitable division of property jointly accumulated by the parties while they lived together as husband and wife.

(May 7, 1898.)

ERROR to the District Court for Sedgwick County to review a judgment in favor of plaintiff in a suit to obtain a division of the property which plaintiff and defendant had ac-

*Headnote by JOHNSTON, J.,

NORM.—For right of action by defrauded party against the other party to a marriage induced by fraud, see note to *Morrill v. Palmer* (Vt.) 33 L. R. A. 411.

41 L. R. A.

cumulated while living together as husband and wife. *Affirmed*.

The facts are stated in the opinion.

Messrs. Amidon & Conly, for plaintiff in error:

A *feme covert* who has been abandoned by her husband is not permitted to marry a second time with impunity until her husband shall have been absent seven years, and shall not have been heard of during that time.

Rhea v. Rhener, 1 Pet. 107, 7 L. ed. 72; *Hancock v. American L. Ins. Co.* 62 Mo. 26; *Dean v. Bittner*, 77 Mo. 101; *Fuller v. Fuller*, 88 Kan. 362; *Wilhite v. Wilhite*, 41 Kan. 154.

There is no judicial separation. A judicial separation can be pronounced only on the petition of either husband or wife in all cases in which a divorce *a mensa et thoro* might have been obtained in the ecclesiastical courts.

Rapalje & Lawrence, Law Dict. p. 700.

Although a person who has not been heard from for seven years is presumed to be dead, the law raises no presumption as to time of death.

Davis v. Briggs, 97 U. S. 642, 24 L. ed. 1091. An allowance of alimony is not warranted where it is alleged, and not denied, that at the

time of the alleged marriage she was the wife of another.

Collins v. Collins, 71 N. Y. 272, 80 N. Y. 1; *Brinkley v. Brinkley*, 50 N. Y. 184, 10 Am. Rep. 460; *Mann v. Mann*, 75 N. Y. 614.

A woman having a husband living at the time of her second marriage is not entitled to dower in the real estate of her second husband; the second marriage being absolutely void.

Smith v. Smith, 5 Ohio St. 32.

A man who, being consciously under disability to marry by reason of having a lawful wife living, falsely represents himself to be competent to marry, and thereby induces an innocent woman to go through the ceremony of marriage with him, cannot maintain against her an action of nullity in a court of equity.

Rooney v. Rooney, 54 N. J. Eq. 231.

If either party to a marriage have a husband or wife living at the time of the marriage, the marriage is absolutely void.

Tefft v. Tefft, 35 Ind. 44.

A judicial invalidation of marriage at any time for the bigamy of a party to it relates back to the time of the marriage, and places the deceived in a free condition to marry again or to do any other act as an unmarried woman without any sentence of the nullity of the marriage.

Gaines v. Hennen, 24 How. 553, 16 L. ed. 770.

Messrs. Stanley, Vermillion, & Evans, for defendant in error:

For the purpose of sustaining the validity of a marriage, courts will presume that a divorce had been granted from a former husband or wife, and will also presume the death of the former husband or wife prior to the last marriage.

Blanchard v. Lambert, 43 Iowa, 229, 22 Am. Rep. 245; *Johnson v. Johnson*, 114 Ill. 611.

Where property has been accumulated during the time the parties had lived together, by their joint efforts, an equitable division of the property should be made when a separation was decreed.

Fuller v. Fuller, 33 Kan. 582.

A marriage annulled by decree of court is a judicial separation.

14 Am. & Eng. Enc. Law, p. 532.

Johnston, J., delivered the opinion of the court:

This was an action brought by Rosa Werner to obtain a divorce from Emil Werner upon the grounds of habitual drunkenness, extreme cruelty, and gross neglect of duty. She also set forth at length a description of the property, in some of which she alleged she owned an interest, and the remainder stood in the name of the defendant, but was in fact the joint accumulation of the parties while they lived together as husband and wife. In his answer, Emil Werner alleged that he was induced to enter into the marriage relation with Rosa through her misrepresentation and fraud; that she was at the time the wife of John G. Cole, who was then living, and from whom she had not obtained a divorce; and that he had no knowledge of this fact until the present proceeding was begun. He also charged her with extreme cruelty, and asked that the marriage contract be declared to be null and void. In her reply,

Rosa Werner asks that, if the marriage should be held to be null and void, and no divorce granted to the plaintiff from the defendant, there be an equitable and just division of the property, which she alleges was the result of the joint earnings and labors of the plaintiff and the defendant during the time they lived together as husband and wife. At the trial considerable testimony was offered as to the misconduct of Emil Werner, but the court found it unnecessary to determine whether the grounds alleged by the plaintiff below had been sustained. It appeared from the testimony that Rosa Werner had a husband living at the time she was married to Emil Werner, and for that reason the marriage was declared to be null and void, and a division of the property was made.

Emil Werner complains of the ruling of the court awarding Rosa a share of the property, contending, first, that she was never, in fact, his wife, and that alimony is never awarded to a woman who is not a wife. It is true, as the plaintiff in error contends, that the marriage between the parties was absolutely void from the beginning. Although living together as husband and wife, they were not, in fact, married, and hence no allowance could be made as alimony. The rule is that permanent alimony can only be allowed where the relation of husband and wife has existed; but this rule does not preclude an equitable division of the property where there is a judicial separation of the parties on account of the invalidity of the marriage contract. *Fuller v. Fuller*, 33 Kan. 582. Strictly speaking, this action as it was tried was not a divorce proceeding, but it was rather one to annul a void marriage. Although instituted, under the statutes to obtain a divorce, the pleadings were so drawn, and the issues so shaped, that it was within the power of the court to grant relief independently of the statutes relating to divorce, and it rendered a decree of nullity, rather than a decree of divorce. The plaintiff below set forth at length the description and nature of the property which had been acquired by the parties, the manner in which it had been acquired, and her interest in the same, and in the prayer of her reply she asked to be allowed a just and equitable division of the same in case the marriage was held to be null and void. The court, in its decree, did not treat the award as alimony, but rather adjudged her a share of the property jointly accumulated by the parties during the time they lived together as husband and wife. *Fuller v. Fuller*, 33 Kan. 582, greatly relied on by the plaintiff in error, holds, it is true, that in an action of this character the defendant is not entitled to recover permanent alimony; but at the same time it is expressly stated: "That in all judicial separations of persons who have lived together as husband and wife, a fair and equitable division of their property should be had; and the court in making such division should inquire into the amount that each party originally owned, the amount each party received while they were living together, and the amount of their joint accumulations." Even in cases where the marriage is valid, and a divorce is refused for any cause, the court may adjudge an equitable division and disposition of the property of the parties. Code Civ. Proc.

§ 643. But, independently of the statute of divorce, we think the court had authority to decree, not only an annulment of the marriage, but also the division of the property which had been jointly accumulated by the parties. It was an equitable proceeding, and within its equity power the district court had full jurisdiction to give adequate relief to the parties. The division that was made was eminently equitable and just. While Emil Werner had considerable property at the time of the marriage, and Rosa had none, the testimony tends to show that the property which they have now is largely the result of their joint labor and earnings. She was active, industrious, and faithful, and, besides household work, she was an efficient aid in conducting and carrying on the different branches of business in which he was engaged. In the early days she performed labor of the hardest and most menial character, and throughout the twenty-two years in which they lived together as husband and wife she was diligent, tireless, and economical in building up a business and in gathering up the property which they held at the time of the trial. She appears to have been a valuable assistant in managing the business and in caring for the property in which their earnings were invested. A portion of the time the title to the property was in her name, but at the time of the separation he held the legal title to most of it. The fact, however, that the legal title stood in the name of one or of the other of the parties does not prevent a just distribution of the property jointly contributed, and in fact jointly owned by both. If a separation had occurred while the property stood in her name, it would hardly be contended that he would be

deprived of any share or interest in the same. No more should she be deprived of a fair share of the fruits of her skill, industry, and toil while she occupied a partnership relation with him. The court has the same power to make equitable division of the property so accumulated as it would have in case of the dissolution of a business partnership. It is claimed that she has no right to appeal to the equitable consideration of the court, because the marriage contract was entered into through deception and fraud on her part, while his conduct was faultless in this respect. The testimony hardly sustains the contention. She states that she frankly told Werner of her former marriage to Cole, and she further told him that Cole claimed at the time he abandoned her that he had a living wife when he married Rosa. Emil Werner advised her that, as Cole had another living wife, her marriage with Cole was void, and that she was at liberty to marry again. He produced a law book, and read from the same to convince her that the former marriage was no obstacle to a legal marriage with him. There is considerable testimony tending to show that there was no deception or fraud, and that her misconception of the law was largely due to the advice and influence of the plaintiff in error. No reason is seen why she was not entitled to ask and obtain a share of the joint accumulations, and, in our view, the share which was awarded her was no more than she was justly entitled to.

The judgment of the court will therefore be affirmed.

All the Justices concur.

Rehearing denied.

KENTUCKY COURT OF APPEALS.

Ella M. ALLEN, *Appt.*,

v.

Samuel P. PERRINE.

(.....Ky.....)

A lien for taxes on property mortgaged for more than it is worth, and afterward conveyed absolutely to the mortgagee in part payment of the debt, cannot be subsequently asserted by the sheriff for previous years during which he failed to collect but accounted for the taxes, when the owner had personal property on the premises from which collections could have been made, as the sheriff's right of subrogation, if any, is subject to the prior equity of the mortgagee.

(April 30, 1898.)

APPEAL by plaintiff from a judgment of the Circuit Court for Mason County in favor of defendant in an action brought to enjoin defendant from selling certain land

NOTE.—As to the priority of claims for taxes against a debtor's estate, see note to *Bibbins v. Clark* (Iowa) 29 L. R. A. 278.

41 L. R. A.

which was subject to plaintiff's mortgage for taxes, for the payment of which the mortgagor was alleged to have had sufficient personal property which defendant failed to subject to the payment of the tax. *Reversed.*

The facts are stated in the opinion.

Mr. A. M. J. Cochran for appellant.

Mr. Thomas E. Phister for appellee.

Guffy, J., delivered the opinion of the court:

It is substantially alleged in the petition in this action that the appellant is the owner of 89 acres of land in Mason county, conveyed to her by deed January 5, 1893, by Allie B. McAtee, and that, at the time of the conveyance, appellant held a mortgage upon the same to secure an indebtedness due her from said McAtee in the sum of \$4,000, with interest from June 25, 1889, until paid, which note and mortgage were executed on June 25, 1889, and were an outstanding lien on said land during the years 1889, 1890, 1891, and 1892, and said land was worth in value less than the mortgage lien during these years, and at the time of the conveyance to her. It is further

alleged, in substance, that during each of said years the said McAtee owned and had in his possession, on said land, and in this (Mason) county, personal property which exceeded greatly in value the amount of taxes due from him to the state of Kentucky and county of Mason, and such fact was known to the defendant, Samuel P. Perrine, who was deputy sheriff of Mason county during said years of 1889, 1890, 1891, and 1892, for John W. Alexander, sheriff of Mason county, and afterwards J. C. Jefferson, sheriff of said county, and ever since has been, and still is, said deputy, and who had in his hands for collection the taxes due from said McAtee for each of said years; that the defendant, Perrine, notwithstanding he knew of this fact, suffered and permitted said McAtee to sell and dispose of said personal property, and collect and receive the proceeds therefor, without making any attempt to collect his said taxes out of same, and has caused the property conveyed to her by McAtee in 1893, and which she now owns, to be advertised for sale at the court house door on the 11th day of March, 1895, for the taxes due from the said McAtee for said years 1889, 1890, 1891, and 1892, amounting to the sum of \$268.30, all of which plaintiff had no notice of before said advertisement, and, unless enjoined and restrained from so doing, he will sell in pursuance to said advertisement; that said defendant and his principal had accounted to the state and county for the taxes due from said McAtee for said years at the time they were required to settle, and the same are now due the defendant, and not the commonwealth of Kentucky, or the county of Mason; that said threatened sale for taxes for said years of 1889, 1890, 1891, and 1892, will produce great and irreparable damage to plaintiff. An injunction was prayed for, and obtained, restraining the defendant from selling the land for the taxes for the years 1889, 1890, 1891, and 1892. The defendant entered a general demurrer to the petition, which was sustained by the court; and, plaintiff failing to plead further, her petition was dismissed, and the injunction dissolved, and judgment rendered against her for costs, to which plaintiff excepted, and prayed an appeal to this court, which was granted.

It appears from the petition that the appellant had a mortgage lien upon the land in question, for an amount in excess of its value, at and before the time the taxes enjoined were assessed or became a charge against McAtee, and that she purchased the land in 1893, taking therefor an absolute deed in part discharge of her mortgage debt. It is the contention of the appellee that the commonwealth had a lien upon the land in contest for the taxes in question, and that, the sheriff having accounted for the same, he is subrogated to all the rights of the commonwealth. Section 4021, Ky. Stat. which seems to be substantially the same as the provisions in the General Statutes, provides that the commonwealth and each county shall have a lien on the property assessed for the taxes due them, respectively, which shall not be defeated by gift, devise, sale, alienation, or any other means whatever, unless the gift, sale, devise, or alienation shall have been made more than five years before the institu-

tion of proceedings to enforce the lien, and nothing shall be exempt from levy and sale for taxes and costs incident to the sale. It will be seen that the appellant acquired her lien upon the land in contest in June, 1889, before any lien had attached for the taxes in contest. One of the questions to be determined is whether or not the defendant can voluntarily pay McAtee's taxes for the years named, and knowingly permit McAtee to dispose of his personal property, sufficient to pay the taxes due from him, and yet be entitled to sell the land in question in satisfaction of the entire amount of taxes due from McAtee for the years aforesaid. It is evidently a fact, as the taxes in this case amounted to \$268.30, that McAtee was the owner of a large amount of property in addition to the land in controversy. It will thus be seen that, if appellee's contention is sustained, the result will be that appellant must pay a large sum of taxes justly due from McAtee upon property other than the land in controversy. It is clear that it was McAtee's duty to pay the taxes in question. It is contended by the appellee that, the sheriff having accounted to the state and the county for the taxes due from McAtee, he thereby became subrogated to all the rights that the state and county ever had in respect to the collection of the taxes. The principle of subrogation rests mainly upon the fact that a party pays the debt of another, which he was legally bound to pay. But if we concede that the sheriff, on account of his failure to collect the taxes due from McAtee, became, as a matter of law, bound to pay the same to the state, and thereby acquired any right of subrogation, that right must be subject to prior equities, and to all rules of equity. It is said in 24 Am. & Eng. Enc. Law, p. 187: "Subrogation is the substitution of another person in the place of a creditor or claimant, to whose rights he succeeds in relation to the debt or claim asserted, which has been paid by him not voluntarily." It is further said in the same work (p. 191). "Subrogation is an equitable, and not a legal, right. . . . Being the creature of equity, it will not be enforced where it will work an injustice to the rights of those having equal equities." On page 192 of the same work it is said: "Subrogation will not be permitted in favor of one who is ultimately or really liable for the debt discharged; nor in favor of one who would thereby be permitted to derive an advantage from, or to establish his claim through, his own wrong or negligence, or inequitable or illegal conduct."

In the case at bar it is shown by the petition, which must in this case be taken as true, that McAtee had an abundance of personal property during all the years of 1890, 1891, and 1892, sufficient to pay his taxes, situated in Mason county, Kentucky, which was known to the appellee, and that he (appellee) permitted said property to be sold and disposed of without any effort to collect the taxes, which were then in his hands for collection. His delay was a matter of choice. It may have been done, as suggested in appellee's brief, for the accommodation of McAtee. It was certainly his duty to levy upon and sell the personal property before levying upon any real estate; and to allow him, for the accom-

modation of the taxpayer, or for any other purpose, to sit idly by, and permit this personal property to be disposed of, and then attempt to collect the taxes by a sale of appellant's land, seems to us to be in violation, not only of the principle above quoted, but contrary to natural justice, and inconsistent with any rule of equity known to the law. If the appellee be permitted to enforce the collection of these taxes by a sale of the land in contest, he simply makes appellant pay the taxes of McAtee; and that, too, without any reason or excuse, unless his desire to accommodate McAtee be considered an excuse. He delayed to collect the taxes, manifestly, for his own accommodation, or that of McAtee; and he should not now be allowed to collect the same off of an innocent party, and a party who never was under any obligation to pay the taxes, and, so far as this record shows, had no notice, until the filing of this suit, of McAtee's failure to pay. It has been repeatedly decided by this court that it was the duty of the sheriff to sell the personal property of a delinquent taxpayer, if it be found in the county, before he levied upon or sold the land, and that a sale of land, when he could have made the taxes by a sale of personal property, was void, or at least passed no title to the purchaser. It may be true that, as between the sheriff and the taxpayer, if the sheriff had delayed the collection of the taxes at the instance of the taxpayer, or through negligence, and the taxpayer had disposed of his personal property, the sheriff might within the five years levy upon and sell real estate, because it was the duty all the time of the taxpayer to pay the taxes, and the indulgence would be presumed to have been for his benefit, or at his instance; and he would not be heard to complain, or avail himself of the delay, to the detriment of the sheriff. But no such state of affairs exists in this case. The delay was evidently for the benefit of McAtee or the sheriff, or both. The negligence was that of the appellee, and manifestly the appellant should not be made to suffer on account of the negligence of the sheriff, or for the benefit of McAtee. We do not think that appellant was under any obligation to pay McAtee's taxes, nor do we think that any presumption should be indulged in that she knew they were unpaid; and, if she was aware of that fact, we are unable to see in what manner she could have protected herself against the liability now sought to be imposed upon her, any further than the amount of taxes due upon the land in question. We have been referred to § 4032 of the Kentucky Statutes as authorizing appellant to have taken such action as would have protected her from the claim of appellee herein. Said section reads as follows: "Any person having a lien on property upon which the owner has failed to pay the taxes, and has become delinquent, such lienholder may pay the taxes, interest, and penalties thereon, and shall be subrogated to the lien of the commonwealth, county, or district therefor, and the sum so paid shall bear legal interest from the date of payment, and shall be collectible in the same manner as the original claim of the lienholder." The most that appellant was authorized to do was to pay the amount of taxes due upon the valuation of the

land, and thus obtain an additional lien upon the land, which would have been utterly worthless in this case. And, if appellee's contention is to be sustained, he could have still sold this same tract of land for the residue of taxes due from McAtee. There is no statute or law, that we are aware of, by virtue of which appellant could have paid McAtee's taxes, and levied and sold his personal property therefor. It seems clear to us that the appellee had no right to sell the land in question for the taxes claimed. It is manifest that appellant had a right to maintain this action, and obtain an injunction, for the reason that a sale of the land in question would have cast a cloud upon her title, which could only have been removed by an equitable proceeding; hence she had no adequate remedy at law. For the reasons given, the judgment appealed from is reversed, and cause remanded, with directions to overrule the demurrer, and for proceedings consistent herewith.

Billy ROSE, by Next Friend, *Appt.*,
v.

J. A. ROSE.

(.....Ky.....)

The right of a husband to the use of his wife's real estate with power to rent it for not more than three years at a time and receive the rent, under Gen. Stat. p. 720, chap. 52, art. 2, § 1, which was in force when the parties were married and the property was acquired, is a vested right of which the legislature cannot deprive him.

(*DuRelle, Hazelrigg, and Burnam, JJ., dissent.*)

(June 2, 1896.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Logan County in favor of defendant in an action brought to recover possession of certain real estate which belonged to plaintiff but which was in possession of her husband from whom she had separated. *Affirmed.*

The facts are stated in the opinions.

Mr. Wilbur F. Browder for appellant.

Mr. James H. Bowden, for appellee:

In order to sue her husband for the possession of land, the wife ought to be required to show some marital dereliction—some act of wrong or improvidence—something. That would protect her in all her property rights, and yet fully preserve the peace of domestic life.

Matson v. Matson, 4 Met. (Ky.) 262; *Kalfus v. Kalfus*, 13 Ky. L. Rep. 389.

The husband's right to the use and possession of the wife's land, which he has in possession, is not inchoate, but present and vested, and the legislature cannot take it away.

Westervelt v. Gregg, 12 N. Y. 203, 63 Am. Dec. 160, and notes; *Junction R. Co. v. Harris*, 9 Ind. 184, 68 Am. Dec. 618; *Ross v. Sander-*

NOTE.—As to power of legislature to change or destroy estates by dower, curtesy, or similar estates, see also *McNeer v. McNeer* (Ill.) 19 L. R. A. 256, and note.

son, 33 Ill. 250; *Clark v. Clark*, 20 Ohio St. 123; *Erwin v. Puryear*, 50 Ark. 356; *Burson's Appeal*, 22 Pa. 164; *Wyatt v. Smith*, 25 W. Va. 813; *McNeer v. McNeer*, 142 Ill. 388, 19 L. R. A. 257; *Myers, Vested Rights*, pp. 31-35.

As to property a wife may get, the husband's right before it is gotten is a mere possibility or expectancy. It may be cut off by a law that he shall not have it. If she has a mere right, and his right depends on a reduction to possession, it is not a title vested, but a right inchoate, and he may be precluded by law.

Percy v. Cockrill, 10 U. S. App. 574, 53 Fed. Rep. 872, 4 C. C. A. 73; *Dixon v. Dixon*, 4 La. 188, 28 Am. Dec. 478.

Paynter, J., delivered the opinion of the court:

It appears from the petition, to which the court sustained a demurrer, that the appellant is the wife of appellee J. A. Rose; that they were married in the year 1890, that a separation has taken place, which is permanent; that they will never live together as husband and wife. It also appears from the petition that after the marriage took place, and before the passage of the act of 1894 (Ky. Stat. §§ 2127, 2128), defining the rights of married women, the appellant by gift acquired title to a tract of land containing 308 acres, and by purchase another tract of 120 acres. It is alleged that the husband is in possession of this land, and refuses to surrender it to the appellant. She therefore prays that the possession of it be adjudged to her. The question involved is, whether, under the act referred to, the rights of the husband—as they existed at the time of its passage—to the use of the land have been destroyed; that is to say, Did the legislature intend to deprive husbands of their interest in the lands of their wives, or, if it so intended, did it have the power to do so?

At common law the husband became the owner of the personal property of the wife. He likewise became seised in an estate for their joint lives of her freehold lands and chattels real. He could sell the personal property thus acquired, and vest the vendee with a title thereto. He could sell the interest which he acquired in the real estate, and vest the purchaser with the title to the interest which became vested in him by operation of law. 2 Dembitz, Land Titles, p. 788; 2 Kent, Com. p. 180; 2 Bl. Com. p. 126. The court held in *M'Clain v. Gregg*, 2 A. K. Marsh. 454, that marriage gives the husband an estate in the lands of his wife, which he could sell, and that his vendee could maintain ejectment. That opinion was before an act of the legislature reducing the interest of the husband in the wife's land. A divorce restores to the wife the exclusive right to her land. *Hays v. Sanderson*, 7 Bush, 489. As civilization advanced, and as the men who made the laws began to recognize that a wife should not be compelled to surrender practically all of her estate to the husband, but should be given a reasonable protection in the enjoyment of her property, the legislature of Kentucky passed an act which supplanted the common law with reference to the rights of a husband in his wife's real estate. It is § 1, art. 2, chap. 52, p. 720, Gen. Stat., and reads as follows: "Marriage shall give to the husband

during the life of the wife, no estate or interest in her real estate, including chattels real, owned at the time, or acquired by her after marriage, except the use thereof, with power to rent the real estate for not more than three years at a time, and receive the rent. If, however, the wife die during the term for which her land is rented, the rent shall go to the husband, if alive, subject to her debts, contracted as stated in the next section. But if during such term the husband die, the rent accruing thereafter shall go to the wife or her representatives, subject to her debts as aforesaid." This section was in force at the time the parties to this action were married, and at the time the wife acquired the land. It gives the husband the use of the wife's land, with power to rent it for not more than three years at a time, and receive the rent. It does not allow this rent to be subjected to the payment of his debts, because the legislature thought it wise to place it in the power of the husband to appropriate the rents for the benefit of his wife and children, if he chose to do so. In obedience to the requirements of the statute, this court has repeatedly held that the rents of the wife's land could not be subjected to the payment of the husband's debts. If the husband cultivates the land himself, then the products of the land have been adjudged to belong to him. The court, in *Moreland v. Myall*, 14 Bush, 474, held that corn standing on the wife's land (her general estate) is subject to levy and sale under execution against the husband. While the rent of the wife's land is not liable for the husband's debts, yet, as between the husband and wife, the rent belongs to him. *Barnes v. Burbridge*, 7 Ky. L. Rep. 445. While, under the act in force when the parties married and when the land was acquired, the husband's interest in the wife's land was not so great as at common law, still it is a vested right; and the legislature could not deprive him of the use of his wife's land, and the right to rent it for three years at a time. The act of 1894 declares that marriage shall give to the husband no interest in the wife's property, and that she shall hold it and own it for her separate and exclusive use, free from the debts and control of her husband. The act is not retrospective in its operation. It cannot take from a husband the rights which existed under the law in force at the time of its passage. It is said by Mr. Cooley, in his work on Constitutional Limitations (5th ed. p. 442): "At the common law the husband immediately on the marriage succeeded to certain rights in the real and personal estate which the wife then possessed. These rights became vested rights at once, and any subsequent alteration in the law could not take them away." It is held in *Junction R. Co. v. Harris*, 9 Ind. 184, 68 Am. Dec. 618, that a husband's estate in the wife's land is not impaired by a statute declaring it separate property. Under the law of New York, a husband had a certain interest in his wife's property. Subsequently the legislature passed an act which, in effect, declared that such property should no longer belong to the husband, but should become the property of the wife, as though she were a single female. The court held that the husband's rights could not be impaired by the act of the legislature. *Westcott*

v. *Gregg*, 12 N. Y. 202, 62 Am. Dec. 160. It was held in *Rose v. Sanderson*, 58 Ill. 247, that a legislative enactment cannot take from the husband a vested life estate in the wife's land and give it to her. Bishop on the Law of Married Women (vol. 2, § 40), after stating what are the rights of the husband at common law in the wife's real estate, says: "This is a vested estate in him; and within the doctrines discussed under our first subtitle, it is not competent for legislation without his consent to take it from him and give it back to the wife." The views we have expressed are supported by *Jackson v. Jackson*, 144 Ill. 374; *Clark v. Clark*, 20 Ohio, 185; *Wyatt v. Smith*, 25 W. Va. 813. Many authorities could be cited in support of these views. A wife who was married before the act of 1894 took effect is entitled to all the rights in property acquired after the act took effect which it purports to give her. Although the marriage took place before the act took effect, the husband has no right to complain that the legislature has given his wife the control of such property as she acquired after the act took effect. The act did not impair any vested right of the husband in property so acquired. His right was expectant, not vested. Mr. Cooley in his work on Constitutional Limitations (p. 448), in speaking in regard to the husband's expectant interest in the after-acquired property of the wife, said: "It is subject to any changes in the law made before his right becomes vested by the acquisition." In *Allen v. Hanks*, 136 U. S. 800, 34 L. ed. 414, it was held competent for a state, in its fundamental law or by statute, to provide that all property thereafter acquired by or coming to a married woman shall constitute her separate estate, not subject to the control or liable for the debts of the husband. Such requirements do not take away or impair any vested rights of the husband. The same doctrine was announced in *Jackson v. Jackson*. It is hardly necessary to observe that, if Mrs. Rose should be divorced from her husband, she is entitled to be restored to the possession and use of her land; or should she, in an appropriate proceeding, show herself entitled to alimony or equitable settlement the products of her land, or the rents thereof, would be subject to the payment of it, in the same manner and to the same extent as they would be if the land belonged to the husband. This is upon the idea that the products of the land, or the rents of it, belong to him.

The only case to which the court's attention has been called which militates against the conclusion we have reached as to the incompetency of the legislature to take from a husband his vested rights, is the case of *Rugh v. Ottenheimer*, 6 Or. 281, 25 Am. Rep. 513. To sustain its conclusion in that case the court cited *Maguire v. Maguire*, 7 Dana, 183. A similar question to the one involved in this case was not before the court in the *Maguire Case*; neither did the court express an opinion on a question like the one involved in this case. The part of the opinion which the Oregon court relied upon to sustain its conclusion was *dictum*, and that does not even sustain the conclusion of the court. The court in *Gaines v. Gaines*, 9 B. Mon. 308, 48 Am. Dec. 425, did 41 L. R. A.

not adhere to the doctrine which was declared in *Maguire v. Maguire*, but said: "And if it were conceded, as intimated in *Maguire v. Maguire*, 7 Dana, 183, that the marriage contract is not as a contract wholly removed, like other contracts, from the power of the legislature to dissolve it in any particular case by special act of divorce, and that the dissolution of a marriage, if required by the public good, may be a legislative function, still it cannot be admitted that a power thus deduced, uncertain upon principle, as to its existence, and still more uncertain as to the grounds of its legitimate exercise, can override the express and highly conservative prohibitions in the Constitution, intended for the protection of private rights of property. We are of opinion, therefore, that whatever power, to be exercised in view of the public good, the legislature may have to enact divorces in special cases, as it cannot, even for the public good, change the right of private property from one to another without compensation, much less can it do so by a special act of divorce, sought by one of the parties against the consent of the other, with the purpose or effect of operating upon the rights of property incident to the marriage relation, as created and sustained by the general laws applicable to that relation." The act of the legislature in question does not attempt to dissolve the marriage contract, nor does it give any additional grounds upon which a court might do it. So the *dictum* in the *Maguire Case*, to wit, "And therefore marriage, being much more than a contract, and depending essentially on the sovereign will, is not, as we presume, embraced by the constitutional interdiction of legislative acts,"—could be regarded as a correct statement of constitutional law and still would have no application to the question at bar.

We have not felt it necessary to discuss marriage as a social relation, nor the necessity of the regulation and control of it by the sovereign power of the state. Neither have we felt it necessary to discuss the question as to the power of the legislature to prescribe the causes for which the marriage contract or relation may be dissolved. Neither would it be profitable to determine the question whether marriage is a contract *sui generis*, or one *publici juris*, or both. The marriage relation was assumed by the parties, it still exists, and no effort is made to have the court dissolve it. The questions we have been called upon to determine were: (1) What rights did the marriage give the husband in the wife's property? (2) Can the rights thus acquired be taken from the husband by the legislature and given to the wife? Our conclusions are supported by the common law, by the consensus of judicial opinion, and by the ablest writers on constitutional law. We have neither thought it wise nor judicial to disregard the rules of law, which are the crystallization of judicial opinion. Neither do we think, because lawmakers may have been slow in giving to wives freedom in the control of their property, that we should give our sanction to a law which, if upheld, will take the property of the husband and give it to the wife. If change and transition are to take place in the domestic relationship, al-

though right and for the public good, still it should not be done at the sacrifice of vested rights.

The judgment is affirmed.

Du Relle, J., dissenting:

The question presented in this case is whether the statutory right given to the husband by the act of 1846 (2 Rev. Stat. p. 8) to the use of the wife's land, with power in him to rent it for not more than three years at a time, can be taken from him by legislation adopted subsequent to his marriage. It is provided in the act of March 15, 1894 (Ky. Stat. § 2127), that "during the existence of the marriage relation the wife shall hold and own all her estate to her separate and exclusive use, and free from the debts, liabilities, or control of her husband," and this suit is brought under the clause quoted, for the recovery of possession of the wife's land. In dissenting from the opinion of the majority in this case, it is essential to an understanding of the reasons of the dissent that the views of the minority upon the institution of marriage, and the peculiar limitations which have been placed by the courts upon the scope and effect of the so-called marriage contract, should be stated. To do this in the shortest mode, I have strung together, without unnecessary comment, extracts from the opinions and writings of judges and law writers who are properly esteemed to have given this subject most careful consideration and philosophic thought. Most of these extracts, and many more, may be found in Bishop's Marriage, Divorce, and Separation: "The word 'marriage' is used in two senses. It may mean the solemnity by which two persons are joined together in wedlock, or it may mean their status when they have been so joined." Cotton, L. J., in *Harvey v. Farnie*, L. R. 6 Prob. Div. 35, 47. In like manner the expression 'agreement of marriage' denotes either a contract between parties to solemnize together a marriage at a future time, or the solemnization itself. The term 'contract to marry' never points to an actual, executed marriage, but 'contract of marriage' often does. We have, therefore, three things: First, an agreement to enter into a marriage; secondly, an agreement of present marriage; and, thirdly, the status of marriage, imposed on the parties by the law as a consequence of their agreement of present marriage, oftener expressed by the single substantive word 'marriage.' A failure to keep in mind these distinctions has led to not a little confusion in our law books." Bishop. Mar. Div. & Sep. § 9. "Marriage, as distinguished from the agreement to marry and from the act of becoming married, is the civil status of one man and one woman legally united for life, with the rights and duties which, for the establishment of families and the multiplication and education of the species, are, or from time to time may thereafter be, assigned by the law to matrimony." Id. § 11. "That marriage, executed, is not a contract, we know because the parties cannot mutually dissolve it, because legislation may annul it at pleasure, and because none of its other elements are those of contract, but all are of status." Id. § 13. "The mere agreement to marry is not essentially different from other executory civil contracts;

it does not superinduce the status; and, on its violation, the injured party may recover his damages of the other. But when it is executed in what the law accepts as a valid marriage, its nature as a contract is merged in the higher nature of the status. And though the new relation—that is, the status—retains some similitudes reminding us of its origin, the contract does in truth no longer exist, but the parties are governed by the law of husband and wife. In other words, their prior mutual promise to marry was simply an undertaking to assume the marital status; and, on its assumption, the agreement being fully performed according to its terms, bound them no longer." Id. § 14. "There may be, and sometimes is, an antenuptial bargaining between the parties, to survive the assumption of the status, more or less regulating their property relations, yet in no degree qualifying the status itself." Id. § 15. "Lord Robertson, a Scotch judge, in a passage approvingly quoted by Judge Story and by Mr. Fraser, said: 'Marriage is a contract *sui generis* and differing in some respects from all other contracts, so that the rules of law which are applicable in expounding and enforcing other contracts may not apply to this. The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. The status of marriage is *juris gentium*, and the foundation of it, like that of all other contracts, rests on the consent of parties. But it differs from other contracts in this, that the rights, obligations, or duties arising from it are not left entirely to be regulated by the agreements of parties, but are, to a certain extent, matters of municipal regulation, over which the parties have no control by any declaration of their will.' " Id. § 24. "Lord Bannatyne said: 'The rights arising from the relation of husband and wife, though taking their origin in contract, have yet, in all countries, a legal character, determined by their particular laws and usages, altogether independent of the terms of the contract, or the will of the parties at the time of entering into it.' " Id. § 25. "Robertson, Ch. J., said in a Kentucky case: 'Marriage, though in one sense a contract,—because, being both stipulatory and consensual, it cannot be valid without the spontaneous concurrence of two competent minds—is, nevertheless, *sui generis*, and, unlike ordinary or commercial contracts, is *publici juris*, because it establishes fundamentals, and most important domestic relations. And therefore, as every well organized society is essentially interested in the existence and harmony and decorum of all its social relations, marriage, the most elementary and useful of them all, is regulated and controlled by the sovereign power of the state, and cannot, like mere contracts, be dissolved by the mutual consent only of the contracting parties, but may be abrogated by the sovereign will, either with or without the consent of both parties, whenever the public good, or justice to both or either of the parties, will be thereby subserved. Such a remedial and conservative power is inherent in every independent nation, and cannot be surrendered, or subjected to political restraint or foreign control, consistently with the public welfare. And therefore marriage, being much

more than a contract, and depending essentially on the sovereign will, is not, as we presume, embraced by the constitutional interdiction of legislative acts impairing the obligation of contracts. The obligation is created by the public law, subject to the public will, and not to that of the parties." Id. § 80. Said Story in his Conflict of Laws: "It is rather to be deemed an institution of society, founded upon the consent and contract of the parties, and, in this view, it has some peculiarities in its nature, character, operation, and extent of obligation, different from what belong to ordinary contracts." Again: "Marriage is not a mere contract between the parties, subject, as to its continuance, dissolution, and effects, to their mere pleasure and intentions. But it is treated as a civil institution, the most interesting and important in its nature of any in society." Id. § 88. "Thus, to say that marriage is a contract, when speaking of the marital condition, not of the agreement to assume it, is, as we have seen, according even to the former utterances of most legal persons, inaccurate, since they further declare that it differs in many particulars from other contracts. And when the differences are pointed out, we see that they have covered every quality of the marriage, and left nothing of contract. All is submerged in the status." Id. § 86. Said Chief Justice Ames in *Ditton v. Ditton*, 4 R. I. 87: "It [the state] may, except so far as checked by Constitution or treaty, create by law new rights in, or impose new duties upon, the parties to these relations; or lessen both rights and duties, or abrogate them, and so the legal obligation of the relation which involves them, altogether. This it may do, with the exception above stated, as to some relations by law, when it wills; declaring that the legal relation of master and slave, for instance, shall cease to exist within its jurisdiction, or for what causes or breaches of duty in the relation, this, or the legal relation of husband and wife, or of parent and child, may be restricted in their rights and duties, or altogether dissolved through the judicial intervention of its courts."

Sufficient quotations have been given—and they might be multiplied—to make plain the general underlying doctrine upon this subject. The Kentucky cases bearing upon this question will next be considered:

The case of *Maguire v. Maguire*, 7 Dana, 184, has been already quoted from. In that case the question was as to the power of the circuit court, under the statute of 1809, to decree a divorce *in invitum* against a husband who was never domiciled in Kentucky. In his argument of the question, Chief Justice Robertson was of the opinion that, "so far as a dissolution of a marriage by public authority may be for the public good, it may be the exercise of a legislative function; but so far as it may be for the benefit of one of the parties, in consequence of a breach of the contract by the other, it is, undoubtedly, judicial." The distinction was drawn with reference to the Kentucky Constitution, under which the legislature could not exercise any power clearly and purely judicial, and deserves attention as recognizing the legislative power of absolute dissolution of marriage, even by private act, when

the object aimed at by the lawmaking power might be the public good.

In *Berthelemy v. Johnson*, 8 B. Mon. 90, 38 Am. Dec. 179, Chief Justice Robertson emphasized the distinction referred to in the *Maguire Case* between the functions delegated by the Constitution to the judiciary and prohibited to the legislature, and held that the legislature might constitutionally authorize the courts to grant divorces, on the ascertainment by them that the marriage obligations had been violated. This was under a special act of the legislature enacted subsequently to the violation for which the divorce was authorized to be granted,—a mode of procedure which has frequently been held constitutional by the courts of other states.

In *Gaines v. Gaines*, 9 B. Mon. 295, 48 Am. Dec. 425, it appeared that Gaines and his wife had separated, with an agreement between Gaines and certain trustees for his wife, to which she was not a party, whereby certain provision was made for her. Some five years afterwards she instituted a suit for divorce, to which he filed a cross bill alleging five years' abandonment. By supplementary answer to the bill he pleaded that since the filing of his original answer the legislature, by an act regularly and legally passed, after due notice to the wife, had divorced him, and she was no longer his wife. Nothing further was done in the suit until after his death, when the wife filed a bill of revivor, claiming arrears of alimony, as well as dower and widow's distributive share. The court, through Chief Justice Marshall, in passing upon the constitutionality of the special act, referred to the distinction drawn in *Maguire v. Maguire*, 7 Dana, 184, and *Berthelemy v. Johnson*, 8 B. Mon. 90, 38 Am. Dec. 179, between the legislative power of divorce for the benefit of the public, and the judicial nature of divorces granted for the benefit of the parties, and remarked upon the characteristic feature of constitutional government in Kentucky, "in which the departments of power are not only carefully distinguished and divided, but the depositories of power in each department are prohibited from exercising, except in cases expressly authorized, any power properly belonging to the others. Can it be consistent with this division and prohibition," asks the court, "that after one department, erected for the very purpose of ascertaining and enforcing existing rights according to existing laws, had obtained possession of the case, and jurisdiction over the parties and their rights, by a suit regularly before it in a form and for purposes authorized by law, another department, not intrusted with the function of deciding upon individual rights as founded in existing laws, prohibited from exercising judicial power, except in a few instances not embracing this, prohibited from passing any law impairing contracts or their obligations, prohibited from taking private property for public use, and having no pretext of a right to take it from A and give it to B, may, upon the application of one of the parties, take the case from the appointed and selected forum, and by its mere fiat put an end, not only to the contest as existing in the judicial tribunal, but to the

right itself, for the enforcement of which the party alleging injury had appealed to the tribunal appointed by the Constitution and the law, for the ascertainment of private rights and the redress of private wrongs?" Pages 300, 301, 48 Am. Dec. 427, 428. After arguing that the power under discussion would imply the further power to nullify by special act a judgment already decreed between the parties,—in effect, power of reversal by the legislature of judicial decrees,—and after considerable argument upon the failure of the evidence before the legislature to establish any ground of divorce in favor of the man, and the evident purpose, by resorting to the legislature, to defeat the wife's claim to provision out of his estate, which would inevitably have been granted in the pending suit, the court thus stated the question for decision: "The question, as thus developed by an analysis of the case, is not simply whether the legislature may, under any circumstances, constitutionally enact that A be divorced from B, but whether, when it is manifest that a party, after having sought a divorce in a judicial tribunal, and while his suit is there pending, abandons that forum, and resorts to the legislative power for the sole purpose of affecting and defeating the legal and equitable rights of his wife in his property, the divorce granted by the legislature on such application can, without disregarding the division of powers and distinction of departments as established by the Constitution, and the security of private rights of contract, and of property therein granted, be considered as asserting to any extent, the rights of property involved in the question of divorce. We are of opinion that it cannot." And again the question decided is stated: "The power of prescribing by general laws what causes shall constitute sufficient ground for a divorce, and what shall be the consequences of a divorce founded upon the ascertainment of these causes, is strictly within the legislative competency, and its exercise is intrusted to the legislative discretion. But the power of deciding upon the existence of these causes in individual cases, and of pronouncing the divorce and enforcing its legal consequences, is strictly judicial." There are some expressions in the opinion indicating that to some extent the court, in argument, based its conclusion upon the theory that, whatever power the legislature might have over the question of divorce by special act, it could not change the right of private property "by a special act of divorce, sought by one of the parties against the consent of the other, with the purpose or effect of operating upon the rights of property incident to the marriage relation, as created and sustained by the general laws applicable to that relation." But I am unable to conclude that by this opinion it was intended to deny the legislative power over the institution of marriage. But, if it be true that in the case last referred to a disposition was shown to limit the broad doctrine laid down in the *Maguire Case*, an equal disposition was shown in a subsequent case to restrict that limitation. In *Cabell v. Cabell*, 1 Met. (Ky.) 819, the husband and wife separated by mutual consent. By the terms of the separation, she was to be furnished with a riding horse and the sum of \$1,-

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000; and it was agreed in writing that either or both might apply to the legislature for a divorce, and that it might be granted without making further provision for the wife's support. Upon the husband's petition to the legislature, setting forth the facts, it was enacted that the marriage should be dissolved, and that they should be restored "to all the rights and privileges of unmarried persons." After Cabell's death, Mrs. Cabell claimed dower, upon the ground that the legislative divorce was unconstitutional and void, as—First, impairing the obligation of a contract, and therefore in violation of both Federal and state Constitutions; and, second, as being an exercise of judicial power by the legislature. This court (Judge Stites delivering the opinion) disposed of the first objection, *viz.*, that the legislative divorce impaired the obligation of a contract, as follows: "It has generally been considered by the courts of this country, Federal and state, that marriage, though in some respects a contract, is not within the constitutional interdiction of legislative acts impairing the obligation of contracts. In *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 639, Chief Justice Marshall observed that the Constitution of the United States had never been understood to restrict the general right of the legislatures of the states to legislate on the subject of divorces. And a similar view seems to have been entertained by Judge Story, in the same case. This doctrine seems likewise to have been acquiesced in by Chancellor Kent, who concedes 'that in ordinary cases the constitutionality of the laws of divorce in the respective states is not to be questioned.' 2 Kent, Com. p. 108. So, in Connecticut, it was held that legislative divorces for cause were constitutional and valid. *Starr v. Pease*, 8 Conn. 541. We are aware of no case in Kentucky in which this question has been directly raised or decided; but the general doctrine that the marriage contract is not within the constitutional inhibition has been certainly approved of by this court impliedly, if not directly." After referring to *Maguire v. Maguire*, 7 Dana, 184, and *Berthelemy v. Johnson*, 3 B. Mon. 90, 88 Am. Dec. 179, the opinion states what was considered to be the effect of *Gaines v. Gaines*: "And in *Gaines v. Gaines*, 9 B. Mon. 308, 48 Am. Dec. 430, in which it was held the legislature could not, by special act of divorce, sought by one of the parties against the consent of the other, affect prejudicially the rights of property of the latter growing out of, and incident to, the marriage relation, the general power of the legislature over the subject of divorces and the contract of marriage is not only not questioned, but is virtually conceded. In addition to these almost direct judicial recognitions of the power of the legislature, to some extent, over the marriage relation and contract, and the rights of the parties incident thereto, and in corroboration of the correctness of the doctrine that the power exists, we have had frequent and repeated instances of its exercise under the Constitution of 1799, acquiesced in by the executive, and, except in the cases referred to, never called in question. Every department of government in this state, since the adoption of the Constitution of 1799, and up to 1850

seems to have recognized the marriage relation, as has been said, 'as an organic institution, subject to the sovereign power of the state, not like mere contracts, to be dissolved by the mutual consent only of the contracting parties, but to be abrogated by the sovereign will, either with or without the consent of both parties, whenever the public good, or justice to both or either of the parties, will be thereby subserved,' and to have regarded 'the obligation as created by the public law, subject to the public will, and not to that of the parties.'" That part of the opinion in *Cabell v. Cabell*, which argues that the facts did not come within the rule laid down in the *Gaines Case*, as showing an exercise of judicial power by the legislature, sheds no light on the present question, and need not be here considered.

The doctrine to be deduced from these cases is that the marriage status, or relation existing between husband and wife, is, with all its attendant rights, subject to the sovereign power of the state. The relation may be entirely abrogated, and every resultant right destroyed, together with the relation from which it sprung. This may be done upon proof being made of ground for divorce which occurred prior to the enactment of the law which made it such ground. This is upon the ground that the marriage relation and its attendant rights are not included in the provision of the state or Federal Constitution as to laws impairing the obligation of contracts. If they were included in such provision, then it would follow necessarily that, wherever a married couple might go, they would take with them the law of the place where the marriage was contracted, as written into the marriage contract. If they sought divorce in another jurisdiction, it would be necessary to prove the law existent at the time the marriage was entered into in the place where it was contracted. And so, wherever they went, they would be governed in their relation to one another by such law, both as to their respective rights and duties, and as to their property rights, notwithstanding they might be domiciled in the new jurisdiction immediately after the marriage was consummated, and remain so domiciled until their death. It would follow necessarily that the act of 1846, which took from the husband his estate of freehold during the joint lives of husband and wife, which attached to him upon marriage, and gave him in lieu thereof merely the use of the wife's land, with power to rent it for not more than three years at a time, and made the husband's rights not subject to his debts, was unconstitutional, both as to the husband and as to creditors. No such doctrine has ever been announced, nor, so far as I am informed, been contended for. It would follow, also, that the act authorizing a circuit court to empower a married woman to act as a *feme sole* was unconstitutional. But, as said by Judge Stites in the *Cabell Case*, every department of the state government seems to have regarded the marital relation as created by the public law, subject to the public will, and not to that of the parties. The *vinculum* of the marriage may be broken, therefore, either by direct statutory action, or under statutory authority given to the courts; and this may be done for causes

antecedent to the statute. *Carson v. Carson*, 40 Miss. 349; *Berthelemy v. Johnson*, 3 B. Mon. 90, 38 Am. Dec. 179; *West v. West*, 2 Mass. 221; *Bigelow v. Bigelow*, 108 Mass. 88. If the foundation of the rights may be taken away, with the result of the absolute destruction of such rights in all property which has not been lawfully consumed or disposed of during the existence of the marriage, why cannot the rights themselves be altered or modified or taken away without the dissolution of the marriage itself? What peculiar sanctity attaches to a marital right which does not belong to the institution of marriage? Does not the greater power include the less? Is not the whole greater than any of its parts?

There are, it is true, a large number of cases, and numberless *dicta* which either state or imply a distinction between the marriage status and the rights of property which accrue under it. These may be found collated in 2 Bishop, *Married Women*, §§ 88-51, and in the note to *McNeer v. McNeer*, 19 L. R. A. 256 (142 Ill. 888). It may be remarked that the New York decisions upon the subject of marriage are not in accord with those of most civilized countries; it being there held that a divorce obtained in another state against a citizen of New York did not release the latter from the marriage bond, though perfectly valid in the state which granted it, and that a subsequent marriage of the man, who, it was admitted, had ceased to have a wife, was polygamy under the laws of New York. *Baker v. People*, 15 Hun, 256. And it is there held that divorce obtained by the wife does not bar dower. A distinction is also drawn in the cases between the various kinds of marital rights, by dividing them into vested and non-vested rights. The preponderance of the decisions is to the effect that both curtesy and dower are not vested rights, though it is difficult to see upon what reason the distinction is founded. A married woman has a present, fixed capacity and right of future enjoyment of an estate for life of one third of the lands of which her husband is seised. It is urged with some plausibility that it cannot be known, until her dower is assigned, exactly what property will be assigned to her; but her right to one third of what her husband is seised of is fixed. So of curtesy. It is claimed that it does not take effect until after the death of the wife. According to the common-law rule, this reasoning is not sound, and is stated to be unsound by Mr. Bishop: for upon the birth of the child the husband becomes tenant by the curtesy initiate. 2 Bishop, *Married Women*, § 43. An estate is none the less vested because it is not in possession. But a tenant by the curtesy initiate is an estate in possession. Upon the birth of the child, the husband's freehold estate by the marital right becomes extended, and merged into a tenancy by the curtesy initiate, under which he holds the land, even during the life of the wife. And yet the author of the note to *McNeer v. McNeer*, 19 L. R. A. 256 (142 Ill. 888), states that he has "been unable to find any case in which the power of the legislature to defeat the right of curtesy initiate has been denied, except where the husband's right, which was held to be vested, and beyond the power of the legis-

lature to destroy, consisted in whole or in part of his present right to the possession and profits of the wife's estate during coverture." And so of the husband's right to the wife's choses in action. He has a right to bring suit for, recover, and reduce them to possession. They then become his. And yet it is said that he has not a vested right to them, because, if he does not exercise the right, it survives to the wife, and it does not pass to his executor. For what other thing has a man a present, fixed right to bring suit and obtain recovery, to which he has not a vested right? Wherein is the husband's freehold by the marital right more a vested right than his right to sue for his wife's choses in action? And yet an act taking away the husband's right to recover the wife's choses in action is not unconstitutional. *Percy v. Cockrill*, 10 U. S. App. 574, 58 Fed. Rep. 872, 4 C. C. A. 78. It is not claimed that any part of the wife's property which had been lawfully consumed or lawfully disposed of during the continuance of the marriage relation, or before any statutory interference with the husband's rights, would be affected by a statute like the one under consideration; but it is insisted that, as between the husband and wife, all the rights growing out of the marital status are subject to the sovereign will.

In *Rugh v. Ottenheimer*, 6 Or. 281, 25 Am. Rep. 513, the plaintiff (appellant) was a married woman at the time of the adoption of the state Constitution. Judge Boise, delivering the opinion, states the question as follows: "The deed from Sebastian to plaintiff did not limit the land to her use, and the evidence does not show that in her trade with Gardner such a limitation was to be inserted in the deed. And, if the rule of the common law is not abrogated or modified by the state Constitution, then W. C. Rugh had an interest in this land which was liable to execution for his debts. It becomes, therefore, necessary to consider how far the real estate of women who were married at the time Oregon became a state was affected by § 5, art. 15, of the state Constitution. This section provides: 'The property and pecuniary rights of every married woman at the time of marriage, or afterward acquired by gift, devise, or inheritance, shall not be subject to the debts or contracts of the husband.'" After deciding that the clause of the Constitution was not merely prospective, and applicable only to future marriages, or property acquired after the establishment of the state government, the court continued: "So, the only real objection is that this section defeats or modifies the rights of the husband in his wife's property. Courts look with disfavor on all laws which are retrospective in their action, where they divest vested estates, or impair the obligation of contracts. It was by virtue of the marriage contract that the husband became, at common law, entitled to the use of his wife's land. And it was a fiction of the common law that husband and wife were one person, and the legal rights of the wife, on marriage, become merged in the husband; but this fiction, and the laws and decisions which grew up under it, were becoming modified in this country before the adoption of our Constitution,—the more ra-

tional and enlightened maxims of the civil law, which recognizes the rights of married women to property, having then been adopted in many of the states. And where the civil law was not adopted, cautious and judicious parents evaded the rigid rules of the common law by making ante-marital settlements for the benefit of future wives. If the section of the Constitution under consideration, which changes the common-law rights of the husband, is right and proper in cases of future marriages, or of property acquired in future, it is also right and proper to apply it to the lands of persons then married, unless such a construction cannot be given it. Against such a construction it is claimed that the husband by the common law became, on marriage, invested with a freehold in the lands of the wife, which estate continued for their joint lives. This estate, however, was conditional, and subject to be defeated by a divorce *a vinculo*. Schouler, Dom. Rel. p. 800. The marriage contract out of which this estate arose, was at common law one in which the state was interested, and over which it exercised legislative control. It is both *sui generis* and *publici juris*. Cord, Married Women; 1 Kent, Com. p. 418, note a; *Maguire v. Maguire*, 7 Dana, 188. In this last case the court, in speaking of the legislative control over marriage contracts, says: 'Marriage being much more than a contract, and depending essentially on the sovereign will, is not, as we presume, embraced by the constitutional interdiction of legislative acts impairing the obligation of contracts.' In view, therefore, of the nature of the contract by which the estate of the husband in his wife's lands is created, and the control which the legislature has always assumed over them, we think that without constitutional authority such contracts are subject to be altered and modified by the legislature. But this section of the Constitution is an expression of the sovereign will of the people, expressed in their Constitution, and in the making of that Constitution the convention represented the sovereign power, and was subject to the control of no higher power, except the Constitution of the United States; and, if they judged it right to exempt the lands of married women from the debts and contracts of these husbands, they could do so, and the only question is, What is the true meaning and scope of the section of the Constitution in question?" In this case the court held that the construction given was not controlled or affected by another provision of the Constitution, that "private rights shall not be affected by such changes." And upon this question the court continued: "The marriage relation, affecting the whole public, and being an institution of society, affecting more deeply than any other the foundations of social order and public morals, has always been under the control of the legislature. The legislature can, and often does, dissolve the marriage relation between parties, and when the relation is thus destroyed the marital right to use the wife's land, which is incident to such relation, ceases longer to exist. And we think this right is not strictly a private right, but is one which is incident to a relation in which the whole community is interested. We think,

therefore, that § 5, art. 15, is not modified by § 10, art. 18, of the Constitution, and that article 15, § 5, does include all the lands owned in their own right by married women at the time of marriage,—whether married before or after Oregon became a state."

We have seen that the legislature of Kentucky has twice modified the life estate by the marital right,—once by direct statutory action, and once by statute to be made effectual through the medium of the courts, by authorizing them to enter decrees clothing married women with the powers of a *feme sole*. No question has ever been made as to the constitutionality of either statute. On the other hand, it has been held in *Azbill v. Azbill*, 92 Ky. 154, that a decree authorizing a married woman to act as a *feme sole* may be entered against the objection of the husband, and after a contest made by him against it in the courts. The opinion in this case, by Judge Lewis, shows one of the grounds of the application to be the wife's ownership of personal property, which of course had vested in the husband by virtue of the marriage, and of land, in which a freehold estate by the marital right had vested in him. Does not this decree take away his vested rights, if any right is vested, under the Constitution, which springs out of, or takes its origin from, the marriage relation? If authorized by such a decree, the wife may by will defeat her husband's right of curtesy. *Garner v. Willis*, 92 Ky. 386. It is conceded that, if we are to be guided by the mere number of cases which have been decided upon this question the husband's contention must prevail. But if we are to reach our conclusion by reasoning from the nature of the marriage relation and the principle which underlie it, it must be decided in favor of the wife. It has appeared to me so plain, from a careful reading of the statute, that it was intended to be applied to existing marriages and property held thereunder, that I have not discussed the question, which, indeed, appears to be conceded in the arguments of counsel. Great difference of opinion may exist as to the policy of the statute in question. Many have doubted the wisdom of the enactments giving to married women greater freedom of contract and disposition of their property. Since the enactment of the statute, cases have arisen which furnish strong argument in favor of the view that it was unwise to take from the wife the restraints which, for her protection, the common law had woven about her. That, however, is a matter for the discretion of the legislature. But I have never had a doubt of the wisdom of the particular provision now under consideration. It has seemed to me monstrous that a brutal husband should have the legal right to put his wife to the election of either leaving him in possession of all her estate, or assuming the social stigma of a divorced woman, and that, having the use of her land, he should have the right there to entertain such guests as he saw fit, against her protest. It is unprofitable, however, to discuss the wisdom of the act. It has been adopted. My conclusion is that it was intended to take effect at once, as to all

property held by virtue of existing or future marriages, except as to such as had been theretofore lawfully consumed or disposed of, and, further, that it is not in conflict with the Constitution, for the reason that all rights obtained by virtue of the status of marriage are taken subject to the sovereign power of the state to alter and modify them. In my opinion, the judgment should be reversed.

Hazelrigg, J., dissenting:

Our statutes conferred on the husband, during the wife's life, no estate or interest in her lands, except an uncertain and contingent use thereof, with power to rent them for not more than three years at a time; and even this rent went to the wife if the husband died during the term. If the wife happened not to avail herself of her statutory right to incumber her estate for debts created for necessities for herself or for any member of her family, including her husband, and also happened not to avail herself (as she might, even in opposition to the husband's will) of the sweeping rights with which she may invest herself under the statute empowering her to act as a single woman, then the husband might enjoy the use of her lands. It is a stretch of legal nomenclature to call this an estate or interest in lands at all, and a clear confusion of terms to call such uncertain and contingent interest a vested estate or interest. The husband cannot sell this use, nor can his creditors subject it to their debts contracted either before or during his marriage. The argument of the cases relied on in the majority opinion finds its chief support in the recited fact that the husband's interest in the wife's lands may be sold or otherwise disposed of by him, or by his creditors. "It cannot be," said the court, in *McNeer v. McNeer*, 19 L. R. A. 360, 142 Ill. 888, 894, "that an interest in property, which can be seized on execution and sold by creditors in payment of their debts, is not such a vested interest as the fundamental law will protect from destruction by retroactive legislation." But, speaking of the modification of the old law by the Illinois statute, the court said further: "So long as she lived, however, his interest in her land lacked those elements of property, such as the power of disposition and liability to sale on execution, which had formerly given it the character of a vested estate." Mr. Cooley, in speaking of the husband's common-law right of curtesy initiate, says: "This right would be property subject to conveyance, and to be taken for debts; and must therefore be regarded as a vested right, no more subject to legislative interference than other expectant interests which have ceased to be mere contingencies and become fixed." Const. Lim. 6th ed. p. 440. I may take occasion, when time permits, to extend these views. I do not believe any case can be found holding such a restricted, shadowy, and uncertain use as is given the husband in his wife's lands under the Kentucky statutes in force when the parties to the marriage entered into that relation to be a vested estate or interest in lands.

Burnham, J., concurs.

MAINE SUPREME JUDICIAL COURT.

John W. HAGGETT

v.

Frances E. HURLEY *et al.*

(91 Me. 542.)

A married woman cannot form a partnership with her husband under Rev. Stat. chap. 61, § 4, making her liable for debts contracted before marriage and those contracted after marriage in her own name, as well as for her torts in which her husband took no part.

(May 28, 1894.)

EXCEPTIONS by Mrs. Hurley to rulings of the Supreme Judicial Court for Knox County made during the trial of an action brought to hold her liable as partner in a business conducted by her husband for goods sold and delivered for use in the business. *Sustained.*

The facts are stated in the opinion.

Messrs. W. H. Fogler and J. E. Hanley for defendants.

Messrs. C. E. Littlefield and A. S. Littlefield, for plaintiff:

There is no state wherein it is held that a wife cannot enter into a contract of partnership with her husband, where the decisions have not been rendered upon statutes essentially narrower and more restrictive in their language than the statutes of the state of Maine.

The state of Maine is in a very marked degree in its legislation in advance of any other state in the Union, and there is no court whose decision holding that a wife cannot enter into this contract would, for that reason, be an authority, even tending to sustain such a conclusion by our court under our legislation.

The question involved is settled by an act of the legislature passed in 1866.

Private and Special Laws of Maine 1866, chap. 52.

The act of 1866 reads as follows: "The contracts of any married woman, made for any lawful purpose, shall be valid and binding, and may be enforced in the same manner as if she were sole; and her separate property shall be holden by attachment, or levy on execution, in any suit brought to enforce such contract, but she shall not be liable to arrest, on any writ in such suit, or on any execution issued on a judgment recovered in the same."

This statute was condensed at the time of the revision in 1871, and appears in chap. 61, § 4, of that revision.

Blake v. Blake, 64 Me. 177.

Upon the authority of that case it is settled that a married woman has the legal right to make a contract "for any lawful purpose" with whomsoever she may choose, and with her husband equally as with anyone else.

Wentworth v. Wentworth, 69 Me. 247.

Lord v. Parker, 8 Allen, 127, is the first case

in Massachusetts holding that the wife has no power to enter into a contract of partnership with her husband. It is practically the original case in which this question was determined in this country, and all the cases which hold that such a contract cannot be entered into practically follow it as authority.

There is nothing in the statutes there discussed that gives her the broad and comprehensive power to enter into any lawful contract.

Lord v. Parker, 8 Allen, 127, is based upon the proposition that the statutes of Massachusetts do not authorize the wife to enter into a contract of any kind with her husband, and for that reason the wife could not enter into a contract of partnership.

Fowle v. Torrey, 185 Mass. 89.

In Massachusetts to-day, by virtue of an express provision of the statute, if a husband desires to make a conveyance to his wife he must employ the absurd and ridiculous mummery of making a conveyance to a third person, who then makes the conveyance to his wife.

Porter v. Wakefield, 146 Mass. 27.

Ever since 1852 in this state the husband and wife have enjoyed the common-sense right against which nothing but a common-law fiction can be urged, of conveying directly to each other.

Allen v. Hooper, 50 Me. 371.

The states in which the court hold with greater or less definiteness that the wife cannot make a contract of partnership with her husband, or any contract, are Washington, Wisconsin, Indiana, Maryland, Ohio, Texas, South Carolina, Florida, and Arkansas, following Massachusetts.

The states which hold that she may become a partner of her husband are New York, Illinois, Vermont, Kentucky, Missouri, Michigan, Alabama, and Georgia.

The cases holding adversely to our contention are—

Fuller & F. Co. v. McHenry, 83 Wis. 573, 18 L. R. A. 512; *Seattle Bd. of Trade v. Hayden*, 4 Wash. 263, 16 L. R. A. 530; *Artman v. Ferguson*, 78 Mich. 146, 3 L. R. A. 348; *Speier v. Opfer*, 73 Mich. 35, 2 L. R. A. 345; *Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607; *Payne v. Thompson*, 44 Ohio St. 205; *Scarlett v. Snodgrass*, 92 Ind. 262; *Mayer v. Soyater*, 30 Md. 403; *Carey v. Burruss*, 20 W. Va. 582, 43 Am. Rep. 790; *Miller v. Marx*, 65 Tex. 132; *Howard v. Stephens*, 52 Miss. 244; *Gwynn v. Gwynn*, 27 S. C. 540.

There are none of them that are in any proper sense in point in favor of defendant's contention; from the Massachusetts case down, the statutory provisions are so distinct and different that none of the cases have any weight in reaching a conclusion at bar.

Upon the other hand, there is a line of respectable authority holding distinctly, under less favorable legislation, that the wife can become a partner of her husband.

Suau v. Caffé, 122 N. Y. 308, 9 L. R. A. 593; *Hamilton v. Hamilton*, 89 Ill. 350; *Dressel v. Lonsdale*, 46 Ill. App. 455; *Dunifer v. Jecko*, 87 Mo. 284; *Schofield v. Jones*, 85 Ga. 823;

NOTE—As to partnership between husband and wife in business, see *Gilkerson-Sloss Commission Co. v. Sallinger* (Ark.) 18 L. R. A. 523, and *note*; also *Fuller & F. Co. v. McHenry* (Wis.) 18 L. R. A. 512; and *Vail v. Winterstein* (Mich.) 18 L. R. A. 515. 41 L. R. A.

Schlapback v. Long, 90 Ala. 525; *Wells v. Caywood*, 3 Colo. 487; *Snell v. Stone*, 23 Or. 327; *Louisville & N. R. Co. v. Alexander*, 16 Ky. L. Rep. 806.

The fact that the controversy at bar is between the creditors of the partnership and the partnership, and not between the parties to the partnership themselves, furnishes a decided distinction which would authorize us to maintain this action against the defendant, and charge her as a partner, even though as between herself and her husband it was not competent for her to enter into that relation.

Lane v. Bishop, 65 Vt. 575.

A wife is liable upon a joint promise with her husband.

Strickland v. Hamlin, 87 Me. 81.

The wife may be jointly liable with her husband, even under the Massachusetts statutes.

Reiman v. Hamilton, 111 Mass. 245.

Mr. Mervyn Ap Rice also for plaintiff.

Emery, J., delivered the opinion of the court:

The important and decisive question is whether a married woman can enter into the relation of a business partnership with her husband, and thus subject herself and her separate estate to liability for the partnership debts contracted in the name of the partnership. The plaintiff, of course, concedes that the affirmative of this question is without support from the common law, and must be based solely on some enabling statute. He contends, however, that it is fully sustained by the statute, Rev. Stat. chap. 61, § 4, the full text of which is as follows:

"Sec. 4. A husband married since April 26, 1852, is not liable for the debts of his wife contracted before marriage, nor for those contracted afterward in her own name, for any lawful purpose; nor is he liable for her torts committed after April 26, 1852, in which he takes no part; but she is liable in all such cases; a suit may be maintained against her, or against her and her husband therefor; and her property may be attached and taken on execution for such debts and for damages for such torts, as if she were sole; but she cannot be arrested."

The "all such cases" in which she is by the statute made liable are three: (1) "Her debts contracted before marriage," (2) "her debts contracted afterward [after the marriage] in her own name," and (3) "her torts committed after April 26, 1852, in which her husband took no part." The statute thus makes a distinction between her debts contracted before and those contracted after marriage. As to the former, she is made liable without restriction; as to the latter her liability is confined to those contracted "in her own name." This phraseology alone at the outset should make the court hesitate to declare that she is liable for a debt contracted after marriage, not by her in her own name, but by the partnership in the partnership name. The intention of the legislature to subject her and her separate estate to such a liability is not clearly apparent from the statute in its present form.

The plaintiff, however, contends that the language of the present statute is but a consolidation of Stat. 1866, chap. 52, which reads 41 L. R. A.

as follows: "The contracts of any married woman, made for any lawful purpose, shall be valid and binding and may be enforced in the same manner as if she were sole." This statute, read by itself, may seem very broad and inclusive. Read in connection with the whole body of the law, it will seem less so. For instance, the statute declares in the most unlimited terms that her contracts "may be enforced in the same manner as if she were sole," yet her husband cannot enforce her contracts with him in any manner. *Hobbs v. Hobbs*, 70 Me. 381. Again, a contract to marry is ordinarily for a lawful purpose, but this statute would not empower a married woman to make such a contract.

No single statute should be interpreted solely by its own words. Upon enactment it becomes a part of, and is to be read in connection with, the whole body of the law. Its interpretation is to be in the light of the general policy of previous legislation and of the long-established principles of law and equity. There is a presumption that by the new enactment the legislature intended some progress along the line, and did not intend any reversal of such established policy and principles. No new statute will be construed as intending such a reversal unless that intent unmistakably appears. *Landers v. Smith*, 78 Me. 212; *Cummings v. Everett*, 82 Me. 260.

That, under the statute of 1866, a married woman may make a contract with her husband, need not be questioned here. That such an authority to make contracts includes the power to enter into the relation of a business partnership with her husband, so as to subject herself and her separate estate to partnership liability, is more questionable. A business partnership between husband and wife is scarcely within the strict letter of the statute. The term "contract," in its ordinary legal sense, implies two opposite parties, or two opposite sets of parties. Each has in the subject-matter of the contract a right distinct and different from that of the other. Indeed, so marked is the difference, the right of the one is the duty of the other. If one is the vendor, the other, as to the same subject-matter, is the vendee. If one is bailor, or employer, or creditor, the other is bailee, or employee, or debtor. Again, a legal contract implies a right of action at law for its breach. The law of contract was first developed through the allowance of actions for the breach. A right of action is often the test of the existence of a legal contract. Without such right it is difficult to conceive of a binding contract. Neither in a contract nor in the part ownership of property is there any idea of community of interest, nor any idea of an entity apart from the individual contractors or owners. The right or interest of each part owner is separate and distinct from that of the others.

Partnership is often called a contract, as marriage is often spoken of as a contract; but it is rather a relation, a status, somewhat as marriage is a relation or status. *T. Parsons, Partn.* § 101.

In a partnership there are no opposite parties with separate and different interests in the subject-matter of the partnership. There is a com-

munity of right and interest. Neither partner owns any proportional part of any article of partnership property. Each has dominion over the whole article, and over the entire partnership property. Upon the death of either partner this dominion remains in the survivors. So long as the partnership continues, no right of action at law exists between partners as to any partnership property or transaction. Much like marriage partners, business partners are left to adjust themselves to one another as best they can until they call upon the courts to dissolve the relation and administer the estate. Again, in a partnership there is a notion of an entity apart from individual partners. In the Roman law the partnership was known as "*societas*." There is individual property and partnership property. A partner may owe the partnership and *vice versa*. A partnership usually has dealing and keeps accounts with each partner. In those jurisdictions where the Roman law is the basis of the jurisprudence, the entity of the partnership is frankly recognized, and actions are allowed between the partner and the partnership. *Fitcher's Succession*, 89 La. Ann. 362; *Liverpool, B. & R. P. Nav. Co. v. Agar*, 14 Fed. Rep. 615.

In common-law jurisdictions this entity is acknowledged, at least in equity, and to some extent at law, in spite of the technical rule that no action at law can be maintained between a partner and a partnership. *Pooley v. Driver*, L. R. 5 Ch. Div. 458; *Curtis v. Hollingshead*, 14 N. J. L. 402, 410; *Walker v. Wait*, 50 Vt. 668.

As to the character of the partnership relation, see also *Duinel v. Stone*, 80 Me. 884; *Woodward v. Cowing*, 41 Me. 9, 66 Am. Dec. 211.

It seems apparent that there is much difference between the partnership relation and the ordinary contract. So far as partnership is a contract, it is *sui generis*, and is not necessarily, or even ordinarily, brought to the mind by the use of the term "contract." The legislature, in using the word "contract" in this statute of 1866, without further definition or expression, has not, we think, expressed in terms an intent to authorize a married woman to enter into a business partnership with her husband. But, however unrestricted the term in the original statute, it should be noticed that in the revision (Rev. Stat. chap. 61, § 4) the term is expressly restricted to contracts in her own name. This restriction clause would seem to exclude contracts made in the name of the partnership, or in any other name than her own. The plaintiff's proposition certainly falls outside of the strict letter of the present statute.

Is such an authority within the spirit of the statute?

To determine this question we shall consider the rules and reasons of the anterior law, the character and trend of its successive modifications, and the reasons for them, and the course, purpose, and policy of legislation upon the subject. If the purpose of a course of legislation can be perceived, it is always to be presumed that the legislature intends to further that purpose, rather than to abandon it.

Before the recent statutes it had been for more than a thousand years the settled legal

policy of the Teutonic nations, at least, to exclude a married woman from all participation in business affairs. The husband, upon the marriage, took over all her personal property, and the use of her real estate for his life. He became responsible for her support, her debts, and her torts. She was not responsible for any debts, nor for any torts committed by her under her husband's influence. There was, of course, for this rule, a reason, which seemed sufficient for centuries. There is no warrant for saying that this reason was in the harshness or selfishness of the male sex, or in any desire to exploit the female sex. Though in early times manners were ruder, and life harder, the family and marital affections do not appear to have been weaker. The strength of these among the Teutonic races, as compared with their weakness under the liberal marriage laws of the Roman empire, excited the admiration of the historian. The reason appears to be in the almost instinctive desire to insure the unity,—the singleness of the family.

There is a general consensus of opinion that the family existed before the state, and that autocratic family government was the first of all forms of government. It seems to have been regarded as an axiom by publicists for centuries that the family was the basis of the state, and that the destruction of the family would be the destruction of the state. To insure the unity and preservation of the family, there seemed to be thought necessary a complete identity of interests, and a single head with control and power. The husband was made that head, and given the power, and in return was made responsible for the maintenance and conduct of the wife. To prevent any clashing of interests between husband and wife, to prevent any divisions or separations in the family, the wife was disqualified during coverture from having any business interests, and from subjecting her personal estate to the claims of creditors. Such at least was the common law.

This policy or rule undoubtedly worked hardship in individual cases. Some husbands were incompetent; some were beyond the seas; some exercised rigidly their marital authority over the property of the wife, but did not apply it to her support. The courts of equity began early to relieve and guard against these hardships by recognizing trusts for married women, by recognizing her conveyances, and even her contracts when clearly necessary for her support in the absence of her husband, by refusing aid to the husband in recovering the wife's property until he create a trust fund for her maintenance, and by other means. The doctrine of the wife's separate estate thus grew up in equity, and was cherished by the courts, but rather to insure the wife's support under the law than to weaken the law. Every attempt of the husband or of third parties to charge this separate estate was resisted. The wife was not allowed to charge it unless clearly for her own benefit. The idea of any legal relation between husband and wife other than that of marriage was not entertained.

In late years the legislatures have recognized these equitable doctrines, and have modified

the law, presumably in the same direction, and for the same purpose, to more fully insure the maintenance of the married woman. An examination of the course of legislation in this state will show this to be the general purpose. The first statute was § 9, chap. 57, Laws 1821, which empowered the court to authorize the wife to make contracts in her name, and sue in her name, during the time her husband may have abandoned her, and absented himself from the state. In 1841, by Rev. Stat. chap. 87, § 29, this former statute was made to include the case of a wife whose husband was in the state prison. By § 81 of the same act the land damages for land of the wife taken under eminent domain were to be secured to the wife's separate use. By §§ 81 and 82 it was provided that a married woman coming into the state without her husband, he never having lived with her in this state, should have power to contract as if sole until his arrival and resumption of his marital rights. The act of 1844 (chap. 117) was entitled "An Act to Secure to Married Women Their Rights in Property." Section 1 provided that a married woman could become seised and possessed of property in her own name, provided the same did not come in any way from her husband. Section 2 provided that when a woman possessed of property married, the property should continue hers as her separate property, exempt from liability for the debts of the husband. Section 3 authorized the wife to release to the husband the control of the property, and the right to dispose of the income "for their mutual benefit." By Stat. 1847, chap. 27, the wife was allowed to acquire property from her husband except as against his creditors. By Stat. 1848, chap. 73, she was granted the right to use all processes to enforce and defend her rights of property under the statute of 1844. By § 3 of the same statute she was authorized to dispose of her estate by will, and if she died intestate her estate was to descend to her heirs. By Stat. 1853, chap. 227, she was empowered to dispose of her separate estate, acquired under former acts, in her own name, as if unmarried. By statute of same year (chap. 291) the husband was freed from liability for his wife's debts, though he might still be joined in the suit against her. The wife could defend alone or with her husband, but was to be free from arrest. By Stat. 1855, chap. 120, she was again authorized to convey her separate estate by her separate deed. In 1856, however, by chapter 250, this right of conveyance was restricted to property not acquired from her husband or his relatives. As to such estate the joinder of the husband was required. By Stat. 1857, chap. 59, she was authorized to receive and sue for the wages of her personal labor performed for others than her own family. Rev. Stat. 1857, chap. 61, § 6, of the same year authorized marriage settlements. By Stat. 1863, chap. 148, she was authorized to engage in business upon her own account, and her contracts therein were made binding and enforceable against her separate property, but the husband and his property were to be exempt from liability therefor.

By Stat. 1863, chap. 214, she was authorized to take and hold property from her husband as security for a bona fide debt, or for payment

for money actually loaned. Next came the statute of 1866, which has been quoted in the early part of this opinion, and upon which the plaintiff relies. The next statute was that of 1876 (chap. 112), granting the wife all processes for the defense of her property and personal rights without control by her husband. By Stat. 1883, chap. 207, the husband was freed from liability for his wife's torts in which he took no part. The statute of 1889 (chap. 176) limited the necessity of the husband's joinder in conveyances to property conveyed by him directly to his wife. Here legislation upon the subject has apparently come to an end.

The main purpose running through all this legislation seems to have been to enable a married woman to acquire, hold, and dispose of a separate property, a property which should be entirely free from her husband's control. This purpose is made more manifest from the revisions of the statutes since 1866. If the statute of 1866 was intended to have the sweeping, comprehensive effect claimed for it by the plaintiff, it must have been understood to have superseded all the previous legislation designed to enlarge a married woman's rights and powers. The previous enlarging acts would have been regarded as obsolete, and dropped from the statute book upon its revision. But this does not seem to have been the understanding of the legislature. We find nearly all these prior statutes twice re-enacted in the revisions of 1871 and 1883, and they are still upon the statute book. Rev. Stat. chap. 61, §§ 1-5, 7-10. The statute of 1866 reappears in § 4, which enacts that a married woman shall be liable for all her debts contracted before marriage, and for those contracted afterwards "in her own name for any lawful purpose." The words "in her own name" were not in the act of 1866, and seem to have been added to bring that act into harmony with preceding acts. They seem to limit her power to contract to such contracts as she may make in her own name. While mere consolidation or condensation of the language of a statute in revision is not to be presumed to indicate a change of meaning, the addition of restrictive words not found in the original statute may indicate an intention or understanding that the statute is restricted in its effect. The words "in her own name" seem to indicate that the wife's power to contract is not unlimited; that it is confined to her separate business or estate. The legislature, by twice re-enacting most of the former statutes, and by using the words "in her own name" in the revisions, has certainly indicated that it did not understand that all disabilities and restrictions upon married woman were removed by the act of 1866. While the legislative construction of a statute is not binding upon the court, it is entitled to great respect.

In enacting these statutes the legislature was aware that they could not be extended by implication, but would be construed strictly as in derogation of the common law, and as modifying a long approved policy. Such was the settled rule of construction in this state when the statute of 1866 was passed. *Swift v. Luce*, 27 Me. 285; *Newbegin v. Langley*, 39 Me. 200, 68 Am. Dec. 613; *Brookings v. White*,

49 Me. 479. It has since been emphatically affirmed in *Hobbs v. Hobbs*, 70 Me. 381, and *Cummings v. Everett*, 82 Me. 260.

In view of this familiar rule of construction, it would be reasonable to expect that if the legislature really intended the act of 1866, as recast in the Revised Statutes, to extend beyond the contract of a married woman in her own name, and to include the power of entering into a business partnership with her husband, to contract in a firm name, and to subject herself and her separate estate to all the incidents, risks, and liabilities of such a relation, it would have used language more pointedly indicating such an intention. Up to that time the policy of the legislature had been to insure the maintenance of the wife and the security of her separate property from her husband's control, following out the equities suggested by the courts. There was manifested no intention to interfere in any other respect with the marriage relation, except to free the husband from liability for his wife's debts or torts. The husband was still left the head of the family, with the duty of support, and the right to direct the family life. The importance of family unity was still recognized. Though husband and wife might each have separate property or business interests, this was for the protection of the wife against the misfeasance or nonfeasance of the husband as to his duty.

There seems to be an incongruity between this policy of the legislature and the incidents of the partnership relation, and also an incongruity between these and the incidents of the marriage relation. In a partnership all the partners are equal in power and liability. A partnership acting through one partner may commit torts as well as make contracts, and each partner may thus be made liable for torts as well as debts caused by another partner. By entering into a business partnership with her husband the wife practically subjects her separate property and herself to liability for debts and torts caused by him,—the very liability the legislature, as well as the court, had been striving to prevent. Ordinarily, the husband would in fact carry on the business, and by reason of his position as husband would have an influence over his partner and the business not justified by any superior business capacity. The partnership relation could not be kept distinct from the marriage relation. The business partners could not forget they were also husband and wife. The essential element of perfect equality between business partners could not exist. The wife would be at a disadvantage. The husband would still be the head of the family, with marital authority. The assent he could not win from his business partner, he might extort from his wife. The result might often defeat the very purpose of the enabling statutes.

True, it may be best for the family and the state that the wife be permitted to enter into this additional relation with husband, and be subject to all its consequences. If we thought the legislature had clearly intended such an almost revolutionary change in the law of husband and wife, we should not assume to question its wisdom; but, in view of all the foregoing considerations, until it uses language

more explicit upon this point than it has heretofore used, we cannot think that such was its intention.

The plaintiff's counsel cites the cases of *Blake v. Blake*, 64 Me. 177, and *Wentworth v. Wentworth*, 69 Me. 247, and especially the language of the opinion in the former case, as inconsistent with the construction here put upon the statute. We do not find in either case an expression of an opinion that the word "contract" in the statute includes a business partnership between husband and wife. That point evidently was not in the mind of the court. We make no decision here inconsistent with those decisions or opinions. We do not decide that a wife may not make a valid contract with her husband, nor that she may not join with her husband in contracts with other parties, nor that she may not become a surety for her husband, nor that she may not make contracts through him as her agent. All these might be contracts "in her own name."

Both counsel with commendable diligence have made exhaustive citations of cases in other states. Such citations are of less assistance in the interpretation of statutes than in ascertaining general legal principles. Since our legislature does not appear to have adopted any statute of another state which has been construed by the courts of that state, but to have legislated independently, those decisions should not very much influence us in endeavoring to ascertain the true intent of our own legislature. Apart from any difference in the phraseology of the statutes of the various states, there may be wide differences in the history, in the general legislative and judicial policy, and in the habit of judicial interpretation in the different states, so that the opinions of their courts as to the intent of their legislatures might not indicate the intent of our legislature, even when they use similar language. Still it may be instructive to briefly survey some of the cases cited by plaintiff's counsel as antagonistic to our interpretation.

The only case necessarily and expressly affirming the plaintiff's contention is *Suaw v. Caffé*, 122 N. Y. 308, 9 L. R. A. 593. But that decision was by four justices against three in the second division only of the court of appeals. The narrowness of the majority detracts from the authority of the decision. In the other cases cited there were other elements, not present in this case, which were considered, and made to a large degree the basis of the decisions, especially the element of estoppel. These will appear in an examination of the cases. In *Lane v. Bishop*, 65 Vt. 575, the wife held herself out as a partner of her husband in running the hotel. The goods were sold upon her credit, and she personally promised to pay for them. The court practically held that she was estopped from denying her liability. The court said a wife could not be allowed to conduct a partnership in which her husband was a secret or open partner, to frequently receive all the benefits to be derived therefrom, and escape all liabilities. The case of *Louisville & N. R. Co. v. Alexander*, 16 Ky. L. Rep. 306, is briefly reported, but the wife seems to have been held liable upon the ground that she had held herself out as a partner. The language of the court is:

"She cannot say to the world, 'I am interested in this business venture with my husband, and my property is therefore pledged to the payment of the partnership debts,' and then escape liability." In *Snell v. Stone*, 28 Or. 827, the wife carried on the business in her own name, but her husband was interested in the business, and so informed the plaintiffs upon their inquiry about the time the account was opened. Upon this ground the husband was held liable. The wife made no defense, confessing her liability on her own contract made in her own name. In *Dunifer v. Jecko*, 87 Mo. 284, the husband and wife sued as co-owners and copartners in a newspaper. The defendant raised the point they could not sue as partners, but, inasmuch as he had dealt with them as partners, and had been allowed a set-off against them as partners, it was held that he could not now complain as to the joinder; but even this much was only held by three justices against two. *Dressel v. Lonadale*, 46 Ill. App. 454, was an action by husband and wife for board. The defendant insisted that the action should have been by the wife alone. The court held that it could make no difference to the defendant whether the action was by one or both, since the judgment would in this case be a bar. The court said briefly and *obiter* that, because husband and wife could contract with each other, they could form a business partnership. *Hamilton v. Hamilton*, 89 Ill. 850, contains *dicta* only. In *Schofield v. Jones*, 85 Ga. 816, Jones and wife were part owners of an hotel, and as such gave joint promissory notes. The wife pledged some of her separate property as collateral security for these notes. It was held that her pledge was binding on her. In *Schlappack v. Long*, 90 Ala. 525, the action was on a judgment against husband and wife as partners in an hotel business. The husband had held himself out to the creditor as a partner. Held, that by reason of such holding out, and because of the judgment recovered against him as such partner, he was now estopped from denying the partnership. In *Wells v. Caywood*, 8 Colo. 487, the action was ejectment, and the question was simply whether a husband could convey to his wife. The court adopted the liberal expansive rule of construction.

On the other hand, the following cases are cited: *Lord v. Parker*, 3 Allen, 127; *Artman v. Ferguson*, 78 Mich. 146, 2 L. R. A. 348;

Vail v. Winterstein, 94 Mich. 281, 18 L. R. A. 515; *Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607; *Payne v. Thompson*, 44 Ohio St. 193; *Fuller & F. Co. v. McHenry*, 83 Wis. 578, 18 L. R. A. 572; *Gilkerson-Sloss Commission Co. v. Salinger*, 56 Ark. 294, 16 L. R. A. 526; *Mayer v. Soyler*, 80 Md. 402; *Howard v. Stephens*, 52 Miss. 244; *Miller v. Marx*, 65 Tex. 182; *Salinas v. Turner*, 33 S. C. 231; *American Mortg. Co. v. Owens*, 25 U. S. App. 659, 72 Fed. Rep. 219, 18 C. C. A. 518. The plaintiff insists that these cases are not in conflict with his proposition, since in all the statutes interpreted was restrictive language indicating an intention to limit the power of contract by a wife to her separate property, or to her separate business affairs.

He assumes that there is no such restrictive language in our statute. As already intimated, we do not think this assumption is well founded. There is one restrictive clause at least. A married woman's contract, to be binding, must be "in her own name." Is not this a concise mode of saying that her contract must concern her own separate property, her own separate business? It could hardly mean the mere outward form or name of the contract. It must have referred to its character, its substance. We do not see such a dissimilarity between the substance of the statutes, as the plaintiff claims there is.

There is one late case, however, which goes to the extreme against the plaintiff's proposition,—*Seattle Bd. of Trade v. Hayden*, 4 Wash. 263, 16 L. R. A. 580. The statute was as follows: "Sec. 2406. Contracts may be made by a wife and liabilities incurred, and the same be enforced by or against her to the same extent and in the same manner as if she were unmarried." The term "contract" in this statute is certainly unrestricted by anything in the context. The action was against Mrs. Hayden to charge her as a partner in her husband's firm of J. P. Hayden & Co. The court, in an elaborate opinion, held that the partnership relation between husband and wife was not within the spirit of the statute. Only one justice out of five dissented. The plaintiff suggests that the "community" law of the state influenced the decision, but the opinion seems to arrive at its result in spite of, rather than on account of, the "community" law.

Motion and exceptions sustained.

MARYLAND COURT OF APPEALS.

ELLA L. CASTLEMAN

v.

Alexander E. TEMPLEMAN *et al.*, Exrs.,
etc., of James A. Templeman, Deceased.

(.....Md.....)

1. The right of a creditor of a corpora-

NOTE.—For powers of receiver outside of the jurisdiction in which he is appointed, see *note* to *Gilman v. Hudson River Boat & Shoe Mfg. Co.* (Wis.) 23 L. R. A. 52; also *Buwell v. Supreme Sitting, O. of I. H.* (Mass.) 23 L. R. A. 846; *Fawcett v. Supreme Sitting, O. of I. H.* (Conn.) 24 L. R. A. 41 L. R. A.

tion to proceed individually against stockholders is merged in a decree obtained by such creditor in another state in a court of competent jurisdiction, directing the collection of such claims by a receiver.

2. A receiver to whom a court of competent jurisdiction orders the payment of assessments by stockholders has no authority to consent to a decree in another state

815; *Baldwin v. Hosmer* (Mich.) 25 L. R. A. 739; *Holbrook v. Ford* (Ill.) 27 L. R. A. 324; *Commercial Nat. Bank v. Motherwell Iron & S. Co.* (Tenn.) 29 L. R. A. 164; *Failey v. Fee* (Md.) 33 L. R. A. 311; *Robertson v. Stead* (Mo.) 33 L. R. A. 208; and *Parker v. Lamb* (Iowa) 34 L. R. A. 704.

for the payment of such obligations to the creditor in whose suit he was appointed.

3. A receiver appointed in another state may, by comity, be allowed to sue on a demand due him, when the suit will not injuriously affect the interests of the citizens of the state in which the suit is brought or violate its policy or laws.

(April 1, 1898.)

APPPEAL by plaintiff from a decree of the Circuit Court for Baltimore City dismissing a bill filed to compel payment for stock held by defendant's testator in a foreign corporation against which plaintiff had recovered a judgment. *Affirmed.*

The facts are stated in the opinion.

Messrs. Pollard & Bagby for appellant.

Mr. J. Markham Marshall, for Thomas A. Bryan:

The contract on which the shareholder's obligation is founded, is not to pay a certain fixed sum upon a future contingency, but such sum or sums as may be required from himself and all other shareholders from time to time, not exceeding a certain sum, and regulated by the wants of the company.

South Staffordshire R. Co. v. Burnside, 5 Exch. 129; *Glenn v. Howard*, 65 Md. 40; *Scovill v. Thayer*, 105 U. S. 155, 26 L. ed. 978.

In the present case, there was nothing due and payable by any stockholder, until the Virginia court, exercising the discretion that the directors of the company had refused to exercise, took an account of the debts against the company, and ascertained the amount of the unpaid capital stock necessary to be called in to discharge those debts.

Glenn v. Williams, 60 Md. 93; *Hawkins v. Glenn*, 131 U. S. 880, 33 L. ed. 191.

The account prayed for by the plaintiff has already been taken by a court of competent jurisdiction in a sister state, whose decisions are entitled to full faith and credit in the courts of this state. The defendant is as much bound by that decree, as if he had been personally before the court, and can only plead to a suit brought to enforce it "never subscribed" or payment of his subscription in full.

Bagby v. Atlantic, M. & O. R. Co. 86 Pa. 291.

Plaintiff is not entitled to have an account against appellant or his codefendants in this case.

When the call was made in the present case, it created a legal obligation on the part of this defendant to pay the unpaid portion of his subscription, if any, not to the company or any creditor of the company, but to the receiver in charge of the company's affairs, when the call was made.

Graydon v. Church, 7 Mich. 86; *Iglehart v. Bierce*, 36 Ill. 138; *Booth v. Clark*, 17 How. 380, 15 L. ed. 167.

State comity demands that a foreign receiver, clothed with full power and authority to sue for a fund or property located in another jurisdiction, should be recognized and allowed to sue in the courts of that jurisdiction.

Hurd v. Elizabeth, 41 N. J. L. 1; *Booth v. Clark*, 17 How. 323, 15 L. ed. 164; *Bidlack v. Mason*, 26 N. J. Eq. 233; *Metener v. Bauer*, 98 41 L. R. A.

Ind. 427; *Merchants Nat. Bank v. McLeod*, 33 Ohio St. 174; *Chicago, M. & St. P. R. Co. v. Keokuk N. L. Packet Co.* 108 Ill. 317, 48 Am. Rep. 557; *Chandler v. Siddle*, 3 Dill. 477; *Lycoming F. Ins. Co. v. Wright*, 55 Vi. 533.

Messrs. Thomas I. Elliott, H. H. Rouser, and William L. Hodge for appellees.

Boyd, J., delivered the opinion of the court:

The appellant, as a creditor of the Salem Loan & Real Estate Investment Company, a corporation chartered under the laws of the state of Virginia, filed a bill in equity in this case to enforce the payment of subscriptions to the stock of that company alleged to have been made by James A. Templeman and Thomas A. Bryan, who were residents of this state. James A. Templeman having died before the bill was filed his executors and his widow, who was residuary legatee, for life, under his last will and testament, were made parties. The decree below having dismissed the bill of complaint as to them, the appellant took this appeal; and, the decree being in her favor against Thomas A. Bryan, he took an appeal, which will be disposed of in the next succeeding case. The appellant obtained a judgment against the company in the circuit court of Roanoke county, Virginia, and afterwards filed a bill in equity in that court, which resulted in a decree establishing an indebtedness due her by the company, on the judgment, of over \$7,000, and which appointed A. B. Pugh receiver, directing him to take charge of all the assets of the company (excepting the real estate, which was sold by a trustee named in a deed of trust, and only realized a few hundred dollars), and to collect the unpaid subscriptions from the resident stockholders who were named, together with the amounts due by each. Shortly afterwards another decree was entered, which confirmed a report of the receiver, which stated that he had collected \$1,050 from two resident stockholders, and had paid over to the plaintiff the balance, after deducting costs, and had issued executions against the other resident stockholders, which had been returned "No effects." It was then further decreed that the several nonresident stockholders of the company, as shown by the report of a commissioner previously filed in the case, pay to said A. B. Pugh, receiver, the amounts due by them respectively, as follows: T. A. Bryan, the sum of \$3,300; J. A. Settle, the sum of \$2,504; and J. A. Templeman, the sum of \$1,250,—the two decrees including all the stockholders, and the assessments being for the entire amount of subscriptions unpaid. The decree further provided that "said A. B. Pugh, receiver, is authorized to collect said several sums of money, and to sue for the same in any proper court or courts having jurisdiction of the person or property of the parties owing the same, whether in this state, or any other state, district, or territory of the United States. And said receiver shall report to the court."

The evidence shows that the amounts stated above were still due on stock in the name of Messrs. Templeman and Bryan, but it is denied that J. A. Templeman ever subscribed

for the stock. The directors of the company had made several assessments, amounting in all to 50 per cent of the stock, which had been paid; leaving the above amounts still due, as claimed by the appellant. The court below held that J. A. Templeman had not subscribed, or ratified the subscription in his name. From the view we take of the case, it will be unnecessary to discuss that question, as well as some others that were argued. Neither Templeman nor Bryan were served with process in the Virginia court, although they were made parties and proceeded against by an order of publication, and hence there could be no valid decree *in personam* against them; but in the case of *Glenn v. Williams*, 60 Md. 93, this court held that a decree of the Virginia court making assessments on stock of a Virginia corporation, held by stockholders who were not parties to the suit, was valid and binding on them, both as to the necessity for the assessment, and the amount thereof. It was there said that, "when the court obtained jurisdiction of the corporation, every stockholder, in his corporate capacity, was a party to the cause, and was supposed to be represented by the president and directors who were intrusted with the management of the corporate interest of all the stockholders;" and again it was said, "The judgment is conclusive, as against the corporation and its property; . . . and upon principle, those who hold its property or funds for the payment of debts ought to be concluded, except where there has been fraud or collusion." That decision has been distinctly approved of by the Supreme Court of the United States in *Hawkins v. Glenn*, 131 U. S. 330, 33 L. ed. 191, and other cases in this state, as well as elsewhere. Of course, it does not decide that one who is alleged to be a stockholder is precluded by such a decree, in a case to which he was not personally a party, from showing that he was not a stockholder, or that he had actually paid for the stock subscribed for by him; and when the fact is established that he is the owner of stock liable to assessment, which is not paid in full, the assessment made by a court of equity having jurisdiction over the corporation is binding on him. In the absence of authorized assessments by the president and directors, the court has the power to make them; and, until they are made, the stockholders are not called upon to pay. The authority of the president and directors to make assessments is the same in this case as it was in *Glenn v. Williams*, the statute requiring a payment of \$3 upon each share at the time of subscribing, and the residue as required by the president and directors. The appellant, having obtained the decree from the Virginia court, thus establishing the amount to be paid by each stockholder (being the balance of the unpaid subscriptions) filed this bill on behalf of herself and any other creditors of the company who might make themselves parties and contribute to the costs of the suit. In her bill filed in Virginia she alleged that there was no other creditor, and, as the decree of that court directed the money collected to be paid over to her, she apparently satisfied that court that such was the case. It is not contended that there are any creditors residing in this state, and we understand it to have been conceded

that the appellant did not reside here. The important question therefore for us to decide is whether the appellant, after obtaining such a decree in the Virginia court as we have referred to, can now sue in her own name to recover the amount of the unpaid subscriptions alleged to be due by Thomas A. Bryan and the estate of J. A. Templeman. The bill alleges that the receiver made demand upon the executors of Templeman and on Bryan for the balance alleged to be due by them respectively, but they refused payment, and that the receiver has taken no further steps to collect them, although it is not alleged that he was unwilling or unable to do so. So far as we are informed (and, indeed, it is so stated in the brief of the appellant), there is no statutory remedy in Virginia, in favor of creditors, directly against stockholders, for unpaid subscriptions. The right of the appellant, therefore, to proceed against them, must depend upon the principle established by courts of equity, that unpaid subscriptions to stock of an insolvent corporation constitute a trust fund for the payment of debts, and that, notwithstanding the company may have failed to make a call or assessment, a court of equity can make its own call for such amount of the unpaid subscriptions as is necessary to pay the debts. The appellant went into the Virginia court, and asked for the appointment of a receiver to take charge of the assets of the company including the unpaid subscriptions to its capital stock, and that the stockholders of the company, "after they shall have been definitely ascertained, and their respective liabilities in the premises determined, may be required to pay to such receiver, or to someone especially appointed by the court for the purpose, so much of their unpaid subscriptions respectively as may be found necessary to pay the plaintiff's said judgment and the costs of this suit." That court granted her prayer, and made the assessments relied on as the basis of this proceeding, but, in doing so, expressly directed that they should be paid to A. B. Pugh, receiver, and authorized him to sue for them. That decree, as we have said, is binding on and conclusive against the stockholders, to the extent of determining the necessity for, and the amount of, the assessment; and, until the assessment was made, there was no unconditional liability on the stockholders who had paid the calls made by the president and directors. But the appellant having obtained a decree in a court of competent jurisdiction, by which the receiver, and not herself, is authorized to collect the amounts due by the stockholders, as fixed by the assessment of the court, her right to sue for them is merged in that decree. Payment to the receiver would have been an absolute bar to her recovery, and he undoubtedly has the privilege of suing in any court which will recognize his authority. The only possible ground that she can now have to sue in another court must be the inability of that receiver, or anyone appointed in his place, if he decline or fail to act, to enforce the collections. In that event she might have some standing in a court of equity. But when her suit is founded on a decree, obtained at her instance, which directs the assessment made to be paid to another person, as an officer or representative of the court,

the inability of the latter to proceed should certainly be definitely and clearly established, in order to enable her to maintain the proceeding in her own name. Has that been done in this case?

That the receiver could have instituted suits in the name of the company, for his use, would seem to be clear. While the company is shown to be insolvent, it has not been dissolved so far as the record discloses. If it has not been dissolved, or if it has been, and the Virginia law authorizes suit to be brought by the receiver in the name of the company, there is express authority for such proceeding, in this state, in the case of *Lycoming F. Ins. Co. v. Langley*, 62 Md. 196. In that case a receiver had been appointed in Pennsylvania, and assessments had been made on a premium now given to the insurance company, by which the defendant promised to pay the amount named "in such portions and at such time or times as the directors of said company, may, agreeably to their act of incorporation, require." One of the assessments was made after the receiver was appointed by the Pennsylvania court, and this court held that the action could be maintained in the name of the company. We can see no distinction in principle between that case and this, so far as the right of the receiver appointed by the court of another state to sue, making the company the legal plaintiff. Many authorities have held that, unless otherwise provided by statute, a receiver must sue in the name of the party over whom he has been appointed if the legal title has not been formally assigned to him; and although in this state a receiver can sue in his own name, if so authorized by the court, he can also sue in the name of the original party. *State v. Wilmer*, 65 Md. 178; *Lycoming F. Ins. Co. v. Langley*, 62 Md. 196. But under the circumstances of this case, the receiver was not confined to that method of proceeding. We understand it to be conceded that there are no creditors of this company residing in this state; and, if not conceded, there is no allegation in the bill, or even suggestion in the testimony or other part of the record, that any of the citizens of this state are interested in the distribution of the assets of this company. The courts of this state had not taken jurisdiction over the subject-matter of this suit, or any of the property of the defendant, when this bill was filed. The subscriptions alleged to be due by Templeman and Bryan must be treated as Virginia contracts, as they were to be performed there, and the rights and liabilities of the parties under them are to be determined by the law of that state. *Fear v. Bartlett*, 81 Md. 446, 83 L. R. A. 721. The Virginia court had jurisdiction over the subject-matter, and has exercised it as far as it could in that state. Under these circumstances, we can see no reason why the receiver should not be permitted to sue here,—not because he, as a matter of right, can demand recognition in this state, but through comity between the states, which should permit the representative of the court of one state to sue in another, when such suit does not injuriously affect the interests of the citizens of the latter, or violate its policy or laws. It is true that as a general rule the functions and

powers of a receiver, for the purpose of litigation, are limited to the courts of the state within which he has been appointed, and that he has no extra territorial jurisdiction, and that such rule has been more than once announced by this court. *Bartlett v. Wilbur*, 53 Md. 485; *Lycoming F. Ins. Co. v. Langley*, 62 Md. 196; *Day v. Postal Teleg. Co.* 66 Md. 854. But as it is said in 20 Am. & Eng. Enc. Law, p. 244, in referring to the exception to this general rule, "the authorities supporting this exception are so numerous, and the language of the courts so favorable to its extension, that it seems certain the exception will soon, if it has not already, superseded the general rule." In *Bartlett v. Wilbur*, 53 Md. 485, and *Day v. Postal Teleg. Co.* 66 Md. 854, this court recognized the fact that there were exceptions to the general rule; but in those cases the exceptions did not apply, as the exercise of the jurisdiction of the courts of this state had been previously invoked in regard to the same subject-matter. In the case of *Hurd v. Elizabeth*, 41 N. J. L. 1, the question is very fully and ably considered. The decision of the Supreme Court of the United States in *Booth v. Clark*, 17 How. 322, 15 L. ed. 164, which has been followed by courts adopting the general rule, including our own, is fully recognized by the supreme court of New Jersey, which held that although a receiver could not sue, or otherwise exercise his functions, in a foreign jurisdiction, if such acts would interfere with the policy of the law in the foreign jurisdiction, or be to the detriment of resident creditors, yet, "after completely protecting its own citizens and laws, the dictates of international comity would seem to require that the officer of the foreign tribunal should be acknowledged and aided." To the same effect are the cases of *Merchants' Nat. Bank v. McLeod*, 38 Ohio St. 174; *Gilman v. Ketcham*, 84 Wis. 60 (23 L. R. A. 52, where there is an excellent note on the subject); *Boulware v. Davis*, 90 Ala. 207, 9 L. R. A. 601; *Bagby v. Atlantic, M. & O. R. Co.* 86 Pa. 291; *Metzner v. Bauer*, 93 Ind. 427; *Pugh v. Hurtt*, 53 How. Pr. 22; *Patterson v. Lynde*, 112 Ill. 196; and other cases cited in 23 L. R. A. 52, and in 20 Am. & Eng. Enc. Law, pp. 241-245. It will be seen, from an examination of those cases, that the tendency is to recognize the exception to the general rule, and to apply it when it can properly be done within the lines indicated above; and we are of opinion that the exception is a proper one, and will often promote the ends of justice, without in any way being in conflict with the previous decisions of this court. Of course, we do not mean that the privilege shall be granted to a foreign receiver to sue for all kinds of property; but for a debt of the character of that before us, we can see no reason why he should not be recognized and aided by our courts, under such or similar circumstances as those disclosed by this record, to which we have referred. The appellant has undertaken to meet this by saying that the Virginia receiver was made a party defendant to this bill, and has answered, consenting to a decree. But that will not do. The receiver is an officer of the court which appointed him, and is subject to its orders. He is, by the decree appointing him, expressly required to report to that court. It would seem to be clear.

then, that he has no authority to bind the Virginia court, or right to thus relieve himself of the duty assumed by him. Besides we have said the appellant has no standing in court to institute proceedings of this kind, because her right to proceed individually against the stockholders has been merged in the decree, obtained by her, directing the receiver to collect the very debts she now seeks to collect. She therefore cannot maintain the suit herself, nor can she confer on herself the right to sue the Templemans and Bryan by joining the receiver with them as codefendant. The proper course for her to pursue is to require the receiver to proceed, or, if he refuses to do so, to have another person appointed, who will obey the order of the court appointing him. It will not be out of place to say that, when a receiver appointed by the court of one state desires to sue in a court in another state, it

would be a proper practice for him to file a petition, setting forth such facts as we have indicated as sufficient to enable him to do so, in the latter court, asking permission to sue.

As we are of opinion that the bill of complaint must be dismissed on the grounds we have stated, it will not be necessary to discuss the other questions raised. Indeed, as it is intimated in the brief of the appellant that additional evidence can be obtained as to whether J. A. Templeman did subscribe for the stock, and as the evidence does not clearly show whether the notice to creditors was given by his executors before they settled their final account, relied on as a bar in this proceeding, we deem it proper not to pass on those questions, but will, for the reasons we have given, affirm the decree dismissing the bill in this case.

Decree affirmed, with costs to the appellees.

MINNESOTA SUPREME COURT.

Carl J. CARLSON, *Resp't.*,

v.

ST. LOUIS RIVER DAM & IMPROVEMENT COMPANY, *Appt.*

(.....Minn.....)

***1. Several miles above plaintiff's land the defendant corporation built two dams across the Cloquet river and one of its tributaries, each 20 feet high, and thereby restrained and collected large quantities of water of said streams, and, by means of sluices, flood gates, and locks, discharged said water in large volumes into the channel of said Cloquet river below said dams, whereby said river suddenly rose above its usual, natural, and ordinary high-water mark, and thereby overflowed the plaintiff's land, and greatly injured and damaged the same. Held, that this was a taking of the plaintiff's land, within the meaning of Const. art. 1, § 12, which the defendant had no right to do without plaintiff's consent, or without first paying compensation therefor.**

2. Conceding, without deciding, that the defendant corporation, under the

***Headnotes by BUCK, J.**

NOTE.—Right to use stream for floating logs.

The existence of the immense tracts of timber lands on this continent so situated that the only practicable method of getting the timber to market was to use the streams flowing through them has brought into prominence the question of the right to such use.

Such use is so low in the scale of navigation that if the stream is capable only of floatage navigation is likely to cease with the disappearance of the forests, and never to have been claimed where the forests are absent. Consequently the decisions upon the question of the navigability of such streams are limited to sections of the country having large tracts of timber land, and most of the decisions depend upon the particular facts affecting the case in hand, so that the general rules are not entirely uniform.

Stream must be floatable in its natural state.

There seems to be an agreement that to be subject to the public right of floatage the stream must be floatable in its natural state.

power conferred upon it by statute, has the right to build dams across navigable streams for the purpose of aiding in floating logs to market, and to mills during seasons of low water, yet this right is subordinate to that of the riparian owner to have his land free from overflow and damage caused thereby, if such damage is the result of so raising the waters beyond the natural, usual, and ordinary high-water mark.

3. As the defendant has illegally caused the plaintiff's land to be overflowed, and thereby damaged it, and as it threatens and intends to continue so to do, an injunction is a proper remedy.

4. The trial court committed no error in refusing defendant permission to introduce certain evidence, as it was immaterial.

(July 1, 1898.)

A PPEAL by defendant from an order of the District Court for St. Louis County denying a motion for new trial after judgment in favor of plaintiff in an action brought to recover damages for injury to plaintiff's land by defendant's booming operations. *Affirmed.*

The facts are stated in the opinion.

ject to the public right of floatage the stream must be floatable in its natural state.

So, one seeking to justify the running of logs down a stream which resulted in the breaking down of the dam of a riparian owner must show that the stream was navigable. *McLaren v. Buck*, 26 U. C. P. 530.

Hence the burden of showing that the stream is floatable is on the person seeking to use it as such. *Gwaltney v. Scottish Carolina Timber & Land Co.* 111 N. C. 547.

In accordance with this doctrine it has been held that the legislature cannot make a stream navigable by declaring it so if it is not so in fact. *Olive v. State*, 86 Ala. 38, 4 L. R. A. 33; *People, Ricks Water Co. v. Elk River Mill & L. Co.* 107 Cal. 221; *Morgan v. King*, 35 N. Y. 459, 91 Am. Dec. 58.

So, a private stream cannot be made public without compensation to the riparian owner. *Allison v. Davidson* (Tenn. Ch. App.) 30 S. W. 905.

Although in *Partridge v. Eaton*, 53 N. Y. 422, a

Messrs. Clapp & Macartney, for appellant:

So long as there is no application of the street to purposes other than those of a highway, any change, not negligently made, does not impose an additional servitude.

Willis v. Winona City, 59 Minn. 27, 26 L. R. A. 142; *Lee v. Minneapolis*, 22 Minn. 13; *Henderson v. Minneapolis*, 32 Minn. 319.

The right of the public to float logs on navigable streams is analogous to the right of the public to use a highway.

Page v. Mille Lacs Lumber Co. 53 Minn. 492; *Doucette v. Little Falls Improv. & Nav. Co.* (Minn.) 73 N. W. 847.

In this state a stream is navigable in the law, even though the natural capacity is actually, and often must be necessarily, aided by various contrivances.

Merriman v. Bowen, 33 Minn. 455; *Minneapolis Mill Co. v. St. Paul Water Comrs.* 56 Minn. 485; *Red River Roller Mills v. Wright*, 30 Minn. 249, 44 Am. Rep. 194; *Fieid v. Apple River Log Driving Co.* 67 Wis. 569.

stream was declared by the legislature a highway for floatage of logs, and provision made for compensation to riparian owners.

A statute declaring navigable streams which are now or at any time have been used for the purpose of floating logs or timber does not apply to a stream which is insufficient to float single logs except during extreme winter freshets and with the aid of dams to carry the flow of the water. *People, Ricks Water Co. v. Elk River Mill & L. Co.* 107 Cal. 221.

Although a statute declares a creek to be a public highway for the purpose of floating lumber, logs, and timber, if it is capable of this use only in periodical seasons of high water, it is a public highway only during those seasons. *Harold v. Jones*, 86 Ala. 274, 3 L. R. A. 406.

So, the general rule is that if artificial aids are necessary to make the timber float the stream will not be regarded as floatable.

The public right of navigation is measured by the capacity of the stream for valuable public use in its natural condition, and any attempt to create capacity at other times at the expense of private interests can be justified only by an assessment and payment of compensation. *Witheral v. Muskegon Booming Co.* 68 Mich. 48.

A stream is not floatable for the public which will not carry logs without the flood water from a storage dam and the blasting of rocks, cutting of trees on the banks, and the straightening of the channel by cuts, while even after all this thousands of logs are left in the stream on private property after the water has subsided so that they will no longer run. *DeCamp v. Thomson*, 16 App. Div. 623.

A stream is not navigable for the floatage of logs if logs cannot be run down it in ordinary water and dams have been used to facilitate the progress of the logs whenever it has been used for running them. *Smith v. Carlow* (Mich.) 72 N. W. 22.

A person cannot be indicted for obstructing a watercourse by building a dam across it if at the time he built the dam the stream was not navigable, although by private enterprise it has since been cleaned out and made so. *State v. Hickson*, 5 Rich. L. 447.

The doctrine of floatage cannot be extended to include small streams of only a few miles in length, although they rise during a few weeks in the year sufficiently high to be used to a limited extent, by the application of artificial means, to float logs at 41 L. R. A.

A stream is navigable though it may require additional facilities for floating the logs.

Lawler v. Baring Boom Co. 56 Me. 443; *Thunder Bay River Boom Co. v. Speechly*, 31 Mich. 386, 18 Am. Rep. 184; *Middleton v. Flat River Boom Co.* 27 Mich. 533; *Buchanan v. Grand River & G. Log. Running Co.* 48 Mich. 364.

Under certain circumstances a person navigating a navigable stream may, as incident, cause damage for which there is no remedy.

Thompson v. Androscoggin River Improv. Co. 54 N. H. 545; *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 504, 12 Am. Rep. 147; *Brown v. Collins*, 53 N. H. 442, 16 Am. Rep. 372.

It is not every taking, or encroachment upon private property, that amounts to a taking within the constitutional provision which forbids the taking of property for public use without just compensation.

Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 504, 12 Am.

short distance. *Haines v. Hall*, 17 Or. 165, 3 L. R. A. 609.

The public right of passage does not include any right to meddle with the rocks or soil of the bed of the stream. *Pearson v. Rolfe*, 76 Me. 380.

The public have no right to use a stream made floatable by improvements put upon it by the riparian owner. *Wadsworth v. Smith*, 11 Me. 278, 28 Am. Dec. 525.

But in Wisconsin a somewhat more liberal rule in favor of the public has been adopted. In one case it was held that a statute requiring the owner of a milldam to maintain chutes to accommodate such rafts as may navigate the river refers to such as may do so after the improvement of the navigation by the dam, and not in the natural state of the stream. *Volk v. Eldred*, 23 Wis. 410.

So, the legislature may authorize the construction of flooding dams without making compensation to the owners of mills who are injured by the interruption of the flow of the water. *Falls Mfg. Co. v. Oconto River Improv. Co.* 87 Wis. 184.

The legislature may authorize the improvement of the navigation of the stream and the taking of tolls for the improved facilities. *Tewksbury v. Schulenberg*, 41 Wis. 584.

And the fact that the Constitution makes the navigable stream a common highway, forever free, is immaterial. *Wisconsin River Improv. Co. v. Manson*, 43 Wis. 255, 28 Am. Rep. 542.

The Pennsylvania act of May 21, 1864, gave a corporation the right to improve the floatable navigation of White Deer Creek. *White Deer Creek Improv. Co. v. Sassaman*, 67 Pa. 415.

If the stream is in fact floatable the state may, for the purpose of developing the use of it, authorize dams and booms where their use will do more good than harm. *Pound v. Turck*, 95 U. S. 459, 24 L. ed. 525.

What streams are floatable.

There is some disagreement among the decisions upon the question what streams are floatable. Of course there are many streams the condition of which is so obvious that all must agree as to the public right in them.

Thus, a stream which is capable of floating logs in its natural condition is by nature a highway for that purpose. *Thompson v. Androscoggin River Improv. Co.* 54 N. H. 545.

A stream which is capable of floating logs at all

Rep. 147; *High Bridge Lumber Co. v. United States*, 87 U. S. App. 204, 69 Fed. Rep. 320, 16 C. C. A. 460; Gould, Waters, ed. 1883, § 90.

Messrs. Eckman & Stevenson, for respondent:

No one can cause the waters of a navigable stream to flow adjacent lands of another above high-water mark of the stream, without becoming liable therefor.

Re Minnetonka Lake Improvement, 56 Minn. 513; *Weater v. Mississippi & R. River Boom Co.* 23 Minn. 534; *McKenzie v. Mississippi & R. River Boom Co.* 29 Minn. 288; *Hackstack v. Keshena Improvement Co.* 66 Wis. 439.

An injunction is the proper remedy in the case at bar.

Morrill v. St. Anthony Falls Water-Power Co. 26 Minn. 222, 37 Am. Rep. 399; *Cotton v. Mississippi & R. River Boom Co.* 19 Minn. 497.

Buck, J., delivered the opinion of the court:

The plaintiff owns a farm containing 63 acres through which flows the Cloquet river,

the waters of which are discharged into the St. Louis river, and thence flow into Lake Superior. The defendant constructed and owns a dam extending across said Cloquet river, 20 feet high, and there constructed sluices, flood gates, and locks on the said dam, 12 feet high, which can be opened and closed by the defendant at will; and, when closed, the water in said river gathers and collects above said dam, and is retained in great quantities. The defendant also built a similar dam, with similar appurtenances, about 10 miles further up said stream, which also gathered said water the same as the other dam. There is a tributary to said Cloquet river called "Boulter Creek," which discharges itself into the Cloquet river above the plaintiff's land. Heretofore the defendant also built across said creek a dam and appurtenances similar to those built by it across Cloquet river, and which collected and retained large quantities of water above said dam. The defendant is a corporation duly created and organized under the laws of this state, for the avowed purpose, as set forth in

seasons except in summer is a floatable stream or water highway of the third class, affording a channel for useful commerce. *State v. White Oak River Corp.* 111 N. C. 661.

A stream which for eight or nine months in the year admits the floating of logs, and upon whose banks are large forests of pine trees, and which was omitted from the government survey, will be held to be navigable for the floatage of logs. *Ruckl v. Cone*, 25 Fla. 1.

Every stream which in its natural state and its ordinary volume of water is capable of being used for the purpose of commerce, of transportation of the products of the fields, forests, or mines on its banks in a marketable condition, is for the purpose of navigation to be deemed public. *Walker v. Allen*, 72 Ala. 453.

A river is navigable if it has sufficient depth naturally for valuable floatage of rafts. *Stuart v. Clark*, 2 Swan, 2, 58 Am. Dec. 49.

A stream which is of sufficient capacity to float the products of the forests through which it flows to market is subject to the right of passage. *Browne v. Scofield*, 8 Barb. 239.

A public easement for floating logs exists in a stream which is capable of being generally and commonly used for that purpose. *Collins v. Howard*, 65 N. H. 190.

A stream may be a public highway for floatage when it is capable in its ordinary and natural stage in the seasons of high water of valuable public use. *Thunder Bay River Boom Co. v. Speechly*, 31 Mich. 336, 18 Am. Rep. 184.

If the stream in its natural condition is capable of floating rafts, logs, etc., and has in fact been used for that purpose, the public has an easement in it. *Goodin v. Kentucky Lumber Co.* 90 Ky. 623.

If a stream is naturally of sufficient size to float boats or mill logs, the public have a right to its free use for that purpose. But such little streams or rivers as are not floatable, that is, cannot in their natural state be used for the carriage of boats, rafts, or other property, are wholly and absolutely private, not subject to the servitude of the public interest nor to be regarded as public highways by water. *Wadsworth v. Smith*, 11 Me. 273, 26 Am. Dec. 525.

A stream is subject to an easement for floating logs if for a considerable period of the year its usual and habitual condition is such that the public may rely upon it as a safe and convenient means of transporting the logs which are cut on its banks, and this condition recurs with the season of our 41 L. R. A.

usual rains and continues through it, even though occasionally interrupted by a decline of its waters. On the other hand, even though at irregular and uncertain intervals during the year, regardless of seasons, it is so swollen by rains that it is temporarily useful for purposes of transportation, it is not a navigable or floatable stream in such sense as to entitle the public to an easement over its waters. *Smith v. Fonda*, 64 Miss. 551.

On the other hand, it has been held that, if the stream is only a brook, although it may carry down saw logs for a few days during a freshet, it is not therefore a highway. *Haines v. Welch*, 14 Or. 319.

In *Morgan v. King*, 13 Barb. 234, it is said that a brook, although it may carry down saw logs for a few days during a freshet, is not therefore a public highway. But a stream upon which and its tributaries saw logs to an unlimited amount can be floated every spring for a period for from eight to ten weeks, and for a distance of many miles, and upon which many thousands will be floated for many years to come, is a public stream for that purpose.

So, a stream only a few rods in length, which can be of use to only one person and his successors in title, which is only floatable for a few days in the year, and even then requires to be cleaned out and deepened and to have a channel cut through solid ground a part of the way, is not navigable for floatage of logs. *Nutter v. Gallagher*, 19 Or. 375.

The courts are very well agreed as to the test of navigability, and that is capacity.

The true test in determining the right of public use in a stream is whether or not it is inherently and in its nature capable of being used for floatage. If it is, an easement in favor of the public exists whether it has been used by the public or not. *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209; *Ames v. Port Huron Log Driving & Boom Co.* 11 Mich. 143, 33 Am. Dec. 731.

A stream on which logs can be floated to market is navigable, and is a public highway for that purpose. *Felger v. Robinson*, 3 Or. 455.

The question of the right to float logs on a stream depends upon its capacity for such use. *Wiese v. Smith*, 3 Or. 445, 3 Am. Rep. 621.

The question of navigability depends upon whether or not the river in its natural state is such that it affords a channel for useful commerce. *Carter v. Thurston*, 56 N. H. 104, 43 Am. Rep. 584.

But in deciding what capacity is sufficient to make the stream navigable there is conflict, first, as to the quantity that can be floated at once, and

its articles of incorporation, of driving logs in the St. Louis river and its tributaries, and to improve said streams for log-driving purposes by clearing and straightening the channel thereof, closing sloughs, erecting sluiceways, booms of all kinds, side rolling, sluicing, and flooding dams, or otherwise for facilitating the running of loose logs and timber down said streams. The plaintiff resides upon said land, and uses the same for agricultural purposes. He brought this action to recover damages caused by the defendant during the years 1895 and 1896 by damming up the waters in said streams, and discharging the same into the stream below, so as to cause the water in the Cloquet river to overflow its banks and flow over plaintiff's land. The action was tried by the court, and it ordered judgment for the

plaintiff in the sum of \$15 damages, and for a permanent injunction as prayed for in the complaint.

The appellant claims that, under the statutes and decisions of this state, a stream that is used for driving logs with or without the aid, at times, of artificial means, is a navigable stream; that one of the functions of said stream is its use in getting logs to market; that, while the logs may be owned and their traffic conducted by individuals or corporations, the right of navigation is a public right; that the riparian owner on such stream takes his title subject to this public use, and in legal contemplation of the same, the same as the owner of lands adjoining a street or highway; and that if the use is necessary, and exercised with care and caution, the necessary

second, as to the duration of the floating capacity.

In regard to the quantity which can be floated at once, it has been held, on one side, that to attribute navigable properties to a stream which can only float a log is carrying the doctrine of navigability entirely too far, and is turning a rule which is intended to protect the public into an instrument of serious detriment to individuals, if not of actual private oppression. *American River Water Co. v. Amsden*, 6 Cal. 443.

So, capacity to float single logs is not enough to show the stream navigable; there must be capacity to float rafts, flat boats, and small vessels of light draught. *Irwin v. Brown* (Tenn.) 12 S. W. 840.

On the other side, in *Buffalo Pipe Line Co. v. New York, L. E. & W. R. Co.* 10 Abb. N. C. 107, it is said, by way of illustration, that the capacity to float logs, singly or together, to run rafts, however small, gives to all the public the right to use and navigate the stream.

And that statement represents accurately the results of many decisions holding streams to be floatable.

In regard to the duration of navigable capacity, the cases all agree that it is not necessary that the stream shall be floatable at all seasons of the year. *Holden v. Robinson Mfg. Co.* 65 Me. 215.

For, if the stream is only floatable at certain seasons of the year, it must be considered subject to public use at such seasons. *Thunder Bay River Boom. Co. v. Speechly*, 81 Mich. 336, 18 Am. Rep. 184.

So, a river is subject to public use if at the times of high water it is capable of floating logs for such a length of time as will make it useful and profitable to use it as a highway to float logs to mill or market. *Gaston v. Mace*, 33 W. Va. 14, 5 L. R. A. 392.

To make the stream floatable it must appear that business men may calculate with tolerable regularity as to the seasons the water will rise to, and remain at, such height as will enable them to make it profitable to use it as a highway for transportation of logs. *Burke County Comrs. v. Catawba Lumber Co.* 115 N. C. 690.

A stream to be public must have sufficient water as the result of natural causes to be capable of valuable floatage periodically during the year, and so continue long enough at each period to make it susceptible of beneficial use to the public. *Lewis v. Coffee County*, 77 Ala. 190, 54 Am. Rep. 55.

The weight of authority is that streams which are not floatable in the ordinary stage of the water, but only when swollen by heavy rains, and then only for very short periods, are not navigable. *Allison v. Davidson* (Tenn. Ch. App.) 39 S. W. 906.

A stream is not shown to be a public highway by the fact that at spasmodic and occasional periods in the winter and spring, as the result of

freshets, it has capacity of floating logs, if it was not exempted from the government survey and there is nothing to show the existence of a great number of forests on its banks or any number of people engaged in the lumber or rafting business so that it has been or may be utilized as a highway. *Payzer v. McMillan Mill Co.* 103 Ala. 395.

A stream which is only capable of floating down logs and timber during certain freshets is not a navigable river at common law. *Whelan v. McLachlan*, 16 U. C. C. P. 112.

A stream is not floatable for logs which is not capable of floating single logs except during season of high water, which is only about two months in the year, when even then they have to be aided in their passage by men in skiffs or on shore, and which has never been used for floating logs except in small quantities, and those were broken and the ends more or less broomed up. *Morgan v. King*, 35 N. Y. 459, 91 Am. Dec. 53, Reversing 30 Barb. 9.

Merely because a watercourse may, in times of periodical freshets for a few days or weeks, be capable of floating mill logs, the stream cannot be regarded as a highway for that purpose at any time, if in its natural state and during the greater portion of the year it is incapable of such floatage. *Hubbard v. Bell*, 54 Ill. 110, 5 Am. Rep. 98.

A stream which is found to be capable of floating logs only at high water or during freshets, without more, will not be held to be public. *Lewis v. Coffee County*, 77 Ala. 190, 54 Am. Rep. 55.

A fresh-water stream is navigable and a public highway when it is susceptible of being used in ordinary condition for a highway of commerce, over which there is valuable floatage. For a season or considerable part of the year it must contain that depth of water which fits it for such transportation. All those streams which have the requisite volume of water only occasionally as the result of freshets and for brief periods are unnavigable. *Morrison Bros. v. Coleman*, 37 Ala. 655, 5 L. R. A. 384.

In order that a stream may be floatable it must be capable of being used to an extent that would make it of some value as a highway, or at least it must appear that the stream will be used for some portions of the year, and the fact that it could be used for a few days in the rainy season, with the aid of dams, is not sufficient. *People, Ricks Water Co., v. Elk River Mill & L. Co.* 107 Cal. 221.

In *Munson v. Hungerford*, 6 Barb. 265, it seems to be assumed that mere capacity to float logs will not render the stream navigable. The court says it is not sufficient that a stream is capable during a period of two to four weeks in a year, when it is swollen by the spring and autumn freshets, of carrying down its rapid course whatever may be thrown upon its angry waters, to be borne at random over every impediment in the shape of dams

damage is a burden incident to the location of the land, and is *damnum absque injuria*; and that, while the land upon which this burden is imposed might be condemned for that purpose, yet the defendant, being a quasi public corporation, is entitled to all the rights to navigate the river which the public possess; and that, though this navigation may impose a temporary and incidental burden, it does not impose any liability. In other words, it claims the legal right to build dams across natural non navigable streams, obstruct the natural flow of their waters, collect them in large quantities, and discharge them, as its necessities require, upon the lands of the riparian owner, in such quantities as to raise the stream to an unnatural and unusual height, and thereby overflow his lands, and destroy his

crops and otherwise injure his said property. The court found as a fact in this case that the streams here involved were non-navigable, and that the defendant, by means of its dams and appurtenances so constructed, enabled it to collect and restrain large quantities of waters of said streams, which it vented and discharged into said Cloquet river in unusual and unnatural quantities, whereby it flowed upon plaintiff's land, to his damage. The evidence tends to show that the overflowing of plaintiff's land was not the result of a mere casual trespass, but the natural and necessary effect of the defendant's plan or scheme of improving the navigation of the stream, which will recur whenever these improvements are utilized. This, in our opinion, was a taking of his property, which it had no right to do without com-

or bridges which the hand of man has erected. To call such a stream navigable in any sense is a palpable misapplication of the term.

And that case was followed in *Curtis v. Keesler*, 14 Barb. 611.

The North Carolina decisions at first followed this rule.

A stream which is not capable of floating logs unless there is a freshet is not of public use. *Gwaltney v. Scottish Carolina Timber & Land Co.*, 111 N. C. 647.

If the stream is only floatable in occasional freshets, it is not in law a floatable stream, but if the freshet should rise from the natural rainfall for a sufficient period to make the stream useful to the public, it may be considered as floatable. *Gwaltney v. Scottish Carolina Timber & Land Co.*, 115 N. C. 579.

But in a later case it held that if the stream rises eight or ten times a year high enough to carry logs over the shallows, at irregular intervals, and remains so for from twenty-four to forty-eight hours, it is floatable. *Burke County Comrs. v. Catawba Lumber Co.*, 116 N. C. 781. Overruling the statement to the contrary in 115 N. C. 600.

And that appears to be the Pennsylvania rule.

Creeks and small rivers are private property, but if of sufficient capacity at any stages of the water to be used for transportation of lumber or other goods, they are held subject to that public easement which our English ancestors guarded with great jealousy. *Barclay B. & Coal Co. v. Ingham*, 86 Pa. 194.

Other tests have sometimes been employed to aid in determining the navigable capacity of the stream. One is that of usage.

In *Burroughs v. Whitman*, 50 Mich. 279, it is said that in the fifty years during which a certain county had been converted from a wilderness into a garden no one had ever thought of running a log or stick of timber down the stream flowing through it, the navigability of which was in question, and it was further said this is pretty nearly conclusive evidence that the stream has never been susceptible of public use for floatage, either valuable or otherwise.

In *Berry v. Carle*, 8 Me. 269, it is assumed that to make a stream navigable for timber above where the tide ebbs and flows it is necessary that it should have assumed the character of a navigable stream by long usage.

However, it has been held that in case of a stream navigable throughout the year it is sufficient to show adaptability for the purpose of navigation or valuable floatage at the usual stage of the water, without reference to the past, present, or prospective use of the stream for these purposes. *Olive v. State*, 86 Ala. 88, 4 L. R. A. 83.

If the right to raft timber down a stream has been 41 L. R. A.

used for twenty-six years, it cannot be disputed by the riparian owner. *Shaw v. Crawford*, 10 Johns. 236.

If the stream has been used for floating logs for more than twenty years, it must be considered a highway for that purpose. *Ford Lumber & Mfg. Co. v. McQueen*, 14 Ky. L. Rep. 621.

In *Pierpont v. Loveless*, 72 N. Y. 216, Reversing 4 Hun, 696, it was held that after the stream had been used for thirty years, and the legislature had declared it a public highway for floating logs, and had made appropriations for improving its navigability, a town cannot allege that the putting of logs into the stream for floatage was unlawful so as to render the one doing so liable for a bridge destroyed by the logs.

A stream which has only been used by a few persons for floating logs, not more than three or four in any year, and then only from three to six days, is not shown to have become public by prescription, although the use continued for thirty years. *Meyer v. Phillips*, 97 N. Y. 485, 49 Am. Rep. 538.

Another element sometimes mentioned is the amount of timber which would seek an outlet through the stream.

In case of a stream which is suitable for purposes of transportation only during certain periods the inquiry relates to its fitness and the period of its capacity for valuable floatage, the number of individuals interested, and the extent of the public interest involved in its use for transportation, the length of time previously used by the public, and its prospective public use, and whether the bed of the stream was embraced in the government surveys of the territory through which it runs, or was excluded therefrom. *Olive v. State*, 86 Ala. 88, 4 L. R. A. 83.

A stream which can be used for only 6 or 7 miles, and which has never been used by anyone for floating logs, while there is not sufficient timber on its banks to make it of public use, cannot be held to be public because an individual has some timber on its banks which he wishes to float to market and it is capable of floatage for a short time at periods of freshets. The public must be interested before a stream can become a public highway. *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439.

In a small private stream there is no right to attempt to float logs which have been brought by rail from a distance, since the right to use the stream for floatage is based on its natural surroundings, and rests on convenience, if not necessity. *Kooperman v. Blodgett*, 70 Mich. 610.

Again, the necessity of going upon the banks to aid in propelling the logs has been made the subject of consideration.

When a stream is inherently and in its nature capable of being used for the purpose of commerce for the floating of rafts or logs, the public easement

pensation. It was an invasion or violation of plaintiff's private rights, which he suffered not in common with the public, but as damage solely to his own private property. We may concede without deciding that, under the power conferred by the state upon this defendant corporation, it has the right to build dams across streams not navigable in fact, for the purpose of aiding in floating logs to market and to mills during seasons of low water. He has a right to insist that his land shall not be taken for private purposes at all, and not for public purposes without just compensation. "The state has not the right, without making

exists. It is immaterial that it may be necessary for the persons attempting to float logs thereon to use its banks. A distinguishing criterion consists in its fitness to answer the wants of those whose business requires its use. Its perfect adaptation to such use may not exist at all times, although the right to it may continue and be exercised whenever an opportunity occurs. They need not be floatable at their ordinary stage. But if the stream cannot be used without going upon its banks to propel what is floating, such fact would evidence its want of capacity for public use. *Brown v. Chadbourne*, 81 Me. 9, 60 Am. Dec. 641.

Streams which are so small and shallow that no logs can be driven in them without being propelled by persons traveling on their banks are not navigable in any sense to give the public a right of way in them. *Treat v. Lord*, 42 Me. 552, 66 Am. Dec. 296.

But the mere fact that it is convenient, and that persons are accustomed to use the banks to aid the floating of their logs, does not show that the stream is not navigable. *Olson v. Merrill*, 42 Wis. 203.

In some cases the floatability has been assumed without decision.

In *Dwinnel v. Barnard*, 28 Me. 554, 48 Am. Dec. 507, it was assumed that the public had a right to float logs in a stream for the purpose of determining the public right to use a cut which carried the water of the stream across private property.

In *Davis v. Winslow*, 51 Me. 264, 289, 81 Am. Dec. 573, it was agreed that the stream was of sufficient size to float logs, and the rights of the parties were adjudged accordingly.

In *Scott v. Willson*, 3 N. H. 321, it is said that the Connecticut river has been so long used by the public for rafting that it must without question be considered as a public highway.

And that ruling was recognized in *Barron v. Davis*, 4 N. H. 338.

In other cases the question of floatability has been regarded as a question of fact.

Whether a stream is capable of being used as a passageway for the purpose of commerce is a question of fact for the jury. *Treat v. Lord*, 42 Me. 552, 66 Am. Dec. 296; *New England Trout & S. Club v. Mather*, 68 Vt. 338, 38 L. R. A. 569.

But, of course, that must be under competent instructions as to what constitutes floatability.

Necessity.

A way of necessity cannot be claimed down a stream if there are other modes of getting the logs to market. *DeCamp v. Thomson*, 16 App. Div. 523.

Artificial channel.

An artificial channel made for the purpose of improving the navigation of a stream and of lessening the expense of driving logs therein to all persons choosing or desiring to use it, if left without gates or guards and used by all without objection from the owner, will be held to have been dedicated to the public so that the owner cannot recover for its use. *Weatherby v. Meiklejohn*, 56 Wis. 76, 41 L. R. A.

compensation, to take or destroy the property of riparian owners in making a watercourse navigable when it is not so by nature, or in appropriating such watercourse to the public use by artificial erections or improvements." *Weaver v. Mississippi & R. River Boom Co.* 28 Minn. 534; *McKenzie v. Mississippi & R. River Boom Co.* 29 Minn. 288; *Re Minnetonka Lake Improvement and Carpenter v. Hennepin County Comrs.* 56 Minn. 513. The rule laid down in *Gould on Waters* (§ 103) is this: "A corporation which is authorized by statute to construct booms upon a river for the purpose of holding and storing logs, acquires thereby

Construction of statutes.

A statute making a stream navigable for boats and rafts will include logs run singly without being formed into rafts. *Dedrick v. Wood*, 15 Pa. 9.

The Canadian statute provides that it shall be lawful for all persons to float saw logs down all streams in upper Canada during the spring, summer, and autumn freshets. *McLaren v. Buck*, 26 U. C. C. P. 539.

The Canadian statute gives no right to float timber on streams which are not floatable in their natural state. *Boale v. Dickson*, 13 U. C. C. P. 337; *Whelan v. McLachlan*, 16 U. C. C. P. 162.

Those cases were, however, overruled in *McLaren v. Caldwell*, 6 Ont. App. Rep. 456, and the court held that all streams which were in fact capable of floating logs were made subject to the public right by the statute, although they had become so by improvements made upon them by their owners.

But that case was in turn reversed, and the authority of *Boale v. Dickson* restored in *McLaren v. Caldwell*, 8 Can. S. C. 436.

Finally the privy council reversed the supreme court, and overruled the authority of *Boale v. Dickson*, and held that the statute is not limited to streams which are capable of floating logs in the natural state, but extends to all streams, including those which had been made floatable by improvements made by riparian owners. *Caldwell v. McLaren*, L. R. 9 App. Cas. 392. *Blackburn* says when once it is shown that there is a sufficient body of water above and below the spot where the natural impediment exists, though that natural impediment renders the stream at that spot practically unfloatable, it does not make it cease to be a part of the stream in the ordinary sense of the words.

Manner of use.

The right of the log driver is to use the stream in its natural capacity, and he cannot crowd the stream far beyond such capacity, nor can he hold back the water for the purpose of obtaining a flow to move his logs down the stream. *Koopman v. Blodgett*, 70 Mich. 610.

A person has a right to drive timber or logs down a public stream without confining them in rafts or clamps and putting competent persons on such rafts or clamps to guide them,—at least so far as such driving does not impinge upon the rights of other persons to navigate the stream in any manner allowed by law. *Sullivan v. Jernigan*, 21 Fla. 264.

A person having a right to use a river for the purpose of running logs will not be permitted to let them run over a fall in such a manner as to destroy structures erected by the government to preserve the fall, but will be required to guide them into the chute provided for taking them over it. *United States v. Mississippi & R. River Boom Co.* 8 Fed. Rep. 543.

Floatable streams are public highways.

Rivers capable of floating rafts and lumber to

no right to appropriate and use the banks, except by the consent of the owners, or in the exercise of the power of eminent domain. This property cannot be taken for a purely private purpose; and the fact that booming companies and companies for the improvement of the navigation are quasi public corporations, and hold their franchises for a public use, does not give them the privileges of a riparian owner, or enable them, by legislative authority, to devote the river banks to the purposes of their charter, without compensation to the riparian owners. Compensation is also necessary where the banks are flooded by public improvements, or by dams

erected for the collection and storage of logs, or by a collection of logs in great numbers." It may be that the construction of the dam, with locks and sluiceways, and the collection of waters, was a right conferred by statute, as well as the right to vent and discharge the same into the channel of the Cloquet river for the purpose of floating logs, and that it only discharged such water in sufficient quantity or volume so that, if kept at or within the usual, natural, and ordinary high-water mark, it would be exercising a legal right; but the evidence shows that it went beyond this, and, in so doing, did not exercise any such right.

market are public highways. *Whisler v. Wilkinson*, 22 Wis. 572; *Sellers v. Union Lumbering Co.* 39 Wis. 525; *Cohn v. Wausau Boom Co.* 47 Wis. 524; *Gerrish v. Brown*, 51 Me. 256, 81 Am. Dec. 539.

A river, so far as it is navigable for logs, is but a public highway by water, and the right to float is but a right of passage, including only such rights as are incident to the use of the stream for that purpose and necessary to render such use reasonably available. *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

Rivers and streams which are of sufficient size and channel that they may be used for the purpose of floating logs are public highways. *Spokane Mill Co. v. Post*, 50 Fed. Rep. 429. But the court in refusing to compel the entire removal of all obstructions from the stream says the water, as well as the light and air and the rest of nature's bequests, are not for the sole benefit and use of any single individual, corporation, or interest, but for all so far as they can be usefully appropriated.

The use of the Mississippi river as a highway to run logs down to market is a right common to all. *United States v. Mississippi & R. River Boom Co.* 3 Fed. Rep. 548.

A stream which may be beneficially used by the public for rafting lumber is for that purpose to be deemed a highway. *Palmer v. Mulligan*, 3 Cal. 315, 2 Am. Dec. 270.

If the stream is floatable the owner of a dam cannot take toll for passing logs through his dam. *Witt v. Jelfcoat*, 10 Rich. L. 389.

But the mere fact that a stream is capable of floating logs does not make it navigable within the meaning of the Constitution and laws of the United States. *Duluth Lumber Co. v. St. Louis Boom & Improv. Co.* 17 Fed. Rep. 419.

Correlative rights of log and riparian owners.

On a stream navigable only by floatage it cannot be said that the right of floatage is paramount to the use of the water for machinery. Each right shall be enjoyed with due regard to the existence and protection of the other. *Middleton v. Flat River Boom Co.* 27 Mich. 533.

The right to obtain water power from a stream for mill purposes, and the right to float logs on the stream, modify each other. *Buchanan v. Grand River & G. Log Running Co.* 45 Mich. 364.

The rights of the public to run logs in a navigable stream are not subordinate to the rights of riparian owners, but are concurrent, and each must be exercised without unnecessarily interfering with the other, and without negligence. *White River Log & Boom Co. v. Nelson*, 45 Mich. 578.

The riparian proprietors may change the natural condition of the stream only so far as changes are possible without any infringement of the public right. *Connecticut River Lumber Co. v. Olcott Falls Co.* 65 N. H. 290, 18 L. R. A. 626.

One wishing to use the stream for floatage has no rights which are paramount to those of the riparian owner, nor has the riparian owner the

right to monopolize the stream to the prejudice of the right of floatage. *A. C. Conn Co. v. Little Suamico Lumber Mfg. Co.* 74 Wis. 652.

But in North Carolina it is held that the public easement of floatage is paramount to that of riparian owners. *Burke County Comrs. v. Catawba Lumber Co.* 116 N. C. 731.

A millowner is under no obligation to provide a better way over his dam than would be afforded by the natural flow of the stream, and in case there is not water enough in the stream to float the logs in the absence of the dam, he is not bound to furnish a passage. *Pearson v. Rolfe*, 76 Me. 380.

The owners of dams on floatable streams are required to furnish reasonable facilities for the passage of logs, but need not provide the same facilities as would exist if the dams were not present. They are not required to provide for the passage of large rafts without breaking them up. *Foster v. Seaport Spool & Block Co.* 79 Me. 508.

A sluice which was sufficient for the passage of logs which would come to it in the natural condition of the stream when the dam was erected need not be enlarged to accommodate logs which come down after the navigability of the river has been improved by the removal of obstructions and erection of storage dams for the accumulation of water. *Stratton v. Currier*, 81 Me. 497, 3 L. R. A. 809.

The owners of dams erected under the Pennsylvania act of 1893 must provide a chute properly constructed and adapted to the stream and dam, to enable the navigator to pass safely by ordinary care and diligence in running it, and having his raft constructed with the usual skill and care. *Newbold v. Mead*, 57 Pa. 487.

A bridge may be authorized over a stream which is floatable for logs only $1\frac{1}{2}$ miles above the bridge, and when only one person is interested in the floatage, although the effect will be to cut off all possibility of floating logs on the stream. *Peters v. New Orleans, M. & C. R. Co.* 56 Ala. 528.

A bridge may be erected over a stream which is navigable for rafts. *Spring v. Chase*, 2 Dane, Abr. 686.

A statute prohibiting the bridging of navigable rivers will not apply to a stream which, although navigable for rafts, has never been used for such purpose. *State v. Gilmanton*, 14 N. H. 487.

A dam cannot be placed across a stream which in its natural state is capable of floating logs without authority of the legislature. *Knox v. Chaloner*, 43 Me. 150, 157.

The owner of a milldam cannot interfere with the right of the public to float logs on the stream. *Parks v. Morse*, 52 Me. 260; *Lancey v. Clifford*, 54 Me. 487, 92 Am. Dec. 551.

The public right of floatage on the stream is not such as to prevent the erection of dams, drags, and flumes, which do not prevent a reasonable chance for public passage. *Pearson v. Rolfe*, 76 Me. 380.

The owner of a mill site cannot maintain a dam so as to interfere with the public use of the river as a stream navigable for rafts and logs. *Dwinnel v.*

It invaded the plaintiff's legal right by artificial means, and whereby his premises were damaged,—a burden which plaintiff was under no obligation to submit to without compensation.

The defendant does not claim that any attempt was made to condemn plaintiff's land, and we are of the opinion that its rights were restricted to the use of the stream in such case so as not to raise the water above the usual, natural, and ordinary high-water mark.

As the law does not permit the defendant to flow the plaintiff's land in this manner, and as it claims the right, intends and threatens to continue so to do, an injunction is a proper remedy. *Morrill v. St. Anthony Falls Water Power Co.* 26 Minn. 222, 37 Am. Rep. 899.

As the extended offer to introduce certain evidence, and excluded by the court, was not material, the court in this respect committed no error.

Order affirmed.

Veazie. 44 Me. 167, 69 Am. Dec. 94; *Veazie v. Dwinel*, 50 Me. 484.

The proper authorities may authorize the erection of dams across streams which are merely floatable. *McLaughlin v. Hope Mfg. Co.* 108 N. C. 100.

The South Carolina statute prohibits the obstruction of streams which are navigable by rafts of lumber or timber, and it was held, in *State v. Culum*, 2 Speers, L. 581, to apply to streams which were used for that purpose at the time the obstruction was placed in the stream.

The state may authorize the obstruction of a floatable stream. *State v. Elk Island Boom Co.* 41 W. Va. 796.

A witness cannot give his opinion as to the possibility of running logs down a stream in its natural state if a dam which had interfered with their running had been removed. *Holden v. Robinson Mfg. Co.* 65 Me. 215.

In *J. S. Keator Lumber Co. v. St. Croix Boom Corp.* 72 Wis. 62, it is said that the use of rivers and small streams for the floatage of logs is essential to the continued prosperity of the immense lumber and industrial interests of northern Wisconsin.

Regulation of floatage.

The state may forbid the running of logs loose in a stream the effect of which is to injure the property of riparian owners and endanger other persons navigating the stream. *Craig v. Kline*, 65 Pa. 399, 8 Am. Rep. 636; *Wendt v. Craig*, 67 Pa. 424.

The New Hampshire statute provides that timber to be floated on the Connecticut river must be rafted, or must be attended, and that any timber found floating without attendance will be liable to forfeiture. *Barron v. Davis*, 4 N. H. 338.

The Massachusetts statute providing no person shall cause or permit to be driven or floated down the Connecticut river any masts, spars, logs, or other timber, unless the same are formed and bound into rafts and placed under the charge of a sufficient number of persons to govern and manage the same, has been held to be constitutional. *Harrigan v. Connecticut River Lumber Co.* 120 Mass. 580, 37 Am. Rep. 387.

Conflict with other navigation.

A person running logs in a stream cannot stretch a boom in such a way as to interfere with the steamboat navigation of the stream. *Crandell v. Mooney*, 23 U. C. C. P. 212.

The mere fact that a stream is more useful for floating logs than for all other businesses combined does not give those using it for that purpose a right to increase its facilities for that purpose, if by so doing they interfere with its use for other purposes. So, booms cannot be constructed, although they greatly facilitate the rafting business, if they interfere with others who have a right to navigate the stream. *Cincinnati Cooperage Co. v. Com.* 11 Ky. L. Rep. 629.

On a stream where the principal industry consists in cutting, floating, and manufacturing into lumber the forests in its vicinity, and where the river is more valuable for this floatage than for any other navigation, the necessity and convenience of
41 L. R. A.

this floatage must be considered in any rules laid down for the public use of the stream. *The City of Erie v. Canfield*, 27 Mich. 432.

Until Congress takes jurisdiction of a stream the state legislature may make steamboat navigation subordinate to the floating of logs and the erection of piers and booms to facilitate such use of the stream. *Heerman v. Beef Slough Mfg., Boom, Log Driving & Transp. Co.* 8 Biss. 334.

The legislation by Congress to exclude the authority of the state must be specific so that mere general legislation making the stream navigable, followed by the survey and improvement of the stream, will not justify the court in enjoining the use of the stream under state statutes by a logging company which obstructs the navigation with its booms and dams. *United States v. Beef Slough Mfg., Boom, Log Driving & Transp. Co.* 8 Biss. 421.

A court of equity will not order the removal of a boom from a stream because it was not authorized by the Secretary of War, if it was constructed under authority of the state legislature before the consent of the Secretary of War was required, and the value of timber which will be floated on the stream is many times greater than the probable value of other products which may be transported upon it, while to make the river available for bringing it to market the maintenance of the boom is necessary. *United States v. Bellingham Bay Boom Co.* 72 Fed. Rep. 585.

The right to tow rafts in navigable waters was impliedly recognized in *The David Morris*, Brown, Adm. 274, by adjudging rights of the respective parties upon the hypothesis that the raft was rightly where it was.

And the same is true of *Lallande v. The C. D. Jr., Newberry*, Adm. 501; *The Joggins Raft*, 40 Fed. Rep. 533; *Seabrook v. Raft of Railroad Cross-Ties*, 40 Fed. Rep. 596; *The Henry Buck*, 38 Fed. Rep. 611; *The F. & P. M. No. 2*, 36 Fed. Rep. 264; *Cartier v. The F. & P. M. No. 2*, 33 Fed. Rep. 511; *Muntz v. A Raft of Timber*, 15 Fed. Rep. 557; *United States v. One Raft of Timber*, 18 Fed. Rep. 796; *McCoord v. The Tiber*, 6 Biss. 409.

Where a raft of such shape as to be difficult to handle was floated down a river having a current of 4 miles per hour, and was permitted to crowd so near the shore that a vessel coming up without warning had not sufficient room to pass in safety: so that it drove directly through the raft, scattering its contents and causing a total loss, the owner of the raft was not permitted to recover for the loss because of his negligence. *The Athabasca*, 47 Fed. Rep. 651.

Conflicting rights of floatage.

If the stream is not of sufficient size to accommodate all wishing to use it, each must so conduct his driving as to give others a reasonable share of the benefit of the stream. *Bearce v. Dudley*, 8 Me. 410.

One log owner cannot unreasonably interfere with the rights of other persons attempting to use the stream. *Page v. Mille Lac Lumber Co.* 53 Minn. 492.

Each person undertaking to drive logs in a stream

An application for rehearing having been filed, the following response was handed down on July 11, 1898:

Per Curiam:

The substance of counsel's application for reargument is that we have ignored our former decisions holding that the rights of riparian owners on navigable streams are subject to the public right of navigation, and that any incidental injury which such owners may sustain, by reason of the lawful and reasonable exer-

cise of this public right, is *damnum absque injuria*. In this, as in their original brief, counsel overlook the extent of, and the limitations upon, this public right of navigation as announced and explained in *Re Minnetonka Lake Improvement*, 56 Minn. 513, and other cases. The gist of the decision in the present case is not that the defendant was guilty of negligence in doing what it did, but that it had no right to raise the water to the extent it did without paying plaintiff compensation.

Application denied.

does so subject to the common right of other log owners to a like use of the stream. *Chesley v. DeGraff*, 35 Minn. 415.

The use of a navigable stream is open to everybody equally. No log owner can exclude another from it any longer than may be necessary, if he is first in occupation to float his logs by the natural current. *Butterfield v. Gilchrist*, 53 Mich. 22.

The mere fact that a boom in the stream is a matter of inconvenience and injury to a person wishing to use the stream for running logs does not of itself show that it is a nuisance. *Atty. Gen., Muskegon Boom Co., v. Ewart Booming Co.* 34 Mich. 362.

Log-driving companies.

Individuals driving their own logs have the same rights as log-driving companies in streams that are navigable for that purpose. *Hall v. Tittabawassee Booming Co.* 51 Mich. 377.

But the state may grant to a log-driving com-

pany the right to the use of the water of a stream so that individuals on the stream will not be permitted to use any water of the stream for the driving of their own logs which will be needed by the company for driving the logs under its charge. *Mullen v. Penobscot Log-Driving Co.* 90 Me. 555.

A grant of the advantages of corporate organization to persons engaged in the improvement and use of the water power of a stream for manufacturing purposes does not show that a total or partial discontinuance of the way was intended by the legislature. *Connecticut River Lumber Co. v. Olcott Falls Co.* 65 N. H. 290, 18 L. R. A. 823.

The right of a person to run logs in a stream is not interfered with by a legislative permission to a boom company to erect a boom which will detain all logs running in the stream, and hold them while logs of other persons are being sorted out. *Osborne v. Knife Falls Boom Corp.* 32 Minn. 412, 50 Am. Rep. 590.

H. P. F.

MASSACHUSETTS SUPREME JUDICIAL COURT.

George A. DEVLIN

Samuel DALTON *et al.*

(.....Mass.....)

1. Certiorari will not lie to review the decision of a board of military examiners respecting the competency of a person to be a militia officer, as the proceedings of the board are not judicial.

2. A writ of certiorari does not lie to review a decision of a question of fact upon evidence heard.

(May 21, 1898.)

REPORT by the Supreme Judicial Court for Suffolk County for the opinion of the full bench of a petition for a writ of certiorari to review the action of defendants as board of examiners for volunteer militia finding petitioner disqualified to act as captain of a militia company. *Petition dismissed.*

The facts are stated in the opinion.

Messrs. Hesselstine & Hesselstine, for petitioner:

The petitioner cannot be deprived of his right and privilege to the office of captain of the volunteer militia of the commonwealth of Massachusetts without due form of law. No arbitrary acts or unlawful power can remove him from that office.

To remove an officer duly elected, exam-

ined, and qualified, there must be some clear, definite, express provision by the legislature, prescribing how and under what circumstances, for what cause, and in what manner he may be tried and removed from his office. The legislature has provided for this by §§ 135, 136, etc., and 150 of said act.

There never has been a system of discipline in the United States by which an officer could be ordered before an examining board, tried upon secret charges, question put to him as to his acts while in the service; no right given to challenge any member of the court, with no right to appear by counsel to know the testimony and witnesses against him; no right to produce evidence, then condemned on a simple report "failed to pass" with no opportunity for review and correction of error, dismissed from the service and disgraced. This is military law and discipline unheard of out of this commonwealth, contrary to all sense of justice,—a violation of the rights of an officer in service.

A writ of certiorari lies to a court of summary as well as inferior jurisdiction.

Haven v. Essex County Comrs. 155 Mass. 467; *Merrick v. Arbelia Twp. Board*, 41 Mich. 681; *People, New York, v. Nichols*, 79 N. Y. 582; *Stone v. New York*, 25 Wend. 157; *Starr v. Rochester*, 6 Wend. 564.

A court of summary jurisdiction is created and limited by law. The petition demands

NOTE.—For other matters about militia, see *Chapin v. Ferry* (Wash.) 15 L. R. A. 116, and *note*, as to calling out for service; *Lewis v. Lewelling* (Kan.) 23 L. R. A. 510, and *note*, as to disbandment; 41 L. R. A.

and *Nixon v. Reeves* (Minn.) 33 L. R. A. 506, as to authority of captain to imprison a member of his company.

the full record of the court, and in default of a complete record a statement of facts should be made sufficient to enable the court to correct error and injustice done.

Haven v. Essex County Comrs. 155 Mass. 467; Spelling, Extraordinary, Relief, § 2016; *Cecil v. Barber*, 8 Wis 297; *Orcutt v. Cahill* 24 N. Y. 578; *Blair v. Hamilton*, 32 Cal. 49.

A summary court cannot take advantage of its own negligence to sustain a wrong. The board should state in their answer the proceedings, all facts as they occurred before them, and it was error to refuse the motion of the petitioner for the board to amend stating the facts.

Tewksbury v. Middlesex County Comrs. 117 Mass. 555; *Sedgwick v. Dawkins*, 17 Fla. 555; *Wells v. Flowers*, 41 Ga. 327; Spelling, Extraordinary Relief, § 2018; *Harris*, Certiorari, § 547.

Where the record reported, although not complete, is sufficient to show injustice, it is the duty of the judge to revise proceedings.

Phillips v. Parr, 19 Tex. 91.

Whatever is put into the return by way of explanation or otherwise, beside what is ordered to be returned, is put in without warrant, and is not to be regarded.

Bacon, Abr. *Certiorari*, H., and authorities there cited; *Stone v. New York*, 25 Wend. 157.

Mr. J. M. Hallowell, for board of examiners:

On a petition for a writ of certiorari, the court cannot examine the evidence given at the trial below, unless it appears upon the record that objection was there taken to its competency.

Cousins v. Cowing, 23 Pick. 208; *Stratton v. Com.* 10 Met. 217; *Farmington River Water Power Co. v. Berkshire County Comrs.* 112 Mass. 206.

Nor can the court examine the merits of a case and set aside a verdict as against evidence. Whether the evidence was sufficient to support the finding is a question of fact upon which the judgment of the board is final.

Nightingale, Petitioner, 11 Pick. 168; *Cousins v. Cowing*, 23 Pick. 215; *Stratton v. Com.* 10 Met. 217; *Farmington River Water Power Co. v. Berkshire County Comrs.* 112 Mass. 206.

The proceedings of the board can be quashed only for want of jurisdiction or for manifest error in point of law.

Hayward, Petitioner, 10 Pick. 358.

The composition of the board has been the subject of much thought by the legislature. It is the final body for determining questions of fact. The practical objections are many against inquiring into the grounds of its decisions, especially when officers who are examined and who have complaints against the board always have the remedy open to them of applying to the commander in chief for redress.

Ex parte Dunbar, 14 Mass. 393; *Hannum v. Belchertown*, 19 Pick. 311; *Murdock v. Sumner*, 22 Pick. 156; *Chadbourne v. Franklin*, 5 Gray, 312; *Bridgewater v. Plymouth*, 97 Mass. 382; *Woodward v. Leavitt*, 107 Mass. 458, 9 Am. Rep. 49; *Warren v. Spencer Water Co.* 143 41 L. R. A.

Mass. 155; *State v. Newport*, 18 R. I. 381; *Ex parte Vallandigham*, 1 Wall. 243, 17 L. ed. 539.

The board having jurisdiction and the finding being a judicial act, the latter was not void, but was merely voidable, and is valid until reversed.

Parks v. Boston, 8 Pick. 218.

The order of discharge was issued by the commander in chief, and being based upon a valid finding, was therefore itself valid.

The court cannot by certiorari review the action of the commander in chief.

People, Leo, v. Hill, 37 N. Y. S. R. 112, citing *Cochran and Shaw's Cases*; *People, Leo, v. Hill*, 126 N. Y. 497.

The petitioner having rested for more than two months, and until after his successor had been chosen and was qualified and commissioned, he is debarred by his laches from bringing this writ.

Simon v. Hoboken, 52 N. J. L. 867; *Fractional School Dist. No. 1 v. Joint Bd. of School Inspectors*, 27 Mich. 3.

Allen, J., delivered the opinion of the court:

The 4th Amendment to the Constitution provides that "all officers commissioned to command in the militia may be removed from office in such manner as the legislature may by law prescribe." Stat. 1898, chap. 367, § 43, provides that an officer elect shall be commissioned and notified to appear before the examining board provided in § 53. Section 53 provides that "every commissioned officer [with certain exceptions not now material] shall upon being notified as provided in § 42, appear before an examining board, to consist of the permanent commanders of brigades, regiments of infantry, battalions of artillery and cavalry, the naval brigade and corps of cadets. The board shall examine the said officer as to his military, moral, and general qualifications.

. . . If in their opinion such officer is competent, the fact shall be certified to the commander in chief. . . . Any officer who fails to appear before the board of examiners within forty days from the date of his election or appointment, or who fails to pass a satisfactory examination before said board, shall be forthwith discharged by the commander in chief." Section 64 is as follows: "An officer who fails to pass the board of examiners or fails to appear before said board, as provided in § 53 of this act, and any officer who may at any time be ordered before said board of examiners, and who fails to pass, shall be discharged by the commander in chief."

The first portion of § 64 is a repetition of the provision last quoted of § 53, but the latter portion provides for a new examination by the same board at any subsequent time, when so ordered. This provision had its origin in Stat. 1884, chap. 230, § 9, and it was repeated in Stat. 1887, chap. 411, § 64; and it was no doubt intended to meet cases where experience raised a question as to the qualifications of officers who had passed the examination provided for in § 53, shortly after their election. The scope and purpose of the later examination are the same as in the original one, namely, to ascertain as to the officer's military, moral, and gen-

eral qualifications, and to determine whether, in the opinion of the board of examiners, he is competent for his position. The petitioner, therefore, lawfully might be ordered to appear before the board of examiners for a subsequent examination, although he had passed a satisfactory examination upon his election in 1893.

The petitioner also contends that he was in reality tried before the board of examiners on secret charges which had been filed against him by his colonel, who was a member of the board, and that the board acted virtually as a court, though without having formal charges filed, or allowing him to be represented by counsel, and that, being a court, a writ of certiorari may issue to correct its proceedings. But this is a misconception of the position and doings of that board, which was acting in no sense as a court of inquiry, or court martial, or court of any kind, but only as a board of examiners, to ascertain and determine if the petitioner was competent for his position. Following the usual course of proceedings on a petition for a writ of certiorari, that board has made a return of its doings, by which it appeared that the petitioner was examined by and in the presence of the board as to his military, moral, and general qualifications; that he answered some of the questions put to him, and refused to answer others; that he took no specific objection or exception to any of the questions so put to him; that he failed to pass a satisfactory examination before the board; and that the result of the examination was forwarded by the board through the regular military channels to the commander in chief. A record of the result was made, but the board had no other or further records concerning any order of discharge, or relating to the proceedings in the examination, and no record of the questions asked, answered, or declined to be answered in the examination. It thus ap-

pears that the petitioner was personally before the board of examiners, who could form some opinion as to his competency to command a company of infantry from his appearance, manner, mode of speech, and conduct, as well as from a consideration of his answers, taken abstractly. It cannot be expected that we should revise their conclusion, or do anything further than to see if it appear that any error in point of law was committed. *People, Leo, v. Hill*, 126 N. Y. 497; *Simon v. Hoboken*, 52 N. J. L. 367. A writ of certiorari does not lie to revise a decision of a question of fact upon evidence heard. *Farmington River Water Power Co. v. Berkshire County Comrs.* 112 Mass. 206. And especially a court of law is not a proper tribunal to determine the competency of a military officer. We are unable to see that any error in law was committed by the board of examiners in reaching their conclusion. The fact that it did not act as a court disposes of most of the objections urged against its proceedings. An examining board, with a view to ascertain the petitioner's qualifications, might put questions touching any matter which would aid it in its decision, and we have no occasion to consider whether or not he properly declined to answer any questions so put. The grounds of its decision are not stated.

None of the minor objections taken by the petitioner can avail him. Since, in these proceedings, the board of examiners did not act as a court, his petition must fail, because a writ of certiorari is issued only to revise proceedings which are judicial in their nature (*Atty. Gen. v. Northampton*, 143 Mass. 589), and, in any case, it does not lie to correct formal or technical mistakes, when no substantial injustice is shown to have been done (*Haven v. Essex County Comrs.* 155 Mass. 467).

The motion for a further return or answer was rightly overruled.

Petition dismissed.

MICHIGAN SUPREME COURT.

William J. LILLIBRIDGE, *Ptff. in Err.*,

v.

Orlando B. McCANN.

(..... Mich.....)

1. The jury may draw such inference as common knowledge will suggest respecting negligence in lying down and going to sleep in a barn upon hay or straw, with a lighted pipe in one's mouth.
2. Lying down to smoke, on hay or straw, in a barn, and going to sleep with a lighted pipe in one's mouth, may be found by the jury to constitute negligence.
3. The owner of a building taking fire from another building which is set on fire through the negligence of another person, without any intervening cause, has a right of action against the person whose negligence started the fire.

NOTE.—As to the right of jurors to act on their own knowledge of the facts in or relevant to the issue, see *note* to *State v. Gaymon* (S. C.) 31 L. R. A. 429.

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4. Whether the consequences of a negligent act ought to have been foreseen is a question for the jury.

5. A wind existing at the time a building is set on fire is not an intervening cause of the burning of another building to which the fire is carried.

(May 17, 1896.)

ERROR to the Circuit Court for Ottawa County to review a judgment in favor of defendant in an action brought to recover damages for the alleged negligent burning of some of plaintiff's property. *Reversed.*

The facts are stated in the opinion.

Mr. George A. Farr, for plaintiff in error:

There was a legal duty resting upon the defendant to exercise reasonable care in the management of his property so as not to endanger that of the plaintiff.

Cooley, Torts, p. 591.

The question of the defendant's negligence, and whether it was the proximate cause of plaintiff's loss, were questions for the jury.

Gould v. Schermer, 101 Iowa, 582; *Union P. R. Co. v. Evans*, 52 Neb. 50; *Alabama Great Southern R. Co. v. Arnold*, 80 Ala. 600; *Cooley*, Torts, p. 70.

If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent.

Clark v. Lebanon, 63 Me. 393; *Willey v. Belfast*, 61 Me. 569; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117; *Henry v. Southern P. R. Co.* 50 Cal. 176; *Perley v. Eastern R. Co.* 93 Mass. 414, 96 Am. Dec. 645; *Hooksett v. Concord R. Co.* 38 N. H. 242; *Small v. Chicago, R. I. & P. R. Co.* 55 Iowa, 582; *Webb v. Rome, W. & O. R. Co.* 49 N. Y. 420, 10 Am. Rep. 889; *Davis v. Garrett*, 6 Bing. 716; *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 768; *Lehigh Valley R. Co. v. McKeen*, 90 Pa. 123, 35 Am. Rep. 644; *Pennsylvania R. Co. v. Hope*, 80 Pa. 373, 21 Am. Rep. 100; *DeLaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 299, 23 Am. Rep. 214.

Whether a fire, communicated from another's negligent fire is a remote or proximate consequence of the negligent act, is a question for the jury.

Pennsylvania R. Co. v. Hope, 80 Pa. 373, 21 Am. Rep. 100; *Fent v. Toledo, P. & W. R. Co.* 59 Ill. 849, 14 Am. Rep. 13; *Perry v. Southern P. R. Co.* 50 Cal. 578; *Kellogg v. Chicago & N. W. R. Co.* 26 Wis. 228, 7 Am. Rep. 69; *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115; *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 354, 15 Am. Rep. 362; *Clemens v. Hannibal & St. J. R. Co.* 53 Mo. 366, 14 Am. Rep. 460; *Louisville N. A. & C. R. Co. v. Krimming*, 87 Ind. 351; *Hoyt v. Jeffers*, 30 Mich. 181; *Burlington & M. R. Co. v. Westover*, 4 Neb. 268; *Anderson v. Wasatch & J. Valley R. Co.* 3 Utah, 518; *Poeppers v. Missouri, K. & T. R. Co.* 67 Mo. 715, 29 Am. Rep. 518; *Atchison, T. & S. F. R. Co. v. Bales*, 16 Kan. 252; *Troxler v. Richmond & D. R. Co.* 74 N. C. 377; *Perley v. Eastern R. Co.* 93 Mass. 414, 96 Am. Dec. 645; *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 768; *Jucker v. Chicago & N. W. R. Co.* 52 Wis. 153; *Higgins v. Dewey*, 107 Mass. 496, 9 Am. Rep. 63; *St. Joseph & D. C. R. Co. v. Chase*, 11 Kan. 58; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 474, 24 L. ed. 259.

The wind was not a new force or power.

Louisiana Mut. Ins. Co. v. Tweed, 7 Wall. 44, 19 L. ed. 65; *Travellers' Ins. Co. v. Seaver*, 19 Wall. 542, 22 L. ed. 158; *Etna F. Ins. Co. v. Boon*, 95 U. S. 131, 24 L. ed. 399; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 251, 26 L. ed. 1071; *Boon v. Etna Ins. Co.* 12 Blatchf. 29; *Crandall v. Accident Ins. Co.* 27 Fed. Rep. 46; *Fent v. Toledo, P. & W. R. Co.* 59 Ill. 849, 14 Am. Rep. 13; *DeLaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 299, 23 Am. Rep. 214; *Jensen v. The Joseph B. Thomas*, 81 Fed. Rep. 584; 16 Am. & Eng. Enc. Law, p. 444; 1 Shearm. & Redf. Neg. 3d ed. § 10; 2 Thomp. Neg. p. 1085.

Messrs. Cutcheon & Swarthout, for defendant in error:

A case may not be left to the jury unless 41 L. R. A.

there is evidence which will warrant a verdict for the party producing it.

6 Enc. Pl. & Pr. pp. 672, 678, note 1; *Grand Trunk R. Co. v. Nichol*, 18 Mich. 170; *Davis v. Detroit & M. R. Co.* 20 Mich. 105, 4 Am. Rep. 364; *Carrer v. Detroit & S. Pl. R. Co.* 61 Mich. 584; *Conely v. McDonald*, 40 Mich. 150; *Meyer v. Houck*, 35 Iowa, 819; *Ryder v. Wombwell*, L. R. 4 Exch. 88; *Kansas P. R. Co. v. Butts*, 7 Kan. 308; *Beckman v. Consolidation Coal Co.* 90 Iowa, 252; *Reeder v. Dupuy*, 96 Iowa, 729; *Barnhart v. Chicago, M. & St. P. R. Co.* 97 Iowa, 654; *Hurd v. Neilson*, 100 Iowa, 555; *Wood v. Chicago, M. & St. P. R. Co.* 51 Wis. 196; *Parks v. Ross*, 11 How. 362, 18 L. ed. 730; *Hanley v. Balch*, 106 Mich. 46; *Knight v. Towles*, 6 S. D. 575.

Every defendant shall be held responsible for all those consequences which might have been foreseen and expected, but not for those which he could not have foreseen, and was therefore under no moral obligation to take into consideration.

1 Thomp. Neg. p. 136.

Where a fire accidentally begins upon the premises of an individual, and it consumes his house, and then extends to his neighbor's and consumes that, no action will lie in favor of the latter against the former, to recover the damages for the loss sustained.

Lansing v. Stone, 37 Barb. 15, 14 Abb. Pr. 199; *Ray*, Negligence of Imposed Duties, pp. 640, 641; 14 Geo. III. chap. 78; *Fahn v. Reichart*, 8 Wis. 255, 76 Am. Dec. 237; *Case v. Hobart*, 25 Wis. 654; *Calkins v. Barger*, 44 Barb. 424; *Stuart v. Hawley*, 22 Barb. 619; *Brown v. Brooks* (Wis.) 21 L. R. A. 256, note.

The negligent burning of a house and the spreading of the fire to a neighboring house, and the burning thereof, do not give the owner of the last house a cause of action against the owner of the house in which the fire originated, the damage in such case being deemed too remote.

Ryan v. New York C. R. Co. 35 N. Y. 210, 91 Am. Dec. 49; *Pennsylvania R. Co. v. Kerr*, 62 Pa. 353, 1 Am. Rep. 431; *Morrison v. Davis*, 20 Pa. 176, 57 Am. Dec. 695; *Macon & W. R. Co. v. McConnell*, 27 Ga. 481; *McGibbon v. Baxter*, 51 Hun, 587; 4 Wait, Act. & Def. p. 670; *Weeks*, Damnum Absque Injuria, § 118; *Field*, Damages, § 50; 1 Thomp. Neg. p. 147, §§ 1, 2; *Lansing v. Stone*, 37 Barb. 15; *Fahn v. Reichart*, 8 Wis. 255, 76 Am. Dec. 237; *Case v. Hobart*, 25 Wis. 654; *Calkins v. Barger*, 44 Barb. 424; *Stuart v. Hawley*, 22 Barb. 619; *Clark v. Foot*, 8 Johns. 421; *Macon & W. R. Co. v. McConnell*, 27 Ga. 481; *Sweeney v. Merrill*, 38 Kan. 216; *Bilman v. Indianapolis, C. & L. R. Co.* 76 Ind. 166, 40 Am. Rep. 230; *Pennsylvania Co. v. Whitlock*, 99 Ind. 16, 50 Am. Rep. 71; *Louisville, N. A. & C. R. Co. v. Nitsche*, 126 Ind. 233, 9 L. R. A. 750.

Negligence cannot be predicated of one's lawful and ordinary use of one's own premises.

Alpern v. Churchill, 53 Mich. 607; *Cosulich v. Standard Oil Co.* 122 N. Y. 118.

The party counting upon negligence must adduce affirmative proof of it.

Alpern v. Churchill, 53 Mich. 613; *Rood v. New York & E. R. Co.* 18 Barb. 80; *Terry v. New York C. R. Co.* 22 Barb. 575; *Norris v.*

Hannibal & St. J. R. Co. 37 Mo. 287; *Indianapolis & C. R. Co. v. Paramore*, 31 Ind. 143.

Where a fire, as the natural, immediate, and proximate consequence of its negligent beginning, extends to an adjacent building and consumes it, the party responsible for the commencement of the fire must bear the loss; but where some new and independent agency has intervened and caused the extension of the fire to other buildings, the person originally at fault cannot be held liable.

Pennsylvania Co. v. Whitlock, 99 Ind. 26, 50 Am. Rep. 71; *Harrison v. Berkley*, 1 Strobb. L. 525, 47 Am. Dec. 578; *Pittsburgh, O. & St. L. R. Co. v. Culver*, 60 Ind. 469; *Pittsburgh, O. & St. L. R. Co. v. Hixon*, 79 Ind. 111; *Louisville, N. A. & C. R. Co. v. Ehler*, 87 Ind. 339.

Unless the wrong and damage are known to be usually in consequence, the damage, according to the ordinary course of events, following from the particular wrong, they will not support the action.

Ray, Negligence of Imposed Duties, p. 655; *Mack v. Lombard & S. Streets P. R. Co.* 18 Wash. L. Rep. 84; *Selleck v. Langdon*, 55 Hun. 19; *Wright v. Chicago & N. W. R. Co.* 27 Ill. App. 200; *Adkins v. Atlanta & O. Airline R. Co.* 27 S. C. 71; *Hudson v. Wabash & W. R. Co.* 32 Mo. App. 667.

A person may set a fire upon his own premises and he is not liable for the injury such fire may inflict upon the property of contiguous proprietors, unless he is guilty of some negligence in permitting the fire to escape—that is, in controlling such fire.

Pittsburgh, O. & St. L. R. Co. v. Culver, 60 Ind. 471; *Pittsburgh, O. & St. L. R. Co. v. Hixon*, 79 Ind. 111; *Louisville, N. A. & C. R. Co. v. Ehler*, 87 Ind. 339; *Wood v. Chicago, M. & St. P. R. Co.* 51 Wis. 196.

The proximate cause of an event must be understood to be that which in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred.

1 Shearm. & Redf. Neg. § 26; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Bigelow's Leading Cases on Torts*, 608, 626; 16 Am. & Eng. Enc. Law, p. 481, and note.

An intervening efficient cause is a new and independent force which breaks the causal connection between the original wrong and the injury, and itself becomes the direct and immediate, that is the proximate, cause of the injury.

16 Am. & Eng. Enc. Law, p. 444; *Pennsylvania Co. v. Whitlock*, 99 Ind. 16, 50 Am. Rep. 71; *Fairbanks v. Kerr*, 70 Pa. 86, 10 Am. Rep. 661; 1 Shearm. & Redf. Neg. § 31; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070; *Read v. Nichols*, 118 N. Y. 224, 7 L. R. A. 180; *Beall v. Athens Twp.* 81 Mich. 536; *Frace v. New York, L. E. & W. R. Co.* 143 N. Y. 182; *Toledo, W. & W. R. Co. v. Muthersbaugh*, 71 Ill. 572; *Fent v. Toledo, P. & W. R. Co.* 59 Ill. 349, 14 Am. Rep. 13; *Martin v. Chicago, M. & St. P. R. Co.* 79 Wis. 140, 11 L. R. A. 506; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 633; *Allegheny v. Zimmerman*, 95 Pa. 237, 40 Am. Rep. 649; *Morrison v. Davis*, 30 Pa. 171, 57 Am. Dec. 695; *McGovern v. Lewis*, 56 Pa. 231; *Scott v. Hunter*, 45 Pa. 192; *Milwaukee & St. 41 L. R. A.*

P. R. Co. v. Kellogg, 94 U. S. 475, 24 L. ed. 259; *Ryan v. New York C. R. Co.* 35 N. Y. 210, 91 Am. Dec. 49; *Sheridan v. Bigelow*, 93 Wis. 426; *Michigan C. R. Co. v. Burrows*, 83 Mich. 14; *Selleck v. Lake Shore & M. S. R. Co.* 58 Mich. 195; *Tisdale v. Norton*, 8 Met. 888; *Daniels v. Ballantine*, 23 Ohio St. 533, 13 Am. Rep. 264; *Davis v. Garrett*, 6 Bing. 716; *St. Clair Mineral Springs Co. v. St. Clair*, 36 Mich. 463; *Kingsley v. Bloomingdale Twp.* 109 Mich. 340; *Lambeck v. Grand Rapids & I. R. Co.* 106 Mich. 512; *Haggerty v. Flint & P. M. R. Co.* 59 Mich. 366, 60 Am. Rep. 801; *Polan v. Morse*, 91 Mich. 208; *Hoyt v. Jeffers*, 80 Mich. 181; *Webster v. Symes*, 109 Mich. 1.

The facts being undisputed, no evidence being adduced by the defendant, it became a question of law for the court whether defendant was negligent or not, and if so, whether his negligence was the natural, direct, and proximate cause of the loss and damage to plaintiff.

Guthrie v. Missouri P. R. Co. 51 Neb. 746; *Kansas P. R. Co. v. Butts*, 7 Kan. 308; *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55, 53 Am. Rep. 790; *Haggerty v. Flint & P. M. R. Co.* 59 Mich. 366, 60 Am. Rep. 801.

The following cases have held to the non-liability of defendant, in cases like the present:

Lansing v. Stone, 37 Barb. 15; *Ryan v. New York C. R. Co.* 35 N. Y. 210, 91 Am. Dec. 49; *Pennsylvania R. Co. v. Kerr*, 62 Pa. 353, 1 Am. Rep. 431; *Morrison v. Davis*, 20 Pa. 176, 57 Am. Dec. 695; *Macon & W. R. Co. v. McConnell*, 27 Ga. 481; 4 Wait, Act. & Def. p. 670; *Weeks, Damnum Absque Injuria*, § 118; *Field, Damages*, § 50; 1 Thomp. Neg. p. 147; *Sweeney v. Merrill*, 36 Kan. 216; *Pennsylvania Co. v. Whitlock*, 99 Ind. 26, 50 Am. Rep. 71; *Wood v. Chicago, M. & St. P. R. Co.* 51 Wis. 196; *Read v. Nichols*, 118 N. Y. 224, 7 L. R. A. 180; *Polan v. Morse*, 91 Mich. 208; *Toledo, W. & W. R. Co. v. Muthersbaugh*, 71 Ill. 572.

Montgomery, J., delivered the opinion of the court:

This is an action on the case for the destruction of plaintiff's house, barns, hay, and grain, orchard, and other property by fire claimed to be caused by the negligence of the defendant. The plaintiff and defendant were farmers living on opposite sides of a highway running east and west through the township of Wright in Ottawa county. The proofs tend to show that the defendant had a barn upon his premises on the south side of the highway, and abutting upon it, which upon the 27th day of July, 1894, was filled with straw, hay, and other combustible material. Over the floor on the south side was a scaffold some 6 feet above the floor, with straw and other things upon it. Across the highway were the barns of the plaintiff, some 10 or 12 rods distant. The barns were filled with hay, and some 20 acres of wheat were stacked near it. The barns substantially joined. The dwelling was about 2 rods from the nearest barn. On the 27th day of July, 1894, the weather was very hot and a drought had prevailed for some time. On that day the wind had risen with the sun, and had steadily blown from the direction of the sun, there being in the middle of the day quite a breeze. This had occurred regularly

for several days prior to July 27. At about 1 o'clock on the 27th the wind came almost directly from the defendant's barn to those of the plaintiff. After dinner, on the 27th day of July, 1894, and a little before 1 o'clock, the defendant lit his pipe, went into his barn, and lay down on the hay or straw on the scaffold over the floor, smoking. He fell into a doze the pipe fell into the straw, and, igniting it, set fire to the barn. This fire was rapidly communicated to the premises of plaintiff, and his barns, with hay, grain, dwelling house, furniture, orchard, shade trees, fences, and personal property, to the value of nearly \$3,000, were destroyed. There was no contributory negligence on the part of the plaintiff.

When the plaintiff rested his case, counsel for the defendant moved that the court direct a verdict for the defendant, for the reason that the plaintiff had not by his proofs shown a cause of action. Thereupon the court directed the jury to render a verdict for the defendant for the reason that the negligence of the defendant was not the proximate cause of the injury.

It is argued in this court that there was no evidence that the origin of the fire was the defendant's pipe. The evidence does, however, show that the defendant admitted that he lighted his pipe, and went into the barn, and laid down in the midst of the combustible material, and went to sleep, and that he stated that he supposed that his pipe must have slipped from his mouth while he was asleep. While it is true that this mere expression of opinion would not be conclusive, we think the facts shown were such as to require the submission of the origin of the fire to the jury.

It is also insisted that there was no evidence of negligence. It is said there is no evidence of the danger of going into a barn with a pipe lighted or unlighted; there is no evidence of communicating fire from a lighted tobacco pipe to oat straw; and counsel cites as a parallel case *Wood v. Chicago, M. & St. P. R. Co.* 51 Wis. 198, in which the testimony was that a lighted lamp was left burning in a building which took fire, and the court seems to have expressed the opinion that the origin of the fire rested in mere conjecture, although the conclusion of the court apparently rests upon the ground that the leaving of a lighted lamp in a house is not negligent. Without discussing the soundness of that case, we think the distinction between leaving a lighted lamp in a house and lying down to smoke in the presence of straw or other combustibles is obvious, and that it was competent for the jury to draw such inference from the proved facts as common knowledge would suggest.

The meritorious question is, Was the defendant liable for the consequences of the fire spreading from his own building to that of the plaintiff, if the fire in defendant's building be found to have originated in consequence of his negligence? In the absence of an intervening cause, it seems to us clear that the bare fact that the defendant may have suffered a loss of his own property through the same negligent act does not render him any the less liable to the plaintiff for a loss ensuing to him through that neglect. Whatever may have at one time been held under the statute (6 Anne, chap. 31, 41 L. R. A.

§ 6), which provides that no action shall be maintained against any person in whose house or chamber any fire shall accidentally begin, that statute is not applicable here. The subsequent statute (14 Geo. III. chap. 78, § 86), which enlarges the statute of Anne, had received no judicial construction prior to the Revolution. Since then, however, it has been construed in *Wilder v. Phippard*, 11 Q. B. 347, and it is held not to include fires set or induced by negligence. See also Smith, Lead. Cas. 477; Ray, Negligence Imposed Duties, p. 641; 2 Shearm. & Redf. Neg. § 665; *McNally v. Colwell*, 91 Mich. 532. Was the defendant's negligence the proximate cause of the injury to the plaintiff? The question is not different than it would be if the building first fired through the defendant's negligence had belonged to a third person or the plaintiff. The question is whether the owner of a building taking fire from another building, which is set on fire through the negligence of another, has an action against that other for the injury. This question has received consideration by this court. In *Hoyt v. Jeffers*, 80 Mich. 199, Mr. Justice Christianity, speaking for the court, said: "If such other buildings are satisfactorily shown to have actually burned by the fire of the Sherman House, caused by the negligence of the defendant, and especially if this was, under the circumstances, the natural and probable, as well as the actual, result of the fire so caused, and without any contributory negligence of the plaintiff, I can see no sound principle which can make the defendant's liability turn upon the question whether the buildings thus burned by the fire of the first were 5, 6, or 50 feet, or the one-hundredth part of an inch from it. And though a building thus burned by the fire of the first might be at such a distance that its taking fire from the first might not, *a priori*, have seemed possible, yet if it be satisfactorily shown that it did in fact thus take fire, without any negligence of the owner, and without the fault of some third party, which could properly be recognized as the proximate cause, and for which he could be held liable, the principle of justice or sound logic, if there be any, is very obscure, which can exempt the party through whose negligence the first building was burned from equal liability for the burning of the second. If it be said that this extent of liability might prove ruinous to the party through whose negligence the buildings were burned, it may be said, in reply, that, under such circumstances, it is better, and more in accordance with the relative rights of others, that he should be ruined by his negligence than that he should be allowed to ruin others who are innocent of all negligence or wrong." See also Cooley, Torts, p. 701; *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 299, 33 Am. Rep. 214; *Perley v. Eastern R. Co.* 98 Mass. 414, 96 Am. Dec. 645; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256.

Was the wind an intervening cause? The evidence tends to show that it was an existing condition at the very time the negligent act occurred, and did not constitute an intervening efficient cause. The fact that the consequences of the defendant's negligent act were more serious than would have followed under other

more favorable conditions of the atmosphere does not relieve the defendant. *Hoyt v. Jeffers*, 30 Mich. 199; 1 Shearm. & Redf. Neg. § 80; *Fent v. Toledo, P. & W. R. Co.* 59 Ill. 349, 14 Am. Rep. 13; *Perley v. Eastern R. Co.* 98 Mass. 414, 98 Am. Dec. 645.

It was a question for the jury as to whether the consequences of the defendant's negligent act ought to have been foreseen, and this is

but another statement of the proposition that negligence is the absence of such care as persons of ordinary prudence are expected to exercise under like circumstances. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Ross v. Ionia Twp.* 104 Mich. 320.

Judgment reversed, and new trial ordered.

The other Justices concur.

MISSISSIPPI SUPREME COURT.

J. R. ZACKERY, *Appt.*,

v.

MOBILE & OHIO RAILROAD COMPANY.

(.....Miss.....)

The blindness of a person does not justify his rejection as a passenger of a railroad when unaccompanied by some other person, unless he is otherwise incompetent to travel alone.

(April 18, 1898.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Clarke County in favor of defendant in an action brought to recover damages for refusal to sell plaintiff a ticket over defendant's road. *Reversed*.

Plaintiff was blind. He attempted to purchase a ticket to travel on defendant's road which defendant refused to sell to him. Defendant as a special plea to the declaration set up a rule to the effect that no sick, insane, imbecile, cripple, invalid, or blind person would be received by conductors, or sold tickets by agents, for transportation, unless accompanied by some person specially charged with their care and comfort while traveling.

Further facts sufficiently appear in the opinion.

Messrs. Buckley & Halsell and D. W. Heidelberg for appellant.

Mr. J. A. P. Campbell for appellee.

Whitfield, J., delivered the opinion of the court:

The demurrer to the special plea should have been sustained. The former opinion of this court settled this. The blind man in this case

NOTE.—For report of former appeal in this case, see *Zachery v. Mobile & O. R. Co.* (Miss.) 36 L. R. A. 346.

"had at the times referred to in the declaration when he applied for tickets and permission to travel on defendant's cars, as much skill and ability to travel without help or attendance as any blind man could have." The declaration avers that, though blind, he was otherwise qualified to travel on the railroad cars, and in fact had traveled for several years constantly on appellee's railroad, without objection. The demurrer to this declaration was overruled and the present demurrer to the special plea presents the same objections, and, of course should have been sustained. It is not every sick or crippled or infirm person whom a railroad regulation can exclude, but one so sick or so crippled or so infirm as not to be able to travel without aid. And so it is not every blind person, but one who, though blind, is otherwise incompetent to travel alone on the cars; otherwise we would have been compelled to hold that one suffering from sickness, no matter how slight, or one who had lost an arm or leg, or one, no matter how active physically, and no matter how expert a traveler, if merely blind, could be shut out by such a rule. And this ought not to be, and cannot be sound law. We are asked to hold that a regulation that no blind person whatever, no matter how skillful or expert a traveler he may have been, or may be, and no matter how perfectly qualified in every other respect, may travel on cars unaccompanied, is a reasonable rule. This cannot be sound. Each case must depend on its own facts, and the reasonableness of the refusal to sell the blind person a ticket must, on principle, depend, not on a universal, arbitrary, and indiscriminating rule like this one, but on the capacity to travel unaccompanied of the particular blind person, as shown by the proof on that point in his case.

Judgment reversed, demurrer to special plea sustained, and remanded.

MISSOURI SUPREME COURT (Division 1).

Annie HENNESSY, *Appt.*,

v.

BAVARIAN BREWING COMPANY,

Resp.

(.....Mo.....)

1. The right of the mother of an unmar-

ried minor whose father is dead to recover damages for the death of the child under a statute giving such right to the father and mother, or the survivor of them, is not changed by the fact that she has married another man who has assumed the obligations of a natural father to his stepchild.

2. A decision by the Kansas City court of appeals is not binding on the Missouri

NOTE.—As to parent's right to recover for death of child, see also *Davis v. St. Louis, I. M. & S. R. Co.* (Ark.) 7 L. R. A. 232; *Noble v. Seattle (Wash.)* 40 L. 41 L. R. A.

R. A. 322, and *Marshall v. Macon, S. D. & L. Co.* (Ga.) *ante*, 311.

supreme court upon subsequent appeal to it after retrial in the circuit court.

3. **The amount in dispute for the purpose of determining jurisdiction on appeal** is that claimed in the petition where a nonsuit is granted, although the sum allowed by the jury on a former trial was much smaller, and the action is for killing a minor whose earnings at the rate received at the time of his death would not have amounted to the sum claimed before his maturity.

(June 22, 1898.)

APPPEAL by plaintiff from a judgment of the Circuit Court for Jackson County in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's minor son. *Reversed.*

The facts are stated in the opinion.

Messrs. Beebe & Watson, for appellant:

The petition states a cause of action under §§ 4426 and 4427, Mo. Rev. Stat. 1889, and it was not necessary to allege or prove that deceased at the time of his death was the servant of plaintiff.

Buel v. St. Louis Transfer Co. 45 Mo. 564; *Owen v. Brockschmidt*, 54 Mo. 285; *Philpott v. Missouri P. R. Co.* 85 Mo. 184; *Parsons v. Missouri P. R. Co.* 94 Mo. 286; *Tobin v. Missouri P. R. Co.* (Mo.) 18 S. W. 997; *Habel v. Union Depot R. Co.* 140 Mo. 159.

This is an action based on §§ 4426 and 4427, *supra*, and not a common-law action for loss of services.

See authorities *supra*; *Barker v. Hannibal & St. J. R. Co.* 91 Mo. 91; *Tobin v. Missouri P. R. Co.* (Mo.) 18 S. W. 997, and cases cited; 9 Am. & Eng. Enc. Law, p. 846, and cases cited.

A cause of action was given under this statute which did not exist at common law. The right of recovery in such an action is not predicated on the relation of master and servant, but upon the relation of parent and child, for if a parent emancipates his child the child will be entitled to its own earnings.

Ream v. Watkins, 27 Mo. 519, 72 Am. Dec. 288; *Philpott v. Missouri P. R. Co.* 85 Mo. 184.

If emancipated, the relation of master and servant does not exist, yet the parent can recover under this statute, because the right to recover is not made to depend upon services which the deceased could have rendered to the parent.

In an action under this statute this court has repeatedly held that, "there being thus no general right of recovery open to all persons representing the estate of the deceased or interested in his life, only such persons can recover in such time and in such manner as is set forth in the statute."

Cooter v. Moore, 81 Mo. 576; *Barker v. Hannibal & St. J. R. Co.* 91 Mo. 94.

The fact that plaintiff had remarried did not change the relation of parent and child.

If remarriage by the wife destroyed a right to maintain an action under this statute, as sole survivor, for the death of her minor child, then *a priori* it would destroy the right of action in the husband had he survived and remarried. But this is not so.

Georgia R. & Bkg. Co. v. Garr, 57 Ga. 277, 24 Am. Rep. 492; *Buel v. St. Louis Transfer* 41 L. R. A.

Co. 45 Mo. 564; Davis v. Guarnieri, 45 Ohio St. 470; *International & G. N. R. Co. v. Kuehn*, 70 Tex. 587.

Mr. Benjamin T. Hardin for respondent.

Marshall, J., delivered the opinion of the court:

Action for \$5,000 damages for death of a minor son of plaintiff. Thomas Donlin, an unmarried minor, thirteen years old, was the son of plaintiff by her former marriage. After her second marriage, the stepfather supported the minor. His mother permitted him to work for defendant, and he turned over his wages to his mother, who used them to buy clothing for him. The death is alleged to have been caused by the negligence of the defendant in not providing proper appliances and safeguards in its factory to prevent injury to the employee, who was required to work close to, but not with or on, the defective appliances. The plaintiff obtained judgment for \$900. The defendant appealed to the Kansas City court of appeals, where the judgment was reversed, and the cause remanded. *Hennecy v. Bavarian Brewing Co.* 63 Mo. App. 111. The case was tried anew in the circuit court upon exactly the same pleadings and evidence on plaintiff's part as it was on the first trial. Pursuant to the opinion of Kansas City court of appeals, the circuit court sustained a demurrer to the evidence, and entered judgment for defendant. Plaintiff then appealed to this court.

1. The Kansas City court of appeals based its decision upon two grounds: (1) That the petition did not state facts sufficient to constitute a cause of action, in that it did not allege a loss of services to the plaintiff by the death of her son; and (2) that the evidence does not establish such a loss. The first conclusion is predicated upon the idea that "the right to recover for loss of service is founded on the relation of master and servant, and not on that of parent and child" (63 Mo. App., loc. cit. 116), and that, upon the death of the child's father, the mother was obliged to support him during minority, and hence was entitled to his services during her widowhood, but that, upon her remarriage, the "stepfather would stand in the place of the natural parent, and the reciprocal rights, obligations, and duties of parent and child attach" if the stepfather "admitted the child into his family, and treated him as a member thereof, and thereby assumed the relation of parent." The second conclusion rests upon the facts deduced from the evidence that the stepfather did admit the child into his family, treated him as a member thereof, and assumed the relation of parent to him, and that the relation of master and servant between the mother and child ended as soon as the stepfather so acted, and that, as the mother was no longer obligated to support the child, she was not entitled to his services, and, not being entitled to his services, she lost nothing by his death, but that notwithstanding the stepfather was in this case obliged to support the child, and therefore was entitled to his earnings, he could not maintain an action of this character, because neither under the statute of this state nor at common law could a stepfather maintain an action for the death of a minor caused

by the wrongful act of another. Bluntly, but logically, stated, this reasoning asserts the startling proposition that if a widow with a minor child remarries, and the stepfather admits her child into his family as a member of it, and assumes the relation of father to him, and if a third party wrongfully kills the child, there is no civil liability to anyone therefor,—not to the mother, because her rights were cut out by her second marriage and the assumption by the stepfather of the natural father's place towards the child; and not to the stepfather, because neither the common law nor the statute gives a stepfather a right to maintain such an action. The error that underlies such conclusions arises from confusing the common-law obligation of the parent, natural or standing *in loco parentis*, to the child, to support it during minority, carrying with the obligation the correlative right to the earnings of the child, with the right, conferred by statute, upon the father (natural) and mother, or the survivor of them, to maintain an action against a third party for the wrongful killing of their child. The case of *St. Ferdinand Loretto Academy v. Bobb*, 52 Mo. 357, is a fair illustration of all the cases cited by the Kansas City court of appeals in support of the first conclusion. That case was an action by a third person against a stepfather, who stood *in loco parentis*, for necessities furnished the child. The legal proposition announced in the case is that, when a stepfather so acts towards a stepchild, "the presumption in such case is, that they deal with each other as parent and child, not as master and servant. This relation being established, the reciprocal rights, duties, and obligations pertaining to it arise between them, the same as if he were their natural father." *Id.* loc. cit. 361. While at common law, and in states like ours, where the common law has been adopted, this correlative duty and right exists between a stepfather and a stepchild, it rests, not upon contract, as in case of master and servant, but upon the relation of parent and child. It continues only during the minority of the child. At common law, neither the natural father, nor the stepfather standing *in loco parentis*, could maintain a civil action for the wrongful killing of the child, because at common law such actions were unknown. The principle of the common law was, "*Actio personam moritur cum persona.*" Hence cases which decide the relative duties and rights of parent and child with respect to suits for necessities furnished by third persons to the child, or for wages earned by the labor of the child, have no possible application to cases like this. Likewise, cases which hold that, after the remarriage of the widow and the assumption by the stepfather of the obligations of a natural father to his stepchild, the mother is released from liability for necessities furnished the child, and loses the right she had during widowhood to recover against third persons for services performed by the child, are of no value in determining the question here involved. They rest upon entirely different principles, and involve rights arising out of the relation of parent and child, and not questions of tort.

The fact that in some cases it has been held that the measure of damages in cases of this
41 L. R. A.

kind, arising under a statute like ours is the loss of services of the child, during minority, minus the expense of maintenance, plus the expense of medical attendance during the child's last illness and of the funeral, does not establish the right to maintain this character of action, nor determine the person on whom that right is conferred by the statute. And it is proper here to say that the damages here allowed are both compensatory and penal, and that in *Parsons v. Missouri P. R. Co.* 94 Mo. loc. cit. 294 *et seq.*, this court speaking through Brace, J., construed the meaning of our statute fixing the measure of damages, and said: "The law allows the parent of such minor substantial damages, and they may be measured by the experience and judgment of the jury," etc. In cases like this, under the statute, the father and mother do not recover the value of services rendered by their child, as the father or stepfather does, as a corollary to the obligation to support in cases arising *ex contractu* or in assumpsit; but they recover, in tort, on the right which the child would have had if he had survived the injury, and which right died with the injured party at common law, but has been by our statute expressly transmitted to them, *eo nomine*. No new right of action is given by our statute. It is solely a preserved, transmitted right. *Proc'or v. Hannibal & St. J. R. Co.* 64 Mo. 112; *White v. Mazey*, 64 Mo. 552; *Elliott v. St. Louis & I. M. R. Co.* 67 Mo. 272; *Gray v. McDonald*, 104 Mo. loc. cit. 311; *Miller v. Missouri P. R. Co.* 109 Mo. 850. By the common law, no such right of action was transmitted to anyone. The stepfather therefore had no such right, notwithstanding his right to recover for services performed by the child when he stood *in loco parentis* to it. Our statute, upon which the right alone rests, and by which it has been transmitted from the child, vests it expressly in the father and mother, *eo nomine* (who must join in the suit, and each have an equal interest in the judgment), or, if either of them be dead, then to the survivor. The fact that the mother is given an equal interest with the father marks the difference between actions of this character and suits for the recovery of the wages of the child, which can only be recovered by the father or stepfather standing *in loco parentis*, and demonstrates the impropriety of attempting to solve questions of this character by reference to cases which involved necessities furnished to or wages earned by the child.

The fact that the statute intended to transmit the rights of the deceased child to the father and mother, and that the relation between them as husband and wife does not affect their rights as parents, and the dissolution of the marital relations between them does not dispense with the necessity for joining both in the litigation, and that neither can maintain the action alone, and that the remarriage of the wife after the dissolution of her former marital relations makes no difference as to her rights as the mother of the deceased, is aptly illustrated by the history of the cases of *Buel v. St. Louis Transfer Co.* 45 Mo. 562, and *Crockett v. St. Louis Transfer Co.* 52 Mo. 457. The child of Ruth and Samuel F. Buel was killed by the alleged negligence of the defendant. The father and mother were divorced persons. The father refused to join the mother in the suit,

so she instituted it as sole plaintiff and joined the husband as a codefendant. After the expiration of the year from the time the accident occurred, the petition was amended so as to make the father a coplaintiff instead of a codefendant. Speaking of the divorce, this court said: "There is no force in the objection that Mr. and Mrs. Buel, the plaintiffs, had been divorced prior to the accrument of the cause of action sued on. They do not sue as husband and wife, but simply as parents. The divorce did not affect the fact of parentage. The statute does not give the action to the husband and wife, as such, but to the father and mother, as the parents of the deceased minor. The circumstance of the divorce explains the fact that the suit was originally commenced by Mrs. Buel as a *feme sole*." 45 Mo. loc. cit. 564. And, as to the right being in the father and mother, the court held that the action could not be sustained by one without joining the other. *Id.* loc. cit. 563. Before the case was retried in the circuit court, Mrs. Buel married John Crockett, and he was made a party plaintiff. Thus, there were Mrs. Buel-Crockett and her former husband, Buel, and her then husband, Crockett, parties plaintiff, and the court held they were all necessary parties.—Mr. Buel as father, and Mrs. Buel-Crockett as mother of their deceased child, and Mr. Crockett as the then husband of the mother. *Crockett v. St. Louis Transfer Co.* 52 Mo. 457. In this case Crockett was never the stepfather of the child, as he married the child's mother after the death of the child, and was joined as plaintiff because the statute then required the husband to be joined with the wife. But it is direct authority upon the construction to be placed upon the statute as to who are proper parties in a proceeding under the statute, and for holding that the mother's right to maintain an action of this character is vested in her because of her relation of mother to the deceased, and that such right is personal to her, and is not affected by a divorce from her former husband or by her remarriage. In this case the father was dead, and the mother as survivor alone had a right to maintain this action. Her second husband was not the father of the deceased, and hence has no right to maintain the action; and her marriage a second time did not sever her relation of mother to her son, nor take away from her the right which the statute transmitted to her as mother to recover damages which her son might have recovered if he had survived the injury. The judgment of the Kansas City court of appeals was therefore erroneous on both propositions decided by it, and, as the circuit court on the trial *de novo* followed that decision, its judgment is likewise erroneous.

3. The contention that the decision of the Kansas City court of appeals is *res judicata* and binding upon this court is untenable. The

cases cited by the learned counsel for respondent apply only where the second appeal is taken to the same court that formerly decided the case. This court has not decided this case before, and the decision of the Kansas City court of appeals is not binding on this court.

8. The amount in dispute in this case is the amount claimed in the petition, which is \$5,000 (*State v. Gill*, 107 Mo. 45; *State, Hartley, v. Rombauer*, 180 Mo. 388, and this brings this case within the appellate jurisdiction of this court. The fact that on the first trial the plaintiff recovered judgment for \$900 fixed that sum thereafter as the amount in dispute, and made the case properly appealable to the Kansas City court of appeals, because, if that judgment stood, it was all the plaintiff could recover or the defendant could be made to pay. But, when that judgment was reversed by the Kansas City court of appeals, the amount in dispute immediately became, as it originally was before any judgment was rendered, \$5,000. It is argued, however, that the evidence shows that deceased was only receiving \$4 per week, and that at this rate he would have earned less than \$2,500 before he attained his majority, not making any deductions for his maintenance, and hence that in no event could a judgment ever be rendered which would make the case properly one within the appellate jurisdiction of this court. This argument is based upon the erroneous premise that the son would never during his minority earn more than he was able to at the age of thirteen or fourteen years. Instances are not infrequent in our day and generation when youths who started on small wages worked their way to good paying positions in life, even before attaining their majority. And this possibility is confined to no one favored class. It is open to everyone, without regard to the station in life in which he was born. We cannot judicially declare how much any given minor would earn between the ages of fourteen and twenty-one. That is a question to be decided by the facts in each case. The only safe rule is to regard the amount claimed in the petition as the amount in dispute, until the claim has been merged into a judgment. *Vineyard v. Lynch*, 86 Mo. 684.

As the action of the circuit court was predicated solely upon the decision of the Kansas City court of appeals, and as the merits of the case have not been discussed by counsel, and no point has been made as to whether the plaintiff made out a *prima facie* case on the facts, we express no opinion thereon; but, for the error in taking the case from the jury for the legal reasons assigned, we reverse the judgment of the Circuit Court, and remand the cause for further proceedings by that court.

All concur.

NEW HAMPSHIRE SUPREME COURT.

Frank GAGNON

v.

Joseph DANA et al.

(.....N. H.)

1. A gratuitous lender of brackets for use in a staging is not liable for an injury to a servant of the borrower caused by a defect in the brackets of which the lender did not know, even though he should have known of it.
2. The fact that there was no competent evidence to sustain a verdict for plaintiff when a motion for a nonsuit was made at the close of plaintiff's evidence is immaterial, where defendant introduces evidence which supplies the deficiency.
3. An instruction that the relation of master and servant did not exist between plaintiff and defendant at the time of an injury to the former should be given in an action based upon such relation where such relation did not in fact exist at the time of the accident, although it had previously existed and the servant was temporarily loaned for a particular service, while the accident is alleged to have happened because of defects in brackets gratuitously loaned by defendant to plaintiff's employer at the time for use in a staging.

(March 11, 1898.)

EXCEPTIONS by defendants to rulings of the trial court for Hillsborough County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence which resulted in a verdict in plaintiff's favor. *Verdict set aside.*

Mr. Bradley was engaged in making some repairs to a building. Dana & Provost were carpenters and building contractors employing plaintiff, who was by trade a carpenter. Bradley applied to Dana & Provost for men, offering them a slight advance over their regular wages to work for him. Plaintiff, among others, was sent to work for Bradley. Bradley also obtained from Dana & Provost certain wall brackets for constructing a staging upon the building. For the use of these brackets no compensation was charged. While upon a staging constructed by the use of one of these brackets plaintiff was precipitated to the ground and injured by reason of a defect in the bracket. The court instructed the jury that if they found the facts to be as stated then Dana & Provost could not be liable for plaintiff's injury unless they knew or ought to have known that the brackets furnished were unsafe and unsuitable for use on the building.

Further facts sufficiently appear in the opinion.

Messrs. F. M. Topliff, D. A. Taggart, and R. E. Walker for defendants.

Messrs. Burnham, Brown, & Warren and Isaac W. Smith, for plaintiff:

If you find the facts to be as stated, then Dana & Provost cannot be liable for Gagnon's injury unless they knew or ought to have

known that the brackets furnished were unsafe and unsuitable for use on the buildings.

When the question is raised by exceptions the only inquiry is whether there is any evidence proper to submit to the jury as having a tendency to support the legal propositions which charge the defendants with liability.

Ford v. Fitchburg R. Co. 110 Mass. 240, 14 Am. Rep. 598.

It was not necessary for the plaintiff to introduce affirmative evidence of the exercise of due care.

4 Am. & Eng. Enc. Law, p. 77, and authorities cited in note 1; Buswell, Personal Injuries, § 185, and authorities cited; *Mayo v. Boston & M. R. Co.* 104 Mass. 187; Thomas, Neg. p. 359; *Huntress v. Boston & M. R. Co.* 66 N. H. 185; *Lyman v. Boston & M. R. Co.* 66 N. H. 200, 11 L. R. A. 364.

A man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom, to that person or any other, who is not himself in fault.

Wellington v. Downer Kerosene Oil Co. 104 Mass. 64; *Farrant v. Barnes*, 11 C. B. N. S. 553; *George v. Skittington*, L. R. 5 Exch. 1; *Thomas v. Winchester*, 6 N. Y. 897, 57 Am. Dec. 455; *Brass v. Maitland*, 6 El. & Bl. 470; 1 Addison, Torts, § 654.

If the defendants had sold these brackets to Bradley, or to the plaintiff, or had loaned them for hire, knowing the use that would be made of them, and knowing their unsuitableness, there would be no doubt that they would have been liable to the plaintiff. What difference can it make that they were loaned without hire, the defendants knowing that they were unsuitable.

Townsend v. Wathen, 9 East, 277; *Carter v. Towne*, 98 Mass. 567, 96 Am. Dec. 682; *Higgins v. Western U. Teleg. Co.* 8 Misc. 433; Thomas, Neg. p. 352; Addison, Torts, §§ 596, 1206.

It is difficult to distinguish the present case (the defendants knowing, as the jury have found, that the brackets were unsuitable, and knowing the use to which they were to be put), from *Dixon v. Bell*, 5 Maule & S. 198, where an injury having been received from a loaded gun, the owner was held liable for leaving a dangerous instrument in a state capable of doing mischief, although the mischief was caused by a girl taking it up, pointing it at a child and snapping the trigger after the priming had been withdrawn.

The lender is bound to give notice to the borrower of the defects of the thing loaned; and if he does not, and conceals them, and an injury occurs to the borrower thereby, the lender is responsible.

Pothier, Prêt à Usage, n. 84; 1 Domat, B. 1, title 5, § 8, art. 8; Dig. Lib. 18, title 6, 1, 17, § 8; Id. L. 18, § 8; Pothier, Pand. Lib. 18, title 6, u. 26; 3 Story, Bailm. § 275; *Blakemore v. Bristol & E. R. Co.* 8 El. & Bl. 1085; *Coggs v. Bernard*, 3 Ld. Raym. 909; *Levy v. Langridge*, 4 Mees. & W.

NOTE.—As to which of two persons must be considered the master of a third person, see note to *Hardy v. Shelden Co.* (C. C. App. 6th C.) 37 L. R. A. 28; also *Channon v. Sanford Co.* (Conn.) ante, 200, 41 L. R. A.

337; *Winterbottom v. Wright*, 10 Mees. & W. 114.

The lender owes a duty to the borrower to disclose defects in the things lent.

Story, Bailm. 9th ed. § 275, note; Broom, Legal Maxims, p. 392; *MacCarthy v. Young*, 6 Hurlst. & N. 829.

Blodgett, J., delivered the opinion of the court:

The brackets having been loaned by the defendants for the use of the borrower, without any reward or compensation to be received by them from him, their only duty in respect of defects was to inform him of any of which they were aware, and which might make the use of the loan perilous to him or to his servants, one of whom was the plaintiff. "The ground of this obligation is that, when a person lends, he ought to confer a benefit, and not to do a mischief." Shirley, Lead. Cas. 43, 44, and authorities generally. But the obligation of a mere lender goes no further than this, and he cannot, therefore, be made liable for not communicating anything which he did not in fact know, whether he ought to have known it or not. *McCarthy v. Young*, 6 Hurlst. & N. 329; *Blakemore v. Bristol & E. R. Co.* 8 El. & Bl. 1035, 1050, 1051; Shearm. & Redf. Neg. 8d ed. § 197, note; 2 Parsons, Contr. 5th ed. 109; 1 Addison, Contr. 361; 2 Wait, Act. & Def. p. 268; Schouler, Bailm. § 79; Story, Bailm. § 275. Resting upon such authority, and being so consonant to reason and justice that it cannot but be the law, the rule thus enunciated necessarily renders erroneous the reiterated instruction to the jury that the defendants might be liable for the plaintiff's injury "if they knew, or ought to have known, that the brackets furnished were unsafe and unsuitable for use on the building." While a gratuitous lender "must be taken to lend for the purpose of a beneficial use by the borrower," and is rightfully "responsible for defects in the chattel, with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured" (*Blakemore v. Bristol & E. R. Co.* 8 El. & Bl. 1035, 1050, 1051, per Coleridge, J.), it would be the greatest injustice as well as extending the law beyond any recognized principle, to subject him to liability for defects of which he is not aware; and especially in a case like this, where the defect complained of was apparently as open to ascertainment by the plaintiff as it could possibly have been to the defendants. The instruction that "it is not material whether anything was paid for the use of the brackets, or not," was no less erroneous upon the question of the defendant's liability. While in many respects the duties and liabilities of the parties are materially different in the case of a gratuitous bailment and one for hire, it is enough for the present purpose to observe that while in the former the benefit is exclusively to the bailee, and therefore the liability of the bailor for defects in the thing loaned extends only to those which are known to him and not communicated to the bailee, in the latter, the bailment being for the mutual benefit of both alike, the bailor's obligation is and of right ought to be, correspondingly enlarged; and it is therefore his duty to deliver the thing hired in a proper

condition to be used as contemplated by the parties, and for failure to do so he is justly liable for the damage directly resulting to the bailee or his servants from its unsafe condition. This distinction is fundamental, and of universal recognition. The relation of master and servant not existing between the plaintiff and the defendants at the time of his injury, their request to have the jury specifically so instructed should have been granted. The duties and obligations of a master to his servant in respect of tools and appliances for performing the labor for which he is engaged differ widely from those of a gratuitous lender to the borrower, and a radically different rule obtains in the one case than in the other. The defendants' additional requests, making actual knowledge of the defect the test of their liability, should have been given not only because the law is so, but because under the instructions which were given, the jury might well have found that the defendants did not know of the defect, and still have found them chargeable with it, on the ground that they ought to have known it. In view of the errors to which attention has been called, it is deemed unnecessary to go further, and specifically consider other exceptions relating to the instructions given and refused; but we think it should be added that, owing to the misapprehension by the court of the obligations of the defendants to the plaintiff and of the legal relation between them, the instructions generally were not such as the case required.

The defendants can take nothing by their exceptions to the denial of their motions for a nonsuit, and to direct a verdict in their favor. If at the time the plaintiff rested, he had not adduced competent evidence to sustain a verdict in his favor (as to which no intelligent opinion can be expressed without additional facts), it is now immaterial, because the defendants, instead of resting their case upon their exception to the denial of their motion for a nonsuit, went on with the trial and introduced their evidence, and the deficiency, if any, of the plaintiff's evidence, was supplied by one side or the other before the case went to the jury, inasmuch as it is found that at some stage of the trial there was testimony from numerous witnesses to and against the defendants' knowledge of the bracket's defective and unsound condition, so that when all the proof was in the case, there was no ground of exception for the reason of its insufficiency to sustain a verdict for the plaintiff; and this being so it is wholly indifferent by which party the proof was introduced. *Fletcher v. Thompson*, 55 N. H. 308, 309, and authorities cited; *Oakes v. Thornton*, 28 N. H. 44, 47, per Woods, J. And this testimony also rendered the renewal of the motion at the close of the evidence unreasonable (*Brown v. Massachusetts Mut. L. Ins. Co.* 59 N. H. 298, 307, 47 Am. Rep. 205) and precluded the granting of the motion to direct a verdict for the defendants (*Shepardson v. Perkins*, 58 N. H. 355). The result is that the defendants' exceptions on this branch of the case are overruled, and their other exceptions, hereinbefore considered, sustained.

Verdict set aside.

Clark, J., did not sit. The others concurred.

NEW YORK COURT OF APPEALS.

Charles I. BERG, *Resp't.*,

v.

Henry PARSONS, *Appt.*

(156 N. Y. 109.)

1. The negligence of a contractor or his employee in blasting rock on a vacant city lot, causing damage to a building upon an adjoining lot, does not make the proprietor who hires the contractor responsible for the damage.

2. The negligence of an independent contractor or his employee in blasting out a ledge of rock which extends close up to the wall of a building on an adjoining property is not chargeable to his employer, who engaged him to excavate the lot preparatory to building thereon.

(Gray, Bartlett, and Hatght, JJ., dissent.)

(June 7, 1898.)

A PPEAL by defendant from a judgment of the general term of the Supreme Court, First Department, affirming a judgment of the New York County Circuit in favor of plaintiff in an action brought to recover damages for the alleged negligent injury of plaintiff's property by blasting on property belonging to defendant. *Reversed.*

The facts are stated in the opinion.

Mr. Alexander Thain, for appellant:

There was no proof of want of care on the part of defendant.

Where in making an excavation upon his own lands, for lawful purposes, a person is obliged to resort to blasting, the fact that the use of such means caused injury to a building on adjoining land does not alone render him liable. It must also appear that he failed to exercise due care.

Booth v. Rome, W. & O. T. R. Co. 140 N. Y. 267, 24 L. R. A. 105.

The presumption is, until the contrary be shown, that every man has performed his duty, and it is incumbent on one who alleges a failure in this respect as a foundation to a right in an action, to prove facts from which an inference of negligence may properly be drawn, and proof of a mere fact that an accident has happened will not, in the absence of any contractual relations between the parties, authorize such an inference.

Cosulich v. Standard Oil Co. 123 N. Y. 118.

Defendant is not liable under the doctrine of *respondent superior*.

The action being for negligence, and not for trespass or for creating a nuisance, the defendant, proving that the act of negligence complained of was not his, but that of an independent contractor, is not liable.

Roemer v. Striker, 142 N. Y. 184; *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544; *Wyllie v. Palmer*, 187 N. Y. 248, 19 L. R. A. 285; *King v. New York C. & H. R. R. Co.* 66 N. Y. 181, 23 Am. Rep. 37.

To hold the defendant liable for the negligence of his contractor it must be made to appear at least that he made his contract with knowledge that the contractor was unskilful or incompetent, or that the reputation of the contractor for carelessness was such that defendant must be presumed to have known of it.

Benoit v. Troy & L. R. Co. 154 N. Y. 228; *Park v. New York C. & H. R. R. Co.* 155 N. Y. 215; *Baulee v. New York & H. R. Co.* 59 N. Y. 356, 17 Am. Rep. 325; *Whart. Neg. § 288*; *Olive v. Whitney Marble Co.* 108 N. Y. 292.

Assuming all for which plaintiff contends, contracting with Tobin was not culpable negligence on the part of the defendant. It was at most a mere error of judgment for which he cannot be held liable.

Benoit v. Troy & L. R. Co. 154 N. Y. 228; *Harley v. Buffalo Car Mfg. Co.* 142 N. Y. 81.

Plaintiff had a right to interfere with Tobin, while defendant had not. Defendant had no cause for complaint, as there was no chance of injury to his property by reason of careless blasting. Plaintiff, after having been warned that Tobin was carrying on his work in a manner likely to endanger his property, might have applied for and obtained, before the accident, the injunction which he procured after the injury had been done.

Weston v. Troy, 189 N. Y. 281; *Hamilton v. Third Ave. R. Co.* 6 Misc. 882; *Wiwrowski v. Lake Shore & M. S. R. Co.* 124 N. Y. 420; *Mitie v. Manhattan R. Co.* 5 Misc. 801; *Robertson v. New York*, 7 Misc. 645.

It is no longer sufficient, to authorize the submission of a case to a jury, that there be a mere scintilla of evidence. There must be proof to sustain a verdict if rendered.

Dwight v. Germania L. Ins. Co. 103 N. Y. 341, 57 Am. Rep. 729; *Corcoran v. Delaware, L. & W. R. Co.* 47 N. Y. S. R. 147; *Baulee v. New York & H. R. Co.* 59 N. Y. 356, 17 Am. Rep. 325; *Cadwell v. Arnheim*, 152 N. Y. 182; *Bond v. Smith*, 113 N. Y. 878; *Pauley v. Steam Gauge & Lantern Co.* 181 N. Y. 90, 15 L. R. A. 194.

Defendant was not liable for any criminal act of the contractor, nor for his recklessness.

Wright v. New York C. R. Co. 25 N. Y. 562.

Mr. Charles W. Pierson, with *Messrs. Alexander & Green*, for respondent:

A person employing an independent contractor to perform a dangerous work upon his premises, requiring skill and likely to injure his neighbors if improperly done, is bound to exercise due and reasonable care to select a competent contractor, and is liable for injuries resulting from his failure to exercise such care.

Norwalk Gaslight Co. v. Norwalk, 68 Conn. 495; *Brannock v. Elmora*, 114 Mo. 55; *McCafferty v. Spuyten Duyvil & P. M. R. Co.* 61 N. Y. 178, 19 Am. Rep. 267; *Cuff v. Newark & N. Y. R. Co.* 85 N. J. L. 17, 10 Am. Rep. 205; *Ardasco Oil Co. v. Gilson*, 63 Pa. 146; *Connors v. Hennessy*, 112 Mass. 96; *Sturges v. Societu*

NOTE.—As to injuries to land or buildings by blasting, see *Benner v. Atlantic Dredging Co.* (N. Y.) 17 L. R. A. 220, and *note*.

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As to liability for negligence of independent contractor in blasting, see *note to Hawver v. Whalen* (Ohio) 14 L. R. A. on page 330.

for Promotion of Theological Education, 180 Mass. 414, 39 Am. Rep. 468; *Ware v. St. Paul Water Co.* 2 Abb. (U. S.) 261; *Burns v. McDonald*, 57 Mo. App. 599; 1 Shearm. & Redf. Neg. § 168; Whart. Neg. § 181; Story, Agency, § 454a, note; 2 Thomp. Neg. p. 899; Thomas, Neg. p. 843.

There are expressions in some of the books which seem to imply that actual knowledge of the contractor's incompetence must be brought home to the employer in order to hold him.

14 Am. & Eng. Enc. Law, p. 836; 1 Lawson, Rights, Rem. & Pr. § 300.

But this is too narrow a statement of the law.

It loses sight of the familiar principle that means of knowledge is equivalent to actual notice.

Norwalk Gaslight Co. v. Norwalk, 68 Conn. 495; 1 Shearm. & Redf. Neg. §§ 194, 217, and cases cited; *Whittaker v. Delaware & H. Canal Co.* 126 N. Y. 544.

In employing subordinates the principal must exercise great care, and is required to institute affirmative inquiries to ascertain their character and qualifications, and negligence in this respect will create a liability.

Chapman v. Erie R. Co. 55 N. Y. 579; *Park v. New York C. & H. R. R. Co.* 155 N. Y. 215; *Baulee v. New York & H. R. Co.* 59 N. Y. 856, 17 Am. Rep. 825; *Chicago & A. R. Co. v. Sullivan*, 68 Ill. 293.

Proof of specific acts was properly admitted to show the contractor's incompetence and reckless character.

Pittsburgh, Ft. W. & O. R. Co. v. Ruby, 88 Ind. 294, 10 Am. Rep. 111; *Park v. New York C. & H. R. R. Co.* 155 N. Y. 215; *Baulee v. New York & H. R. Co.* 59 N. Y. 856, 17 Am. Rep. 825; Whart. Ev. 3d ed. § 56; *Etansville & T. H. R. Co. v. Guyton*, 115 Ind. 450; 1 Greenl. Ev. § 102; *Terrell v. Com.* 18 Bush, 246; *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89.

There was no error in admitting evidence of the contractor's intemperate habits.

Kean v. Detroit Copper & B. Rolling Mills, 66 Mich. 277; *Chicago & A. R. Co. v. Sullivan*, 68 Ill. 293; *Pennsylvania R. Co. v. Books*, 57 Pa. 539, 98 Am. Dec. 229; *Gilman v. Eastern R. Co.* 13 Allen, 438, 90 Am. Dec. 210.

Martin, J., delivered the opinion of the court:

The doctrine of *respondet superior* is based upon the relation of master and servant or principal and agent. As no such relation existed between the parties, I find no ground upon which the judgment in this action can be sustained.

The rule that where the relation of master and servant or principal and agent does not exist, but an injury results from negligence in the performance of work by a contractor, the party with whom he contracts is not responsible for his negligence or that of his servants, is well established by the authorities in this state. *Bake v. Farris*, 5 N. Y. 48, 45 Am. Dec. 804; *Pack v. New York*, 8 N. Y. 222; *Kelly v. New York*, 11 N. Y. 482; *McCafferty v. Spuyten Duyvil & P. M. R. Co.* 61 N. Y. 178, 19 Am. Rep. 267; *King v. New York C. & H. R. R. Co.* 41 L. R. A.

66 N. Y. 181, 23 Am. Rep. 87; *Pierrepoint v. Loveless*, 72 N. Y. 211; *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544; *Herrington v. Lansingburgh*, 110 N. Y. 145; *Roemer v. Striker*, 142 N. Y. 134.

In *Blake v. Ferris* the defendant had a license to construct, at his own expense, a sewer in a public street. He engaged another person to construct it for a stipulated price. The sewer was left at night in a negligent manner by the workmen who were employed in its construction. It was held that the immediate employer of the servant, through whose negligence the injury occurred, was responsible, but that the primary principal employer was not.

In *Pack v. New York*, which was an action for damages caused by the alleged negligence of a contractor in blasting rocks, which resulted in injury to the plaintiff's house, in personal injury to his wife, and in killing one of his children, it was held that, as the work was being prosecuted under a contract with a person who was to perform it, the corporation was not liable, but that a recovery for such an injury could be had only against the person actually guilty of the wrongful act, or against one to whom he stands in the relation of servant or agent, and that the contractor in such a case was not the servant or agent of the corporation.

The *Kelly Case* was also an action for damages occasioned by negligence in blasting. In that case there was a contract between the city and a contractor to grade a certain street, and it was held that the city was not liable for damages occasioned by negligence in the performance of the work, but that the contractor was alone liable, although the contract provided that the work should be done under the direction and to the satisfaction of the officers of the corporation.

The *McCafferty Case* was for an injury to the plaintiff's store and property by alleged negligence in blasting rocks necessary for the construction of the defendant's road. There the corporation had let the work of constructing the road by contract, and the negligence was that of the contractor or his employees, and this court held that the defendant was not liable, and that there was no distinction between real and personal property, so far as its negligent use and management were concerned, or of negligent acts upon it by others.

In the *King Case* the owner of real property was held not liable for injuries resulting from negligence on the part of a contractor or his employees engaged in performing a lawful contract for specific work upon the premises of the defendant, and the rule that the law will not impute to one person the negligent acts of another, unless the relation of master and servant or principal and agent exists, was again asserted.

The same doctrine was held in the *Pierrepoint Case*, where the *Blake* and *Pack Cases* were followed, and it was declared that a contractor or his employees did not stand in the relation of servants to a person who was the owner of the property and with whom the contract was made, and that the latter was not answerable for their negligence.

In *Ferguson v. Hubbell*, where the injury for which a recovery was sought resulted from the

act of a contractor, it was again decided that the contractor was, in no sense, the servant of the defendant, and that the doctrine of *respondent superior* did not apply.

The *Herrington Case* was for damages occasioned by carelessness in blasting. The work was done by contractors, and the court followed its previous decisions, and held that the defendant was not liable, but that the injury was occasioned by the negligence of the contractors, and that they alone were responsible.

The *Roemer Case* was also for negligence in blasting and excavating on the defendant's premises which adjoined the premises of the plaintiff. The work was done by a contractor, and the owner was held not liable.

It seems to me that the principle of these decisions is decisive of the case at bar, and is directly adverse to the contention of the respondent. The only authorities in this state cited as sustaining the doctrine contended for are *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304, and *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 487. The *Blake Case*, we have already referred to, which is a direct authority against the doctrine it is cited to sustain. In the *Storrs Case* the facts were different and the principle of the decision has no application. There the doctrine of the *Blake*, *Kelly*, and *Pack Cases* was expressly indorsed in the opinion of Judge Comstock, who said: "Now, in these two cases of *Pack v. New York*, and *Kelly v. New York*, the general doctrines so well set forth in *Blake v. Ferris* were applied with entire precision and accuracy." While the learned judge doubted the propriety of the application of that doctrine to the case of *Blake v. Ferris*, he expressly recognized its correctness and its applicability to a case like this. The decision of the court in the *Storrs Case* was placed upon the sole ground that it was the duty of the corporation to keep its streets in a safe condition for public travel, and for a failure to discharge that duty the corporation was liable. The question of the negligent manner in which the work was performed was entirely excluded by the opinion in that case.

There are certain exceptional cases where a person employing a contractor is liable, which, briefly stated, are: Where the employer personally interferes with the work, and the acts performed by him occasion the injury; where the thing contracted to be done is unlawful; where the acts performed create a public nuisance; and where an employer is bound by a statute to do a thing efficiently and an injury results from its inefficiency. Manifestly, this case falls within none of the exceptions to which we have referred. There was no interference by the defendant. The thing contracted to be done was lawful. The work did not constitute a public nuisance, and there was no statute binding the defendant to efficiently perform it. In none of those exceptional cases does the question of negligence arise. There the action is based upon the wrongful act of the party, and may be maintained against the author or the person performing or continuing it. In the case at bar the work contracted for was lawful and necessary for the improvement and use of the defendant's property. Consequently, no liability can be based upon the

illegality of the transaction, but it must stand upon the negligence of the contractor or his employee alone. It seems very obvious that, under the authorities, the defendant was not responsible for the acts of the contractor or his employees, and that the court should have granted the defendant's motion for a nonsuit. If a contrary rule were established it would not only impose upon the owners of real property an improper restraint in contracting for its improvement, but would open a new and unlimited field for actions for the negligence of others which has not hitherto existed in this state, and practically overrule a long line of decisions in this court which firmly establish a contrary doctrine.

It follows that *the judgment should be reversed.*

Parker, Ch. J., O'Brien and Vann, JJ., concur with **Martin, J.**, for reversal.

Gray, J., dissenting:

The question is whether in a case like the present one, where the work contracted for is obviously and necessarily hazardous, it is an assumption inconsistent with the doctrine of exemption for the acts of an independent contractor that a legal duty is imposed upon him who employs the contractor to use a reasonable amount of care in the selection of one who is both competent and careful, and that for a failure to perform that duty he may be held for the damages occasioned by negligence.

The plaintiff and the defendant were owners of adjoining pieces of real estate in the city of New York. Upon the plaintiff's property there was a dwelling house. The defendant's property was vacant and was covered with a mass of rock, which extended above the curb. The defendant made a contract with one Tobin to excavate his plot to the depth of 10 feet below the curb line, preparatory to building thereon. In the performance of the contract, Tobin appears to have proceeded unskillfully and with considerable recklessness, and, in the work of blasting, he caused some damage to the plaintiff's house, both within and without. For the damage so sustained the plaintiff brought the present action. The complaint charged, and the case went to the jury upon the theory, that the defendant had failed to exercise proper care, or a due regard for the safety of the plaintiff's premises in the selection of a competent and careful contractor to do the dangerous work of excavating the earth and rock. The defense was, in substance, that the person employed by the defendant for the purpose was an independent contractor, having the entire control and management of the work, and that as the result of inquiries, showing him to be a competent, skillful, and careful contractor, the defendant had made the contract with him. Upon the trial the evidence showed that the defendant had committed to one Squier the supervision of the construction of the building upon his land, and that he acted for him in all pertinent matters. Squier was a builder of very considerable experience, and had had much to do with contracts in the building of houses in the city. He had never heard of Tobin before giving him the contract for the work in question. That work

was shown to have been plainly of a hazardous nature; inasmuch as it necessitated the blasting out of a ledge of rock, which extended close up to the wall of the plaintiff's adjoining house. There was evidence to the effect that it was quite possible to do this work of excavation without causing injury to the adjoining building, and that work of that description was being constantly done in the city, with safety to adjoining premises. The way that Tobin performed his contract warranted a belief that he was incompetent and reckless. He was the lowest bidder for the work. The evidence showed him to be an illiterate person and of intemperate habits, whose appearance and surroundings might permit inferences adverse to his fitness to do responsible work of such a nature. There was testimony concerning two previous jobs of a similar nature, from which it might be inferred that Tobin was either reckless, or lacked skill. Squier testified, for the defendant, to having inquired of the representative of a real-estate operator about Tobin, who spoke of him as a good and careful blaster, and he visited two places, to which Tobin had referred him, to see work that he had done. That inquiry satisfied him. He denied any knowledge of Tobin's habits; but he made no inquiry concerning them. A witness testified to having employed Tobin upon rock excavation, and to having found him satisfactory in his work. While there was evidence of some care having been exercised by the defendant's agent, was it of that conclusive nature which precluded criticism? As the case stood, it could not be said, as matter of law, that the defendant had discharged his whole duty towards the plaintiff, in the matter of the selection and employment of a proper person to perform the required work. There was a fair question upon the evidence, whether, in initiating a work which, under the particular circumstances, was necessarily fraught with some danger to the adjoining property, the defendant had exercised a reasonable degree of prudence in the employment of Tobin. The plaintiff was not obliged to show that the defendant knew about the characteristics and previous conduct of Tobin; but, there being evidence, in the testimony of the witnesses, affecting his capacity and habits, previously to the employment, it became a question whether defendant's inquiries were sufficient and such as a prudent man would have made, who realized the hazards involved to the adjoining property and who intended to proceed about the employment of a contractor, as he would have expected to be done by if the positions were reversed. The plaintiff recovered a verdict for the amount of the expense to which he had been put in repairing the damage done to his house. It is, of course, evident from that verdict that the evidence had failed to satisfy the jury that the defendant had proceeded in the matter without due regard for his neighbor's rights, or that Tobin was the kind of man to be intrusted with a job demanding both skill and a sense of responsibility.

If there was evidence raising a question as to whether the defendant had exercised reasonable care in contracting out this work to Tobin, then I think it was properly submitted to the determination of the jury. What is there in 41 L. R. A.

the doctrine, behind which the defendant seeks to shelter himself, which should interfere with the trial and submission of the issue which was tendered by the complaint and accepted by the answer; namely, whether proper care had been exercised by the defendant in committing the work to Tobin? The argument for the defendant is, as Tobin was performing his work as an independent contractor, that he and his men were not under the supervision or control of the defendant, and that, as no relation of master and servant existed, the defendant could come under no liability for Tobin's negligent acts.

The doctrine which exempts a person from liability for damages caused by the negligence of an independent contractor employed by him is well established in this state. It rests upon a basis of justice and of reason, and was a departure from the general doctrine of the responsibility of the master for the servant's acts which the courts, both in England and this state, have agreed upon within comparatively recent years. *Quarman v. Burnett*, 6 Mees. & W. 499; *Reedie v. London & N. W. R. Co.* 4 Exch. 253; *Blake v. Ferris*, 5 N. Y. 48. 55 Am. Dec. 304; *Storrs v. Utica*, 17 N. Y. 104 72 Am. Dec. 437.

Formerly, the rule *respondent superior* was deemed controlling, and the legal relation of master and servant, to which it was applicable, received the broad extension, within which the employer of another became responsible for the other's acts, upon the principle *qui facit per alium facit per se*. That, as a maxim, handed down from the Roman Code, meant that the agency of the servant was an instrument of his employer. Any man having authority over another's actions, who commands him to do an act, or who may be deemed to have impliedly commanded him in the ordinary course of his employment or business, becomes responsible for his acts, as for his own. The injustice, however, of applying this principle to a situation where a person is engaged in doing a piece of work, under an employment or a contract, in the performance of which he uses his own means and his own servants, without any control upon the part of the general employer, became apparent. It was evident that the relation of master and servant did not exist, when the relation between the parties was governed by such an engagement or contract. Whereas, under the operation of the rule *respondent superior*, the injured person might hold the master responsible and disregard the servant, who was the immediate author of the injury; under the introduction of the reasonable modification of that rule, the independent contractor, and not the general employer, became responsible for negligent acts, committed in person, or by those under his orders.

The principle of the decision below, in the present case, in my judgment, in no respect weakens the doctrine of the exemption of the general employer from liability for damages caused by the negligence of the independent contractor; nor, in any wise, threatens its stability. Nor does it affect it, otherwise than by establishing a reasonable safeguard against too broad a claim for exemption. It seems to me a proposition, as clear as it is reasonable, that

the assumption that there has been an exercise of due care in the selection of a competent and careful contractor, is a part of the foundation for the doctrine. I do not think that it would do to hold that a person, by the mere act of employing a contractor to do some work of a nature in itself obviously hazardous to others, thereby discharges himself of all responsibility. Something more is required of him. With that due regard for his neighbor's rights, which is obligatory upon all, in the use which they make of their own property, he should be held to the exercise of reasonable care and of some deliberation in the selection of a contractor. We are referred to decisions of the courts of other states, where this duty on the part of a general employer seems to have been distinctly recognized (*Norwalk Gaslight Co. v. Norwalk*, 68 Conn. 495; *Brannock v. Elmora*, 114 Mo. 55), and while precisely a similar case to this may not be found in our reports, the reasonableness of the proposition commends and sustains it. As I have suggested, it may be assumed as an inherent element of the employer's claim for exemption. See Whart. Neg. § 181; Story, Agency, 9th ed. § 454a, at p. 556, note; *Cuff v. Newark & N. Y. R. Co.* 35 N. J. L. 17, 10 Am. Rep. 205; *Ardesco Oil Co. v. Gilson*, 63 Pa. 146; *Sturges v. Society for Promotion of Theological Education*, 180 Mass. 414, 39 Am. Rep. 463.

In the text-books and cases just referred to, it will be observed that the assumption I mention is recognized as one associated with the employment of an independent contractor. I do not think it needs much argument to vindicate the entire propriety of the assumption. The exemption from liability should not be so broad as to exclude the consideration of the manner in which the independent contractor was selected for the particular work. When we consider the hazards incident to the work of blasting in a city block, there ought to be no question, where the work is obviously and necessarily of a dangerous nature, as to the propriety of imposing upon the owner of the property to be improved thereby a legal duty to exercise proper care in the selection of his contractor. If that be true, then the question of the exercise of due care becomes one of fact upon the evidence. If there is evidence proving, or tending to prove, that the contractor was an incompetent, or a reckless, or an unfit person to be intrusted with the job, and that it was possible for the defendant to have discovered these facts by inquiry, then it is for the jury to render their verdict upon the issue between the parties. It is not essential that the defendant be shown to have known of the acts of incompetency, or of the conduct from which unfitness may be inferred. It is sufficient if it appear that no sufficient inquiry had been made, and that a careful inquiry might have revealed the incompetency or the unfitness. The circumstances of the selection of the contractor might be such as to justify a belief that there was a failure to exercise care and prudence in the matter.

The conclusion, therefore, which I reach after a careful consideration of the question, is that the defendant, in employing a contractor to blast out the rock upon his premises,—a work obviously dangerous to the adjoining

owner,—owed a legal duty to the plaintiff to carefully select one who was both competent and careful, and that for a failure to perform that duty, under the circumstances of this case, he became responsible for any injury to the plaintiff's property resulting from the contractor's negligence. I think that there was evidence adduced from which the jury might infer that the defendant had not proceeded with that care and due regard for the plaintiff's rights which were incumbent upon him. It may not have been very strong; but it cannot be said that there was none giving rise to inferences. Minds might differ upon the question; but that only goes to show the necessity of leaving it to the arbitration of a jury. The learned justices below have thought that there was a question for the jury upon the evidence. I think that they were right and that there are no errors calling for a reversal of this judgment.

Bartlett and Haight, JJ., concur with **Gray, J.,** for affirmance.

Belle C. SCHENCK, *Respt.*,

v.

William D. BARNES, Impleaded, etc., *Appt.*

(156 N. Y. 316.)

1. A trust created by a debtor under which he is the beneficiary is not affected by 1 Rev. Stat. p. 730, § 63, which prohibits a person beneficially interested in a trust for the receipt of rents and profits of lands from assigning, or in any manner disposing of, such interest.

2. A person cannot place his property in trust with remainder over, reserving to himself the beneficial interest for his life, subject to the expenses of the trust, and thereby put his life interest beyond the reach of subsequent creditors.

(*Parker, Ch. J., and O'Brien, J., dissent.*)

(June 7, 1898.)

APPEAL by defendant Barnes from an order and interlocutory judgment of the appellate Division of the Supreme Court, Second Department, reversing a judgment of a Special Term for Kings County sustaining demurrers to the complaint in an action brought by a creditor to reach the interest of his judgment debtor in a trust fund of real estate created by himself in which he reserved to himself a life interest. *Affirmed.*

The facts are stated in the opinions.

Messrs. Jay & Candler, for appellant:

The trust deed was made some three years before the plaintiff's judgment was obtained, and it has been held that if the conveyance and trust were made prior to the time when the plaintiff's claim accrued or judgment was

NOTE.—For attempt to place property by a trust beyond the reach of the grantor's creditors, see also *Brown v. McGill* (Md.) 39 L. R. A. 806.

As to spendthrift trusts generally, see also *Roberts v. Stevens* (Me.) 17 L. R. A. 236, and cases cited in footnote thereto; also *Wetmore v. Wetmore* (N. Y.) 33 L. R. A. 703.

obtained, it is immaterial with what intent such conveyance was made, the defendant not having been given credit based upon his possession of the real estate, which is covered by the deed of trust.

Holmes v. Little, 86 Hun, 226; *Howe v. Striker*, 5 Misc. 309.

The plaintiff should allege facts on which could be predicated a claim that there was remaining, after providing for the proper support of the *cestui que trust* and his family, a surplus income, and that the same is subject to the payment of his or her claim as a judgment creditor.

Kilroy v. Wood, 42 Hun, 636; *Bunnell v. Gardiner*, 4 App. Div. 321; *Card v. Meincke*, 72 Hun, 299; *Tolles v. Wood*, 99 N. Y. 616.

As the trust is governed by the Revised Statutes, the whole estate in law and equity is vested in the trustee, and the appellant has no estate or interest in the lands.

Noyes v. Blakeman, 6 N. Y. 567.

The appellant has no interest whatever in the subject of the trust, except the right to enforce the same, and he cannot in any manner anticipate the income.

What he cannot do by way of anticipation, the court cannot do, except in so far as it may be authorized to do by virtue of the statute, which would empower the court to apply the surplus income to the satisfaction of the claims of creditors as above suggested.

Douglas v. Cruger, 80 N. Y. 15; *Lent v. Howard*, 89 N. Y. 169; *Cuthbert v. Chauvet*, 136 N. Y. 326, 18 L. R. A. 745; *Re Vanderbilt*, 20 Hun, 520; *Powers v. Bergen*, 6 N. Y. 358.

Messrs. John W. Hutchison, Jr., and Walter S. Newhouse, for respondent:

Prior to the Revised Statutes, plaintiff would have been entitled to the relief sought under the common law, and in no other state would her right to such relief be questioned.

Such an interest could have been reached by a bill in equity prior to the Revised Statutes.

Bryan v. Knickerbocker, 1 Barb. Ch. 409; *Hadden v. Spader*, 20 Johns. 554; *Graff v. Bonnett*, 31 N. Y. 25, 88 Am. Dec. 286; *Nichols v. Levy*, 5 Wall. 441, 18 L. ed. 598; *Rome Each. Bank v. Eames*, 4 Abb. App. Dec. 99; *Gray, Restraints on Alienation*, 82; *Wait, Fraud. Conv. § 860*; *Eameston v. Lyde*, 1 Paige, 641; *Eager v. Price*, 2 Paige, 336; *Patrice Nat. Bank v. Windram*, 133 Mass. 175; *Jackson v. Von Zedlitz*, 126 Mass. 342; *Warner v. Rice*, 66 Md. 436; *Lackland v. Smith*, 5 Mo. App. 153; *Ghormley v. Smith*, 139 Pa. 584, 11 L. R. A. 565; *Mackason's Appeal*, 42 Pa. 384, 82 Am. Dec. 517; *Frazier v. Barnum*, 19 N. J. Eq. 316, 97 Am. Dec. 666; *Cosby v. Ferguson*, 3 J. J. Marsh. 264.

Section 1871 of the Code of Civil Procedure provides: Where an execution against the property of a judgment debtor, issued out of a court of record, as prescribed in the next section, has been returned wholly or partly unsatisfied, the judgment creditor may maintain an action against the judgment debtor, and any other persons, to compel the discovery of anything in action, or other property belonging to the judgment debtor, and of any money, thing in action, or other property due to him, or held in trust for him; to prevent the

transfer thereof, or the payment or delivery thereof, to him, or to any other person, and to procure satisfaction of the plaintiff's demand, as prescribed in the next section but one.

Craig v. Hone, 2 Edw. Ch. 568; *Chataugue County Bank v. White*, 6 N. Y. 236, 57 Am. Dec. 442; *Chataugue County Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347; *Scoville v. Halliday*, 16 Abb. N. C. 43; *Farnham v. Campbell*, 10 Paige, 598; *McArthur v. Hoyersradt*, 11 Paige, 495; *Scoville v. Shed*, 21 N. Y. Week. Dig. 389.

This being a valid express trust, the defendant Barnes has no estate in the lands, but a right to enforce it which is a chose in action and personal property.

1 Rev. Stat. 729, § 60; *Tompkins v. Fonda*, 4 Paige, 448; *Payne v. Becker*, 87 N. Y. 153.

The exception in the statute relates to trusts held by a third person for the benefit of the judgment debtor or his family, and created by persons other than himself.

Leroy v. Rogers, 8 Paige, 236; *Craig v. Hone*, 2 Edw. Ch. 569; *Hallett v. Thompson*, 5 Paige, 586; *Stewart v. McMartin*, 5 Barb. 442; *Bramhall v. Ferris*, 14 N. Y. 41, 67 Am. Dec. 118; *Graff v. Bonnett*, 31 N. Y. 9, 88 Am. Dec. 236; *Campbell v. Foster*, 35 N. Y. 366; *Williams v. Thorn*, 79 N. Y. 270; *Tolles v. Wood*, 16 Abb. N. C. 1, note.

Bartlett, J., delivered the opinion of the court:

This appeal certifies two questions: "First. In case a party, when solvent, executes a deed of trust of real property situate in this state, whereby he conveys the same to a trustee, reserving to himself the payment to him from time to time during his life of the net income from the trust estate, subject to the necessary expenses of the trustee, with a remainder over, and with full power to sell in said trustee, can a party who at the time of the creation of the trust was not a creditor of the creator or beneficiary of the trust, but who subsequently became a creditor, and who thereafter obtained a judgment upon his debt, and issued an execution upon the judgment against the property of the said beneficiary, and had the same returned unsatisfied in an action like the present one, recover any relief or any judgment which will authorize the sale of the right, title, or interest of the beneficiary in the said trust, or a judgment requiring the trustee to pay over to said creditor the entire net income from the said trust estate as it accrues? Second. Whether in such a case an interest reserved for his own benefit by the founder of a trust is subject to the claim of his subsequent creditors; and, if so, to what extent?"

The main question is whether a person can place his property in trust, with remainder over, reserving to himself the beneficial interest for his life, subject to the expenses of the trust, and thereby put the life interest beyond the reach of creditors whose claims arose after the creation of the trust. The special term answered this question in the affirmative, and the appellate division has taken the contrary view. We are of opinion that the appellate division reached the proper conclusion. While it is true that in this and other states the English rule has been modified, which makes the

interest of a beneficiary under a trust created for his benefit by a third party subject to the claims of his creditors, yet we have not ignored the general policy of the law, that creditors shall have the right to resort to all the property of the debtor not protected by statute. The provisions of the Revised Statutes, as construed by the courts, render this clear. In 2 Rev. Stat. p. 178, § 88, is the following provision: "Whenever an execution against the property of a defendant shall have been issued on a judgment at law, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a bill in chancery against such defendant, and any other person, to compel the discovery of any property or thing in action, belonging to the defendant, and of any property, money, or thing in action, due to him, or held in trust for him; and to prevent the transfer of any such property, money, or thing in action, or the payment or delivery thereof, to the defendant, except where such trust has been created by or the fund so held in trust has proceeded from, some person other than the defendant himself." This section has been substantially preserved in Code Civ. Proc. §§ 1871, 1879. It was at first contended that this statute protected absolutely the interest of a debtor in a trust created for his benefit by a third party, but it is now the settled law that this provision must be read with 1 Rev. Stat. p. 729, § 57, providing that the surplus income of a trust estate shall be liable in equity to the claim of the creditors of the *cestui que trust*. *Williams v. Thorn*, 70 N. Y. 270; *Graff v. Bonnett*, 31 N. Y. 9, 88 Am. Dec. 236. The statute quoted (2 Rev. Stat. p. 178, § 88), clearly implies that a trust created by the debtor, under which he is the beneficiary, does not protect his interest from the pursuit of creditors, as it is, in contemplation of law, property which he has put aside for his own use, and consequently a part of his estate, to which creditors are entitled. This general principle is also recognized by Code Civ. Proc. § 2463. A trust created by a debtor, and under which he is the beneficiary, is not affected by the provision of the Revised Statutes (1 Rev. Stat. p. 730, § 63) which prohibits a person beneficially interested in a trust for the receipt of the rents and profits of lands from assigning or disposing of the same. The policy of this statute is clear, when applied to trusts created by third parties, but is without force when the debtor creates the trust. The statute is obviously designed to assist the creators of trusts in protecting and caring for the beneficiaries who are the natural objects of their solicitude and care, but it cannot be invoked by a debtor to protect a trust which he has created to serve in time of need as a refuge from his creditors. The defendant Barnes, being out of debt in October, 1893, was at liberty, if he saw fit, to give away all his property, real and personal, to those of his blood, or to strangers. There would be no creditor to complain if he was moved to act in so unusual and improvident a manner. As matter of fact, he did at that time, as to the real estate in question, divest himself of the legal title; reserving under a conveyance, in trust, a beneficial interest in the property for life, with remainder over. The present action in no way

challenges the right of Barnes to thus divest himself of the legal title to this real estate; but plaintiff, as a subsequent creditor, seeks to have appropriated to the payment of her judgment such interest as Barnes reserved to himself in the property, and nothing more. It would be a startling and revolutionary doctrine to hold that this reserved interest cannot be reached by the plaintiff, as a creditor. If such is the law, it would make it possible for a person free from debt to place his property beyond the reach of creditors, and secure to himself a comfortable support during life, without regard to his subsequent business ventures, contracts, or losses. In Massachusetts and Pennsylvania it has been held that no such result can be accomplished. *Pacific Nat. Bank v. Windram*, 183 Mass. 175; *Mackason's Appeal*, 42 Pa. 380, 82 Am. Dec. 517. The prayer of the complaint in the case at bar asks the court to determine the amount of the interest which defendant Barnes reserved to himself in the trust fund, and to order it sold and applied on the judgment. A person for whose benefit a trust is created takes no estate or interest in the lands, but he can enforce the performance of the trust in equity. 1 Rev. Stat. p. 729, § 60. This right to enforce is a chose in action, and personal property in the hands of defendant Barnes in the case before us, and liable in equity for his debts. *Tompkins v. Fonda*, 4 Paige, 448; *Payne v. Becker*, 87 N. Y. 158. It is the settled policy of this state that where property is held in trust for a debtor, and the fund proceeds from a third party, the creditor can only reach the surplus income after providing for the proper support of the *cestui que trust*; but, if the debtor created the trust, his entire reserved interest is a fund to which his creditors can resort. *Graff v. Bonnett*, 31 N. Y. 9, 88 Am. Dec. 236. (Hogeboom, J., in the case last cited (p. 14, 88 Am. Dec. 240.) said: "In other words, it was a legislative declaration, in language intended to be explicit, but possibly liable to some misconstruction, that property held in trust for the debtor, when such trust proceeded from himself, was in no case to be protected for his benefit; but, where the trust or the fund proceeded from some other source, the liability of the property to, or its exemption from, judicial seizure, was to depend upon the general provisions of law applicable to trust property.")

We are asked to answer two questions, which may be thus stated: (1) Can this plaintiff, under the circumstances disclosed, recover a judgment which will authorize the sale of the debtor's interest in this trust, or require the trustee to pay over the entire net income as it accrues? (2) Where the founder of a trust reserves an interest for his own benefit, is it subject to the claim of his subsequent creditors; and, if so, to what extent? The second question differs little, if any, from the first, and seems to put the inquiry merely in a changed form. Under § 190 of the Code of Civil Procedure, the jurisdiction of the court of appeals is confined to the review of actual determinations made by the appellate division of the supreme court. The idea that a question may be certified to this court for its decision, whether it arose in the case, and was passed upon by the appellate division, or not,

seems to prevail to some extent, at least. It is, however, an erroneous conception of the powers and duties of this court, which has only such jurisdiction as is conferred upon it by statute, wherein is not included the power of determining abstract questions, or those which have not been actually determined by the court certifying them. We have already held that the court will decline to answer any question certified unless it is sufficiently definite to prevent different answers under differing circumstances. We have also held that we will not answer abstract questions, nor those that have not been decided by the court below. *Granman v. Westchester Racing Assn.* 153 N. Y. 449; *Barter v. McDonnell*, 154 N. Y. 432, 486; *Hearst v. Shea*, 156 N. Y. 169.

Following the principle of those cases, it must be held that the questions certified in this case can be reviewed only so far as they actually arose, and were determined by the appellate division. To that extent we answer them in the affirmative; but, so far as they were not determined by that court, we decline to answer them. The learned appellate division [25 App. Div. 160], in its opinion, uses this language: "In what manner the debtor's life interest shall be appropriated to the plaintiff's claim,—whether by collecting the rents and applying the income from time to time upon the judgment, or by a sale of the life estate for a similar object,—it is unnecessary to determine. We hold that in some manner or other the debtor's interest is subject to the plaintiff's judgment." It is quite possible that the demurrer to the complaint, when strictly construed, entitled the plaintiff to specific directions from the appellate division as to the precise manner in which the life estate of defendant Barnes is to be dealt with in the event of final judgment against him. These directions were not given, however, and we confine ourselves to the determination of the appellate division.

The order and interlocutory judgment appealed from should be affirmed, with costs, and the questions answered as above stated.

Haight, Martin, and Vann, JJ., concur.

Gray, J., concurring:

I think that this judgment should be affirmed, upon the broad ground that the Revised Statutes of this state have only changed the common-law rule, which subjected the interest of the beneficiary of a trust to the claims of his creditors, so far as to protect that interest when under a trust created by another than the beneficiary. The statutory provision relied upon as affording a general protection to all beneficiaries, irrespective of the manner of the creation of the trust, does not, when fairly read, imply a trust founded by the beneficiary himself. That "no person, beneficially interested in a trust for the receipt of rents and profits of land, can assign, or, in any manner, dispose of, such interest," not only imports, by the language, that the founder of the trust and the beneficiary are two different persons, but such is the meaning required by the policy of the law. The changes effected by the adoption of our Revised Statutes in the rules of the

common law proceeded upon a sound policy and principle, and not arbitrarily. Both policy and principle were opposed to granting immunity to a beneficiary against the claims of his creditors, if his interest was one reserved in a trust created by himself for his own benefit. The principle which underlay the statutory provision making the interest of the beneficiary in a trust created by another inalienable was that of affording protection to a provision which, in theory of law, had been made for the helpless, the unfortunate, or the improvident. That is a just principle, and one which the policy of the law sanctions. The creditor cannot complain if he is unable to reach the estate of his debtor under a trust created in the property of a third person. But neither principle nor policy can justify the protection of the debtor's estate against the claims of his creditors, when it is one of his own creation. Although, as in the present case, a person may have placed the legal title to his property in another, nevertheless, if he has in the conveyance reserved to himself a life interest in the enjoyment of the rents and profits, it is clear that he has not divested himself of anything more than the legal title and the power of disposition. He still has that interest which made the legal possession of the property valuable, namely, the enjoyment of the income. In other words, what the appellant sought to do in this case was to place his own property in such a legal situation that, while he might enjoy its income, his creditors could have no resort to it in order to satisfy the debts which he might incur. Sound public policy condemns such a proposition. As it is clearly shown in the opinion of Justice Cullen, it was never contemplated by the authors of the Revised Statutes that the section above quoted and relied upon was intended to apply to a case where a debtor himself created the trust. I think that we may safely rest the affirmation of this judgment upon that broad ground, and without resort to other provisions of the statutes to make clear the conclusion reached, that one may not secure to himself the enjoyment of a life interest in his own property which shall be beyond the reach of the just claims of his creditors.

Parker, Ch. J., dissenting:

I am unable to agree in the decision about to be made, for the reason that it seems to me clear that the legislature has established the law applicable to this case adversely to the holding of the court. It appears that the defendant Barnes in October, 1883, while he was out of debt, conveyed real estate to a trustee in trust, "reserving to himself the beneficial interest in the said property for life, subject to the necessary expenses of the said trustee, with remainder over, and with full power of sale in said trustee;" that the said trustee accepted his trust, and at the time of the commencement of this action was in possession of the property. Since that time Barnes seems to have become indebted to the plaintiff, who now seeks by this action to collect her claim out of the property so conveyed in trust. It is the law in England that the interest or income of the equitable life tenant (with the single exception of a trust for a married wo-

man) is alienable by the beneficiary, passes to an assignee in bankruptcy, and is at all times subject to the claims of creditors. Such was formerly the law in this state, and in many of our sister states. The legislature, in its wisdom, saw fit to disregard the views of the judges, and to reverse the law as settled by the courts. No good purpose can be accomplished by a discussion of the question whether the courts or the legislature were in the right. The legislature had the power to change the law on that subject absolutely, and did it. The statute reads: "No person beneficially interested in a trust for the receipt of the rents and profits of lands, can assign or in any manner dispose of such interest; but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created, are assignable." 1 Rev. Stat. p. 780, § 68. What the beneficiary cannot grant by way of anticipation, the court cannot, except to the extent declared in another provision of the statute, which reads, "The surplus of such rents and profits beyond the sum necessary for the education and support of the beneficiary, shall be liable for the claims of his creditors." Revised from 1 Rev. Stat. p. 729, § 57. See 3 Birdseye's Rev. Stat. 2d ed. p. 2618, § 78. It is not alleged in this complaint that there is any surplus of income over and above that needed for the support of Barnes, and therefore this provision is not applicable to the case in hand. A person, therefore, who is "beneficially interested in a trust for the receipt of the rents and profits of lands," cannot dispose of the income by way of anticipation, nor can his creditors claim it, except as to the surplus, as prescribed by the provisions of the statutes quoted. *Douglas v. Cruger*, 80 N. Y. 15; *Lent v. Howard*, 89 N. Y. 169. That would seem to leave only the question whether there was a valid trust created in the lands in controversy. It is not pretended that it is invalid against the plaintiff, upon the ground that it was made to hinder, delay, and defraud creditors. The deed is in due form, and was properly executed, its trust provisions are in harmony with the statutes bearing upon that sub-

ject, and there is no claim that it was not valid at the time of the creation of the trust. That being so, the trust is governed by the Revised Statutes, the whole estate in law and equity became vested in the trustee, and the appellant has no estate or interest whatever in the lands. 1 Rev. Stat. p. 729, § 60. It has been said in this case, with reference to the assertion that a creditor cannot reach the beneficial income in the trust estate, that "the proposition itself would seem to shock our sense of justice." That was the position which the courts formerly took as to the beneficial income of all trusts in lands. Recognizing that the statute has some force, and cannot be altogether ignored, the decision is to the effect that, where trusts are created by third parties, only the surplus of income can be obtained by the creditor, but that a different rule applies where the income goes to the founder of the trust. There is no such distinction pointed out in the statute. It does not speak of a person beneficially interested in a trust created by third parties, or by the founder of a trust. It refers to persons beneficially interested in a trust "for the receipt of the rents and profits of lands." This language is broad enough to include all trusts in land created in conformity with the statutes, and the rules of statutory construction require that the language employed should be so construed. The greater includes the less, and I see no escape from holding that it covers every valid trust in lands created under the Revised Statutes, and this must be conceded to be such a trust. If the public interests require that a distinction shall be made as to the disposition of the income to creditors where the trust is created by a third party, and where the founder of the trust is the person beneficially interested in the income, then the legislature can, and probably will, make the change. But it is not the province of the court to make it. I advise a reversal of the judgment.

O'Brien, J., concurs with Parker, Ch. J., for reversal.

NORTH CAROLINA SUPREME COURT.

Steve GREENLEE

v.

SOUTHERN RAILWAY COMPANY, *Appt.*

(.....N. C.)

1. Contributory negligence of a brakeman in coupling cars will not preclude a recovery for injury caused by the absence of self-couplers, which constituted continuing negligence of the master and existed subsequently to his negligence.

NOTE.—The above case is believed to be a pioneer in holding that the failure to equip freight cars with self-couplers constitutes negligence *per se*. The doctrine of continuing negligence presents an important modification of the law of contributory negligence. It seems to have been acted upon without expressly adopting it, in *Thompson v. Salt Lake Rapid-Transit Co.* (Utah) 40 L. R. A. 172. This doctrine materially restricts the rule of the "last clear chance."

See also 44 L. R. A. 313.

2. Failure to equip freight cars with self-couplers constitutes negligence *per se*.

3. An extension of time procured from the interstate commerce commission by railroad companies for placing self-couplers upon freight cars merely relieves the companies from the penalty provided in the act to regulate commerce, but does not relieve them from the legal liability to employees for failure to provide suitable appliances in general use.

4. A brakeman's knowledge that cars are not furnished with self-couplers does not make him assume the risk by continu-

ing to couple cars without self-couplers. It seems to have been acted upon without expressly adopting it, in *Thompson v. Salt Lake Rapid-Transit Co.* (Utah) 40 L. R. A. 172. This doctrine materially restricts the rule of the "last clear chance."

ing in the service and coupling the cars in the course of his duty.

(*Faircloth, Ch. J., and Furches, J., dissent.*)

(May 26, 1898.)

APPEAL by defendant from a judgment of the Superior Court for McDowell County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinions.

Messrs. Charles Price, G. F. Bason, and A. B. Andrews, Jr., for appellant:

When a man contracts to do a thing in a certain way, and not to do it in another way, the rule of the "prudent man" has nothing to do with the case. He must perform the work in the way he contracted to do it; and when he attempts to do it in the way he was warned not to do it, he violates his contract, and he cannot recover for any injury he sustains in violating his own contract.

Bailey, Master's Liability for Injuries to Servant, pp. 71 *et seq.*

The plaintiff had two ways of doing his work, the one safe and the other perilous. He adopted the perilous way, and cannot recover.

Chambers v. Western N. C. R. Co. 91 N. C. 475; *Pierce, Railroads*, p. 378, notes 2, 3; 3 Elliott, Railroads, §§ 1280, 1282; *Mason v. Richmond & D. R. Co.* 114 N. C. 718; *Rittenhouse v. Wilmington Street R. Co.* 120 N. C. 547.

The rules of the master, if they are reasonable, are as much a part of the contract between him and the servant as the price per month agreed to be paid.

State v. Christmas, 51 N. C. (6 Jones, L.) 471; *Smith v. Sasser*, 50 N. C. (5 Jones, L.) 383.

The defendant had a right to have its theory of the case presented to the jury by the specific instructions asked because it was supported by evidence, and the instructions were properly requested.

Poole v. Consolidated Street R. Co. 100 Mich. 379, 25 L. R. A. 744; *Russell v. Carolina C. R. Co.* 118 N. C. 1098; *Stokes v. Suffolk & C. R. Co.* 107 N. C. 178.

On rehearing.

There was no allegation in the complaint that the negligence causing the injury was the failure of the company to equip its cars with automatic couplers.

Messrs. J. T. Perkins and E. J. Justice, for appellee:

If the jury find plaintiff was not negligent, and his superior signalled a car to be kicked down upon him when he could not see it, and if they find that it was the duty and custom of such superior to warn plaintiff of his danger under these circumstances, and he failed, and the injury was a direct result, such failure and conduct on the part of the vice principal would constitute negligence.

Russell v. Carolina C. R. Co. 118 N. C. 1098; *Michael v. Roanoke Mach. Works*, 90 Va. 492.

If there was error in submitting the question of whether reasonably safe appliances were furnished, it was a harmless error, and cured by verdict.

Ginsberg v. Leach, 111 N. C. 15; *Wagoner v. 41 L. R. A.*

Ball, 95 N. C. 328; *Deming v. Gainey*, 95 N. C. 528; *Bush v. Hall*, 95 N. C. 82; *Rogers v. Bank of Oxford*, 103 N. C. 578.

The jury was properly left to pass upon the question of plaintiff's and defendant's conduct under the rule of the prudent man.

Hinsaw v. Raleigh & A. Air Line R. Co. 118 N. C. 1047; *Russell v. Carolina C. R. Co.* 118 N. C. 1098.

Clark, J., delivered the opinion of the court:

In any aspect of this case, the defendant is liable, whether the plaintiff was or was not guilty of contributory negligence; for the negligence of the defendant in not having self couplers, and in not sending a man to couple cars at all, was a continuing negligence, which existed subsequent to the contributory negligence, if there had been any, of the plaintiff, and was the proximate cause—the *causa causans*—of the injury. Six years ago in *Mason v. Richmond & D. R. Co.* 111 N. C. 482, 18 L. R. A. 845, 846, the court, in considering "whether the defendant company was negligent in failing to provide what is known as the Janney, or some other improved coupler, which would obviate the necessity, under any circumstances, of going between the ends of cars in order to fasten one to another," said: "We think that the time has arrived when railroad companies should be required to attach such couplers . . . on all passenger cars, . . . and the new couplers have now become so cheap, as compared to the value of the lives and limbs of servants and passengers, that it is not unreasonable to require that they provide them on peril of answering for any damage which might have been obviated by their use." While the court declined, on account of the expense, to hold that the same was true at that time as to freight cars, it added: "Doubtless, the day will soon come" when it would be negligence not to attach them to freight as well as passenger cars. Congress so thought, and passed an act (27 Stat. at L. 531) requiring self couplers and air brakes to be placed on all cars, freight as well as passenger, by January 1, 1898; and this had been complied with as to "over 60 per cent of the freight cars," besides nearly all passenger cars, operating in interstate commerce, by that date. In *Witsell v. West Asheville & S. S. R. Co.* 120 N. C. 557, the above citation from *Mason v. Richmond & D. R. Co.* was approved, and the court held that, while it was not negligent to fail to provide the latest improved appliances, a railroad company was liable for any injury caused by the failure to use approved appliances that are in general use. The railroad companies have of late procured from the interstate commerce commission an extension, till January 1, 1900, of the time by which self couplers should be placed upon all freight cars used in interstate service; but this was for their accommodation, and did not and could not relieve them from the legal liability incurred for injuries caused by their failure to provide "suitable appliances in general use" where the use of such would have prevented the injury. It only relieved them from the penalty provided in that act. The eleventh annual report (1897) of the

Interstate Commerce Commission issued by authority of the United States government, and based upon the reports of the railroad companies themselves, shows (p. 80) that, of railroad employees (leaving out passengers altogether), 1,861 were killed and 29,969 were wounded in the year ending June 30, 1896, being greater loss than in many a battle of historic importance. Of the trainmen, this report (p. 130) shows that nearly 1 in 9 had been killed or wounded that year,—total of over 17,000. Of these casualties, it is officially stated, 229 were killed and 8,457 were wounded in this single particular of coupling and uncoupling cars. As those figures are reported by the corporations themselves, it is not probable that they are overstated. If the railroads not reporting to the Interstate Commerce Commission (because not engaged in interstate carrying) should be added, the figures of killed and wounded from this cause would doubtless be largely increased. By these figures, for the last year reported, nearly 9,000 men had been killed and wounded in coupling and uncoupling cars. As the corporations, on their own motion, or under compulsion of congressional action and judicial decision, have adopted self-couplers on the passenger cars, and on "over 60 per cent" of the freight cars, it will be seen how many thousand of lives and bodies have been saved thereby; but that still nearly 9,000 men should in one year be killed or wounded "coupling and uncoupling" the freight cars which up to June 30, 1896, still required that duty, for lack of self-couplers, is the highest proof of the duty of the courts to enforce liability for failure to provide self-couplers in every case where an injury occurs from that cause. That nearly 9,000 men should still be killed and wounded in one year for failure to furnish appliances which are so widely in use, and which would entirely prevent such accidents, points out the duty of the courts.

In *Witsell's Case*, 190 N. C. at page 562, this court says: "If an appliance is such that the railroads should have it, the poverty of the company is no sufficient excuse for not having it." But in fact this defendant reports that this railroad has issued bonds and stocks for \$76,557 per mile. N. C. R. R. Com. Report, 1896, at page 246. This is presumed to have been paid in by its issuing the bonds and stocks, and hence it should be able to furnish appliances which will protect its employees from such injuries as this, and should be held liable for failure to do so, for the Interstate Commerce Commission report shows the self-couplers can be added for \$18 per mile. In a large majority of the states, as well as by the Federal government, railroad commissions have been created to supervise and regulate the charges and the conduct of these corporations. The courts will be very derelict in their duty if they do not enforce justice in favor of employees as well as the public. Six years ago this court said it would soon be negligence *per se* whenever an accident happened for lack of a self-coupler. Congress has enacted that self-couplers should be used. For their lack, this plaintiff was injured. It is true, the defendant replies that the plaintiff remained in its service knowing it did not have self-couplers. If that were a defense, no railroad company

would ever be liable for failure to put in life-saving devices, and the need of bread would force employees to continue the annual sacrifice of thousands of men. But this is not the doctrine of "assumption of risk." That is a more reasonable doctrine, and is merely that when a particular machine is defective or injured, and the employee knowing it continues to use it, he assumes the risk. That doctrine has no application where the law requires the adoption of new devices to save life or limb (as self-couplers), and the employee, either ignorant of that fact, or expecting daily compliance with the law, continues in service with the appliances formerly in use. The defendant, after notice of six years from this court, and with notice of the act of Congress, and also from the general adoption of self couplers, that it should use them, was guilty of negligence in failing to do so. The injury to the plaintiff could not have occurred save for the failure of the defendant to comply with its duty in this regard, and the court below should have held it liable to the plaintiff upon the defendant's own evidence.

Affirmed.

Furches, J., dissenting:

The plaintiff was an employee of the defendant company as a laborer in its yard, at its station in Asheville, and, while so employed, was injured by defendant, for which he brings this action. The yard was under the management and control of one Adams, under whom the plaintiff worked, and Adams had the right to discharge the plaintiff for disobedience of his orders. A part of the business of the plaintiff was to couple and uncouple cars, and, when he was employed, he was told he must not couple with his hands, but with a stick. At the time of the injury, Adams and his force, among whom was the plaintiff, were engaged in making up a train on a side track by taking cars off the main track, and putting them on the side track. This was done by what is called "kicking the cars;" that is, by pushing a car with the engine at the start, and then letting the car run by its own momentum. There had been two cars kicked down the track, and they had become stationary, and the plaintiff was injured when the third car was kicked down. The plaintiff contends that he was injured between the first and second cars kicked down, and the defendant contends that he was hurt between the second and third cars kicked down.

The plaintiff contends that he was injured in attempting to put in a coupling link, which could only be done with the hand; and the defendant contends that the plaintiff was hurt in attempting to make a coupling with his hand, instead of with a stick, as he was directed to do, and in this way contributed to his injury, and that this negligence was the proximate cause of the injury, and plaintiff cannot recover on that account. It was in the night (dark) when all this occurred, and the plaintiff had a lantern, and his theory is that the second car being between him and the engine, he could not see the engine and the third car; that it was this third and last car kicked down the track, striking the second car, which

caused it suddenly and violently to crash against the first car, that caused the injury; that Adams knew he was between these cars; that he had just before the injury told plaintiff "to hurry up with coupling the cars on the side track, as train No. 44 was coming, and he wanted to get out of the way." The plaintiff offered other evidence besides his own tending to sustain his contention, and the defendant offered evidence to contradict the plaintiff—to show that the injury of plaintiff was received between the second and third cars while attempting to effect a coupling with his hand, contrary to orders. And among other evidence introduced for this purpose was the testimony of Dr. Hilliard, who testified that he was the surgeon of the defendant, and was required by the company to examine—to poll—the plaintiff as to how he got hurt. And if he got anything favorable to the company, we suppose he was to become a witness for it. This evidence was objected to by the plaintiff, but we think it competent, as declarations of the plaintiff to be taken by the jury for what it was worth, considering the circumstances under which it was taken. The defendant contended that it was competent as a part of the *res gestæ*, and cited *Southerland v. Wilmington & W. R. Co.* 106 N. C. 100, as authority for this position. *Southerland v. Wilmington & W. R. Co.* is based upon entirely different principles. In that case it was as to what the engineer—a third person—said, and, of course, it was hearsay, unless it was a part of the *res gestæ*.

This appeal depends upon the charge of the court, upon prayers given and prayers refused, as there seems to have been no charge except what is contained in the prayers for instruction. It was important to determine the question whether the injury was received between the first and second cars, as plaintiff contended, or between the second car kicked down and the last car, as defendant contended. If between the first two cars, as contended by plaintiff his theory is consistent whether correct or not; while, if it occurred between the last two cars kicked down, his theory would appear to be inconsistent with his contention that he could not see the approaching car, as there would be no intervening car to prevent his seeing the approach of the last car, if he was hurt between the last two cars kicked down. It does not seem to us that the jury were sufficiently instructed as to this; and it also seems to us that there is too much said in plaintiff's prayer for instructions (which were given) about the pin not being in its proper place, and having to be hunted by the plaintiff, this not being supported by evidence in the case. There was no written contract between plaintiff and defendant that plaintiff should not couple cars with

his hands. But it was in evidence and admitted by the plaintiff that when he hired to the defendant, he was instructed never to couple cars with his hands. But the court was asked by the plaintiff to charge the jury that plaintiff had signed no written contract not to couple with his hands, and this being so, the rule of the prudent man applies; that is, did the plaintiff act with ordinary prudence and care in attempting to make this couple, if he was making a coupling? and if he did, he would not be guilty of negligence. The court gave this instruction, and defendant excepted. In this there was error. There is no special virtue in contracts of this kind being in writing. There is no statute requiring them to be in writing, and it does not appear to us that this was a contract, but an instruction from Adams, the man who employed the plaintiff.

But the plaintiff contends that, whether it was a contract or an instruction, it was abrogated by Adams saying to the plaintiff: "Hurry up with your coupling! No. 44 is coming, and I want to get out of the way." If Adams said this, it does not revoke or tend to revoke the instruction before given "not to couple with his hands." *Mason v. Richmond & D. R. Co.* 114 N. C. 728, 18 L. R. A. 845. There is no evidence showing or tending to show that Adams knew or had reason to know that the plaintiff could not effect a coupling as quickly with his stick as with his hand. If plaintiff's contention were correct, it would be dangerous for a railroad "boss" to hurry up his hands, lest he abrogated all former orders and directions. This order was not inconsistent with the previous instruction, and does not fall within *Shadd v. Georgia, O. & N. R. Co.* 116 N. C. 968; *Patton v. Western N. O. R. Co.* 96 N. C. 456.

There were other exceptions discussed by counsel, but they will probably not arise on a new trial, and we do not discuss them. The plaintiff by accepting service under the defendant to work in its yard in shifting and coupling cars, accepted all the ordinary risks of this service, without the special instruction not to couple with his hands. But it seems to us that as a matter of economy, to say nothing of the suffering and loss of human life, railroads would be induced to get and use the more modern and safer appliances. They will have to do this soon, or answer for damages caused by the lack of them.

This was written as the opinion of the court; but, since it was written, the court has changed its opinion, and I file it as my dissenting opinion.

Faircloth, Ch. J., concurs with Furches, J.

Rehearing denied.

TENNESSEE SUPREME COURT.

MOBILE & OHIO RAILROAD COMPANY,
Pff. in Err.,

v.

POSTAL TELEGRAPH CABLE COM-
PANY.

(.....Tenn.....)

1. A condemnation of the right of way for a telegraph line over a railroad right of way is authorized by Acts 1885, chap. 185 (Shannon's Code, §§ 1868-1871), conferring the right to take the property or easements of private corporations for public purposes and internal improvement.

2. Only nominal damages can be given to a railroad company for the use by a telegraph line of the space occupied by its posts and wires along the railroad right of way through an agricultural section of country, when the use and occupation of the right of way for railroad purposes is not interfered with or encumbered in any way.

(April 27, 1896.)

WRITS of error to the Circuit Courts for Gibson and Madison Counties to review judgments against the railroad company in proceedings by the telegraph company to acquire a right of way for its poles along the railway right of way. *Affirmed.*

The facts are stated in the opinion.

Messrs. Caruthers & Mallory, Deason & Rankin, and McCorry & Bond, for plaintiff in error:

Under the laws of Tennessee, a telegraph company has no power or authority to condemn the right of way of a railroad company. Such company is authorized by law to condemn only the property of private individuals.

The act of 1885, chap. 66, in express terms, gives telegraph companies the power to condemn rights of way upon, along, and parallel to any of the railroads of the state.

The failure of the speaker of the house to sign the bill in open session, and the failure to have the fact of such signing noted on the house journal renders said bill inoperative, and it was never constitutionally passed.

The presumption of the regularity of the passage of an act when signed by both speakers in open session, and the fact of that signing noted on the journals, may be rebutted by the affirmative showing of the journal that other constitutional requirements have been disregarded.

Brewer v. Huntingdon, 86 Tenn. 784.

It must affirmatively appear by the journals that the constitutional requirement has been complied with.

Sutherland, Stat. Constr. § 48.

Section 1816, Code of 1858, is as follows: "Any person or company may construct a telegraph line along the public highways and streets of this state, or across the rivers, or over any lands belonging to the state free of charge, and over the land of private individuals as

hereinafter provided, and may erect the necessary fixtures therefor."

In the absence of a legislative definition extending the meaning of the word "individual" it could not be held to include a railroad company; for the natural meaning of the term "private individual" is far from the same as a railroad company.

Sutherland, Stat. Constr. § 887; 3 Elliott, Railroads, § 955; Cooley, Const. Law, p. 833; *Harding v. Goodlett*, 8 Yerg. 52, 24 Am. Dec. 546; *Clack v. White*, 2 Swan, 541; *Memphis Freight Co. v. Memphis*, 4 Coldw. 421; *Anderson v. Turberville*, 6 Coldw. 152.

The construction of the legislative grant in the first taking is strict; but it should be even more strict in case of the second taking.

Sutherland, Stat. Constr. § 338; 3 Elliott, Railroads, § 964; *Postal Telegr. Cable Co. v. Norfolk & W. R. Co.* 83 Va. 921.

The true measure of damages in such a case is the fair cash market value of the property taken, estimated as if the owner were willing to sell and the other party desired to buy that particular quantity or that particular property, at that particular place and in the particular form in which it is found, together with incidental damages.

Alloway v. Nashville, 88 Tenn. 518, 8 L. R. A. 128; *Woodfolk v. Nashville & C. R. Co.* 2 Swan, 434; *Taylor v. Chandler*, 9 Heisk. 863; *Moses v. Sanford*, 11 Lea, 733; *East Tennessee & V. R. Co. v. Love*, 8 Head, 67; *Paducah & M. R. Co. v. Stovall*, 12 Heisk. 4; *Mississippi R. Co. v. McDonald*, 12 Heisk. 54.

The right of eminent domain is a prerogative of sovereignty, and is in derogation of private rights. The delegations of this power must be strictly construed, and the courts will not extend the right beyond the plain letter of the grant.

Sutherland, Stat. Constr. § 887; 3 Elliott, Railroads, § 955; Cooley, Const. Law, p. 833; *Harding v. Goodlett*, 8 Yerg. 52, 24 Am. Dec. 546; *Clack v. White*, 2 Swan, 541; *Memphis Freight Co. v. Memphis*, 4 Coldw. 421; *Anderson v. Turberville*, 6 Coldw. 152.

Where the property already devoted to public use or purpose is sought to be condemned a second time, and appropriated to a different use, the construction of the legislative grant of authority is construed even more strictly than where it is the first appropriation.

Sutherland, Stat. Constr. § 888; 3 Elliott, Railroads, § 964.

Messrs. Hays & Biggs and J. R. McIntosh, for defendant in error:

By § 62 of Shannon's Code a "person" includes a corporation, and an "individual" is defined to be a "person."

While the journals would be considered in determining the validity of an act of legislature, every reasonable inference and presumption would be drawn and indulged in favor of the regularity of its passage, and where it did not affirmatively appear not to have passed, and such legitimate construction could be given to the record as sustained the law, it would be done.

Brewer v. Huntingdon 86 Tenn. 787; *Nel-*

NOTE.—For telegraph line along railroad right of way, see also *American Teleph. & Telegr. Co. v. Smith* (Md.) 7 L. R. A. 200, and *nota*.

41 L. R. A.

son v. Haywood County, 91 Tenn. 596; *State, Whelton, v. Algood*, 87 Tenn. 168.

Where the journal does not affirmatively show the defeat of the bill, every reasonable inference and presumption will be indulged in favor of the regularity of the passage of an act subsequently signed in open session by the speaker.

Williams v. State, 6 Lea, 549; *State v. McConnell*, 8 Lea, 888.

Land already taken by the exercise of eminent domain for a public use, and actually used for that purpose, may be taken by legislative authority for other purposes. When so taken, it is presumed that the former use has ceased, or become detrimental, or relatively of less importance, or that the second use is not inconsistent or destructive to the former use. A right of way for a telegraph company may be condemned along a railroad track.

Mills, Em. Dom. § 45, citing *Miller v. Craig*, 11 N. J. Eq. 175; *Talbot v. Hudson*, 16 Gray, 417; *Peoria & P. U. R. Co. v. Peoria & F. R. Co.* 105 Ill. 110; *Wood v. Macon & B. R. Co.* 68 Ga. 539; *Chicago & N. W. R. Co. v. Chicago & E. R. Co.* 112 Ill. 589; *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.* 97 Ill. 506; *Chicago & W. I. R. Co. v. Illinois C. R. Co.* 113 Ill. 156; *Barber v. Andover*, 8 N. H. 898; *Eastern R. Co. v. Boston & M. R. Co.* 111 Mass. 125; *North Carolina & R. & D. R. Co. v. Carolina C. R. Co.* 88 N. C. 489.

The measure of just compensation to the defendant is the amount of decrease in the value of its use of the right of way for railroad purposes caused by the use of it by petitioner for telegraph purposes.

Chicago, B. & Q. R. Co. v. Chicago, 149 Ill. 457, 166 U. S. 248, 41 L. ed. 988; *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 408, 25 L. ed. 206.

The just compensation required by our Constitution (art. 1, § 21) is the fair cash value of the land taken for public use, estimated as if the owner were willing to sell and the corporation desired to buy that particular quantity, at that place and in that form.

Woodfolk v. Nashville & C. R. Co. 2 Swan, 487; *East Tennessee & V. R. Co. v. Love*, 8 Head, 66; *Tennessee & A. R. Co. v. Adams*, 8 Head, 600; *Memphis v. Bolton*, 9 Heisk. 509.

This value means the market value.

Lewis, Em. Dom. §§ 478, 479; *Cooley, Const. Lim. 5th ed. p. 699*; *Alloway v. Nashville*, 88 Tenn. 510, 8 L. R. A. 128; *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 408, 25 L. ed. 206.

A different rule altogether prevails where the property sought to be condemned is held under restrictions or limitations.

Randolph, Em. Dom. § 250; *Tobey v. Taunton*, 119 Mass. 404; *Whitaker v. Phenixville*, 141 Pa. 327; *Stebbing v. Metropolitan Bd. of Works*, L. R. 6 Q. B. 87; *Allen v. Boston*, 187 Mass. 319.

Railroads own and hold their rights of way solely for railroad purposes, and nothing more. They cannot speculate upon this property or use it for any other purposes.

Stebbing v. Metropolitan Bd. of Works, L. R. 6 Q. B. 40; *Chicago, E. & L. S. R. Co. v. Catholic Bishop of Chicago*, 119 Ill. 529; *Hilcoat* 41 L. R. A.

v. Bird, 10 C. B. 327; *Allen v. Boston*, 187 Mass. 319; *Re Albany Street*, 11 Wend. 149, 25 Am. Dec. 618.

A grant or reservation of a right of way does not authorize the use of it for any purpose beyond that of a way.

Jones, Easem. § 383; *Chicago & N. W. R. Co. v. Chicago*, 151 Ill. 348; *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.* 30 Ohio Stat. 604; *Lewis, Em. Dom. § 489*, pp. 644, 645; *Re Cortland of H. Horne R. Co.* 98 N. Y. 336; *Stockton & L. Gravel Road Co. v. Stockton & C. R. Co.* 53 Cal. 11.

Where a railroad company took a part of a wall made to protect land from washing, and the wall still answered the purpose, the damage would not be what the wall cost, but what would make the owner whole.

Mills, Em. Dom. § 159; *Chicago & A. R. Co. v. Goodwin*, 111 Ill. 273; *Hollingsworth v. Des Moines & St. L. R. Co.* 63 Iowa, 443; *Gear v. C. C. & D. R. Co.* 39 Iowa, 23.

Evidence tending to show that there is another route by which the road could enter a city is inadmissible.

Union Depot Street R. & Transf. Co. v. Brunswick, 31 Minn. 297, 47 Am. Rep. 789; *Sullivan v. Lafayette County Supers.* 61 Miss. 271.

A telegraph line may be established along a railroad right of way, it being no material interference with the use thereof for railroad purposes.

Lewis, Em. Dom. § 269; *New Orleans, M. & T. R. Co. v. Southern & A. Telog. Co.* 58 Ala. 211; *Peoria & P. U. R. Co. v. Peoria & F. R. Co.* 105 Ill. 110.

The Mobile & Ohio Railroad Company has undertaken to make an exclusive contract with the Western Union Telegraph Company to operate a telegraph line along its right of way, giving the Western Union the right in the name of the railroad company to resist the attempt of any rival telegraph company to construct, maintain, and operate a competing line upon said right of way.

The courts have uniformly declared such contracts void as against public policy and in restraint of trade.

Western U. Telog. Co. v. Baltimore & O. Telog. Co. 19 Fed. Rep. 680; *Western U. Telog. Co. v. American U. Telog. Co.* 65 Ga. 160, 88 Am. Rep. 781; *Western U. Telog. Co. v. Burlington & S. W. R. Co.* 11 Fed. Rep. 1; *Pensacola Telog. Co. v. Western U. Telog. Co.* 96 U. S. 124, 24 L. ed. 708, 715; *Pacific Postal Telog. Cable Co. v. Western U. Telog. Co.* 50 Fed. Rep. 493.

The legislature is the judge of the necessity of taking private property for public use.

4 *Rapelje & Mack's Dig.* p. 400, § 62; *United States v. Oregon R. & Nav. Co.* 16 Fed. Rep. 524; *State, Baitzell, v. Stewart*, 74 Wis. 620, 6 L. R. A. 394.

All contracts are subject to the power of eminent domain whenever the public necessity requires its exercise, and must be regarded as made with reference thereto.

5 *Rapelje & Mack's Dig.* p. 417, § 101; *Dunlap, v. Toledo, A. A. & G. T. R. Co.* 50 Mich. 470.

Corporate franchisees may be taken, like any

other species of property, by the commonwealth by virtue of the right of eminent domain.

4 *Rapalje & Mack's Dig.* p. 417, § 101; *Philadelphia & G. Ferry Pass. R. Co.'s Appeal*, 102 Pa. 123; 1 Wood, *Railway Law*, pp. 670, 673.

The property of a corporation, as well as that of an individual, is subject to be taken for public uses for railroad purposes under the power of eminent domain.

4 *Rapalje & Mack's Dig.* p. 418, § 103, p. 109, § 419; *Mobile & G. R. Co. v. Alabama Midland R. Co.* 87 Ala. 520; *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.* 97 Ill. 509.

Land occupied by the company as its right of way may be taken by the state under its power of eminent domain, to the same extent as that of a private citizen for either the use of another railroad company or for a public highway.

1 Wood, *Railway Law*, p. 670, note 1; 4 *Rapalje & Mack's Dig.* p. 423, § 112; 25 Am. & Eng. Enc. Law, p. 756; *Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co.* 62 Mich. 564.

Wilkes, J., delivered the opinion of the court:

These two cases involve in the main the same questions, and are heard together by request of counsel. The actions were brought in the circuit courts of the respective counties of Gibson and Madison by the telegraph company against the railroad company to acquire rights of way for telegraph purposes along, upon, and over the right of way of the railroad company. The petitions in both cases were demurred to, and demurrer overruled, and they proceeded to hearing and disposition on the merits, and for the assessments of damages; the Madison county case being heard on appeal from the report of the jury of inquiry, before the judge without a jury, and the Gibson county case by the judge and a jury. In the Madison county case the trial judge held that nothing but nominal damages could be had; and in the Gibson county case the learned judge charged the jury that they could give as damages nothing except the value of the land occupied as post holes by the telegraph company. The cases are before us on appeal by the railroad company; but the real party in interest is the Western Union Telegraph Company, a competing line, with which the railroad has a contract for an exclusive line over its right of way, and which has the right under its contract, to use the name of the railroad company in any suit to resist the attempt of any competing line to construct any other line upon its right of way. This contract appears to be based upon a valuable consideration, of services to be rendered.

The first question raised is that the telegraph company has no power to have condemned a right of way over land already condemned for railroad purposes, in the absence of express legislative authority. 3 Elliott, *Railroads*, § 964. It is conceded that such right is conferred by chapter 66 of the Acts of 1885, but it is insisted this act is invalid for constitutional reasons, and that there is no other law confer-

ring such right. The Constitution provides (art. 2, § 18) that "no bill shall become a law until it shall have been read and passed, on three different days in each house and shall have received on its final passage, in each house, the assent of a majority of all the members to which that house shall be entitled under this Constitution, and shall have been signed by the respective speakers in open session,—the fact of such signing to be noted on the journal." There is no entry on the house journal showing that the speaker of the house ever signed this bill. There is no other irregularity or defect alleged against its passage. The journals of each house show that it has passed on three separate readings on three different days in each; and the journal of the senate shows that it was signed by the speaker of the senate, and the fact noted on the senate journal, and it was then transmitted to the house for the signature of the speaker of the house, but there is no entry upon the journal of the house that it was signed by the speaker of the house. It was approved by the governor upon the next day thereafter. It is said this defect vitiates the whole act; that the provision of the Constitution is mandatory, and unless complied with, the act does not become a law, or have any validity. This presents a question of grave difficulty and doubt, but, if we concede this act to be invalid, still, in our opinion, chapter 185 of the Acts of 1885 (Shannon's Code, §§ 1868, 1871) does confer the right to condemn and take the property privileges, rights, or easements of private corporations for public purposes and internal improvement; and the construction of a telegraph line is a species of internal improvement, and expressly so regarded and treated in other portions of the act, and as embraced by it. Shannon's Code, §§ 1869-1871. It is said that this act of 1885 (chap. 185) has reference to the remedy or mode of procedure to condemn property, and does not confer any right, and that the right was intended to be conferred by chapter 66. While the act does prescribe the manner of proceeding, it also clearly gives the right to take the privileges, rights, or easements of private corporations in the same manner and to the same extent as in case of the property of individuals. Shannon's Code, §§ 1868-1871.

This being true, the next question that arises is as to the measure of damages; and the mode of ascertaining the same. In the Madison county case it was held, as before stated, that the railroad company was entitled to only nominal damages. In the Gibson county case the court charged the jury that the measure of damages was the value of the land taken, and occupied as post holes, but refused to charge that the proper measure of damages was the fair cash market value of said right of way or easement taken, estimated as if the railroad company was willing to sell, and the telegraph company desired to buy, that particular right of way or easement, and to give the fair cash market value of the right of way or easement taken, without deduction. The contentions of the parties are thus shown to be that complainant insists that the damages are purely nominal, while the defendant insists, according to the request, that they are the fair cash market

value of the right acquired or easement secured, as if it were a matter of contract between the parties. In its petition the telegraph company disclaims any right or purpose to obstruct, impede, or interfere with the railroad in its use of its right of way for railroad purposes, and proposes, whenever the railroad company desires to use any part of its right of way occupied by the telegraph company for additional side tracks or other railroad use, to remove its poles, and replace them at such other places on its right of way as may be mutually agreed on by the two companies. It proposes to plant its poles or posts 80 feet from the outside edge of the rail of the track of the railroad, and upon the side of the track opposite that of the Western Union Telegraph Company's lines. The interest or estate which a railroad company acquires in lands over which its right of way extends, when they are acquired under condemnation proceedings, has been so often defined that it is familiar law. It does not acquire any estate in fee. It only acquires an easement or right of way, and this only for railroad purposes. While its right of way extends to a certain distance upon each side of its track, it has no right to occupy the way beyond its track, cuts, and fills, or to such distance and to such extent as to maintain its track and operate its trains. It can only go beyond these limits for necessary railroad purposes. It cannot sell, transfer, encumber, or use its right of way, except as its necessities and convenience may demand for the proper operation of its road. It cannot license the appropriation of any part of such right of way to private business purposes, nor to public purposes, except so far as needful, and helpful to the operation of the road itself. *Jones, Easem.* § 883. Its right of way can therefore have no market value, because it cannot be placed upon the market, either at private sale or public outcry. A railroad company is entitled to have a right of way by process of condemnation, because it is a work of internal improvement,—a quasi public use. But it has been held that land already taken by the exercise of eminent domain for a public use, and actually used for that purpose, may be taken by legislative authority for other public uses not inconsistent with or destructive to the former use. *Mills, Em. Dom.* § 45, and cases there cited. It is not insisted in this case that the use of the right of way and construction of the telegraph line will be any detriment or obstruction to the railroad, but, on the contrary, it is shown that it would be a benefit and convenience. A telegraph line along a railroad line is not only a convenience, but a necessity, and is very properly treated as a railroad appurtenance. A railroad company may therefore construct a telegraph line along its right of way, or permit another to do so; but it acquires, and can confer, no exclusive right to do so. *Western U. Telegr. Co. v. Baltimore & O. Telegr. Co.* 19 Fed. Rep. 660; *Western U. Telegr. Co. v. American U. Telegr. Co.* 65 Ga. 160, 88 Am. Rep. 781; *Western U. Telegr. Co. v. Burlington & S. W. R. Co.* 11 Fed. Rep. 1; *Pensacola Telegr. Co. v. Western U. Telegr. Co.* 96 U. S. 1, 24 L. ed. 708; 3 Am. & Eng. Enc. Law, 1st ed. pp. 885, 886.

Under this view of the estate and interest
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which railroad companies have in their rights of way, it is difficult to see how the damages sustained by the road can be anything but nominal. We are not now considering the rights of the holders of contiguous lands, who own the fee in the lands over which the railroad has its right of way. Such rights are in no wise involved in this case, and we make no intimation upon this feature of the matter. Neither is the question raised in these cases about the measure of damages when the railroad spans a large stream by means of a bridge, and the telegraph company seeks to use the superstructure of the road as a support for its wires or fastenings. Such a condition of affairs is not presented by the record in this case, but we have only the ordinary case of the construction of a telegraph line over the railroad right of way, extending through an agricultural section of country, when the telegraph company simply desires to plant its posts in the ground, and string its wires overhead along the right of way. Neither are we considering the possible contingency that may arise when it may become necessary or expedient for the railroad company to erect and maintain its own telegraph line for the proper conduct of its railroad business, and when the erection of such line by the railroad may conflict with any other line erected by a third person or company. This is simply a case where the railroad is not using the space occupied by the posts and wires, and when it cannot convey it to another for any purpose, in which case only nominal damages arise.

It is said, with much earnestness, and with some degree of plausibility, that it would be unjust to allow a telegraph company to plant its poles along the right of way, when a railroad company had expended thousands of dollars to clear and keep it free of obstructions, and yet pay nothing for the privilege. But this view is more specious than sound; for the railroad must incur this expense for its own purposes, whether the telegraph line is there or not, and must keep its right of way clear of obstructions, whether it is occupied by a telegraph line or not, and there is no greater burden or expense because of the presence of a telegraph line. The learned trial judge in the Madison county case held, "The measure of damages to the defendant is the amount of decrease in the value of the use of the right of way for railroad purposes, when it is jointly used for telegraph purposes." This rule was, no doubt, adopted from the rule laid down by the Supreme Court of the United States in the case of *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 248, 41 L. ed. 988. That was a case where the city of Chicago desired to open a street across a portion of the railroad right of way in the city, and instituted condemnation proceedings in the courts of Illinois. The jury awarded nominal damages of \$1. The supreme court of Illinois affirmed this verdict and judgment. The case was removed to the Supreme Court of the United States. It was attempted to be shown by the railroad company that, in consequence of opening the street across its right of way, it would be put to the extra expense of erecting gates, maintaining flagmen, and planking the crossing; but this evidence, as well as evidence of the market or salable

value of the land, was excluded; and the Supreme Court of the United States held that it was not error to exclude such evidence of the salable value of the land, nor the estimated increase in maintaining the roadbed, flagmen, etc. And the court laid down the rule as before stated, as applicable to railroads, though in the same proceedings and by the same jury full damages were awarded to contiguous land-owners for their lands, estimated on their value for all purposes. See also *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.* 30 Ohio St. 604; Lewis, Em. Dom. §§ 499, 491, 492. It is said that the statute (Shannon's Code, § 1857) prescribes that the jury shall give the value of the land, without deduction. But this has reference to the land of owners, which may be used for all purposes. It does not refer to telegraph companies. But by § 1870, Shannon's Code, it is provided, as to these, that juries shall not be required to lay off the property privileges, rights, or easements sought

to be condemned by metes and bounds, and it shall be discretionary with the jury of inquest whether they view the premises or not.—a provision which is mandatory in cases of private property taken and condemned. The right of the railroad company being simply to occupy and use the right of way for railroad purposes, it follows that it can suffer only nominal damages when that use and occupation is not interfered with or encumbered in any way.

A question is raised in the Madison county case as to the right of the defendant to have a jury trial on appeal to the circuit court on the quantum of damages; but in the view we have taken, that the defendant was only entitled to nominal damages, that question is unimportant. In the Gibson county case, damages of \$12.50 were assessed upon the wrong basis; but as they are nominal in amount, and not complained of, that case will not be reversed for the error, but both are affirmed, with costs.

UTAH SUPREME COURT.

STATE of Utah, *ex rel.* Morgan RICHARDS, Jr., State Auditor,
v.

Francis ARMSTRONG *et al.*,
Salt Lake County Board of Equalization.

(.....Utah.....)

*1. Section 2579, Rev. Stat., in so far as it provides that a county board of commissioners "may remit or abate the taxes of any insane, idiotic, infirm, or indigent person to an amount not exceeding \$10 for the current year," is in conflict with §§ 2 and 8 of article 13 of the Constitution of Utah, and is therefore void.

2. The word "abatement" comes as well within the prohibition of the Constitution as the word "exemption."

3. Where the legislature attempts to do indirectly, by enactment, that which it cannot do directly, under the Constitution, its enactment is void.

4. To prevent the legislature from exempting property not included within the exceptions of the Constitution, express words of inhibition are not necessary. A positive direction in the Constitution as to what property shall be exempt contains an implication against an exemption of any other property by the legislature.

5. Whether an enactment of the legislature is void because of repugnancy to the Constitution is always a question of much delicacy, and in a doubtful case should seldom, if ever, be decided in the affirmative. Where, however, the mind is convinced of the unconstitutionality of the law, the duty which devolves upon the court to declare it so is imperative, even where the statute appears to be in consonance with justice and humanity.

(June 1, 1893.)

* Headnotes by BARTOE, J.

NOTE.—As to the power of a state legislature to exempt property from taxation, see *note to Hogg v. Mackay* (Or.) 19 L. R. A. 77; also *Wells v. Hyattsville Comrs.* (Md.) 20 L. R. A. 89, 41 L. R. A.

PETITION for a writ of prohibition to prevent the respondents from remitting or abating taxes on property of insane persons.
Granted.

The facts are stated in the opinion.

Mr. A. C. Bishop, Attorney General, for plaintiff:

Except where the Constitution has imposed limitations upon the legislative power, it must be considered as practically absolute, whether it operates according to natural justice or not in any particular case. The courts are the guardians of the rights of the people only when these rights are secured by some constitutional provision which comes within the judicial cognizance.

Cooley, Const. Lim. 5th ed. p. 201; *Bennett v. Boggs*, Baldw. 74; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24.

Exemptions are granted on considerations of general public policy.

Cooley, Taxn. 2d ed. p. 204, and numerous cases cited under note 1.

Where a state Constitution provides a general class of property which may be exempted, such as charities, property devoted to educational and eleemosynary purposes, etc., the legislature can make no exemptions outside of such specified classes.

Chesapeake & O. R. Co. v. Miller, 19 W. Va. 408; *Hogg v. Mackay*, 23 Or. 339, 19 L. R. A. 77; *Croisan v. Hogg*, 23 Or. 346.

A provision that all property shall be taxed precludes exemptions by the legislature.

Memphis & O. R. Co. v. Gaines, 8 Tenn. Ch. 604; *Ellis v. Louisville & N. R. Co.* 8 Baxt. 580; *Memphis R. Co. v. Gaines*, 97 U. S. 697, 24 L. ed. 1091; *State v. Hannibal & St. J. R. Co.* 75 Mo. 208; *New Orleans v. Lafayette Ins. Co.* 28 La. Ann. 756; *Chattanooga v. Nashville, C. & St. L. R. Co.* 7 Lea, 561.

Taxes are charges imposed by the authority of the legislature upon property subject to its jurisdiction, but such authority must always be exercised with due regard to any limitation imposed by the Constitution.

People v. McCreery, 34 Cal. 432; *People v. Eddy*, 43 Cal. 381, 13 Am. Rep. 148; *Wilson v. Sutter County Supers.* 47 Cal. 91; *Gunnison County Comrs. v. Owen*, 7 Colo. 467.

The legislature has no power to exempt or release a person, or community of persons, from their proportionate share of these burdens.

Hunsaker v. Wright, 80 Ill. 146. See also *Jacksonville v. McConnel*, 12 Ill. 188; *O'Kane v. Treat*, 25 Ill. 558; *Madison County Ct. v. People, Toledo, W. & W. R. Co.* 58 Ill. 456; *Dunkham v. Chicago*, 55 Ill. 357; *People, McCreia, v. Soldiers' Home*, 95 Ill. 561; *Iowa Homestead Co. v. Webster County*, 21 Iowa, 221; *Dubugue & P. R. Co. v. Webster County*, 21 Iowa, 235; *Louisiana Cotton Mfg. Co. v. New Orleans*, 81 La. Ann. 440; *New Orleans v. Lafayette Ins. Co.* 28 La. Ann. 756; *New Orleans v. St. Charles Street R. Co.* 28 La. Ann. 498; *New Orleans v. New Orleans Sugar Shed Co.* 35 La. Ann. 548; *Brewer Brick Co. v. Brewer*, 62 Me. 62, 16 Am. Rep. 395; *Farnsworth Co. v. Lisbon*, 62 Me. 451; *Dyar v. Farmington*, 70 Me. 615; *State v. United States & Canada Exp. Co.* 60 N. H. 219; *Zanesville v. Richards*, 5 Ohio St. 590; *Hill v. Higdon*, 5 Ohio St. 243, 67 Am. Dec. 289; *Western U. Teleg. Co. v. Mayer*, 28 Ohio St. 521; *Fields v. Highland County Comrs.* 36 Ohio St. 476; *Exchange Bank v. Hines*, 8 Ohio St. 1; *Louisville & N. R. Co. v. State*, 8 Heisk. 668; *Chattanooga v. Nashville, C. & St. L. R. Co.* 7 Lea, 561; *Chesapeake & O. R. Co. v. Miller*, 19 W. Va. 408; *Gilman v. Sheboygan*, 2 Black, 510, 17 L. ed. 305; *Kittle v. Shervin*, 11 Neb. 65; *Waring v. Savannah*, 60 Ga. 93; *Judge v. Spencer*, 15 Utah, 249, and authorities there cited.

Messrs. Waldemar Van Cott, Graham F. Putnam, and Ray Van Cott, for defendants:

The primary meaning of the word "abatement," or "abate," is to take away or reduce a certain amount from the original sum.

"Exempt" means to be free from obligation; to release, as to be exempt from military duty, or from jury service, or from fear or pain, or from a tax—to be freed.

When property is "exempt" from taxation, it means that it cannot be taxed at all. But that is not the meaning of the word "abate." "Abate" means that the property is subject to taxation, that it can be taxed; but the law is in such a case, that a part, or the whole, of the amount may be abated, that is taken away, according to the circumstances.

In finding what restrictions are placed upon the state legislature in enacting laws, we must remember that they may legislate on every subject, so far as this case is concerned, except as expressly taken away by the state Constitution.

See *Hughes v. Murdock*, 45 La. Ann. 935; *State, Hovey, v. Noble*, 118 Ind. 850, 4 L. R. A. 101; *Fox v. McDonald*, 101 Ala. 51, 21 L. R. A. 529.

In construing the section of our Constitution under consideration, we are to construe and expound it in the light of the conditions existing at the time of its adoption.

Johnston v. State, Sefton, 128 Ind. 16, 12 L. R. A. 235.

When a word is used in a statute or Constitution, it is presumed to have the same meaning wherever used.

Pitte v. Shipley, 46 Cal. 161.

Prohibitions contained in the Constitution are not to be enlarged by construction.

Hughes v. Murdock, 45 La. Ann. 935.

The question whether a law is void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case.

Fletcher v. Peck, 6 Cranch, 128, 3 L. ed. 175.

Bartch, J., delivered the opinion of the court:

This is an original proceeding in this court for a writ of prohibition to prohibit the defendants, who constitute the board of equalization of Salt Lake county, from remitting or abating the taxes of insane, idiotic, infirm, or indigent persons, under § 2579, Rev. Stat. Utah, in which it is provided, "The board may remit or abate the taxes of any insane, idiotic, infirm, or indigent person to an amount not exceeding \$10 for the current year." The petitioner insists that the statute is unconstitutional and void, and that the legislature had no power, under the Constitution, to exempt any property from the burdens of taxation, except such as is expressly exempted by virtue of that instrument, and maintains that the remitting or abating of a tax is virtually an exemption. Counsel for the defendants concede that, if an abatement of the taxes is in effect the same as an exemption thereof, then the board of equalization has no authority to abate such taxes. The question, therefore, is whether an abatement of taxes on taxable property which is owned by an insane, idiotic, infirm, or indigent person is prohibited by the Constitution as being in effect an exemption of property from taxation which is not included within the list of exemptions contained in the fundamental law.

In Const. art. 13, § 2, it is provided: "All property in the state, not exempt under the laws of the United States, or under this Constitution, shall be taxed in proportion to its value, to be ascertained as provided by law." This provision is clear and explicit, and, under its command, no property within this state, except such as is exempt by virtue of the laws of the United States, or of the Constitution of this state, can escape the burden of taxation. Id. § 8, reads as follows: "The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe by general law such regulations as shall secure a just valuation for taxation of all property; so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property: provided that a deduction of debts from credits may be authorized: provided further, that the property of the United States, of the state, counties, cities, towns, school districts, municipal corporations, and public libraries, lots with the buildings thereon used exclusively for either religious worship or charitable purposes, and places of burial not held or used for private or corporate benefit, shall be exempt from taxation. Ditches, canals, and flumes owned and

used by individuals or corporations, for irrigating lands owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned, and used exclusively for such purpose." In construing this section, this court in *Judge v. Spencer*, 15 Utah, 242, said: "This provision made it incumbent upon the legislature to provide a uniform system by which every species of property within the state, not exempt by the organic law, should equally and ratably bear its due proportion of the public burden, and the legislature had no power to exempt property not exempt under the Constitution. The intention manifest from the several provisions of that instrument, respecting revenue and taxation is not only that previous territorial legislation, as to such exemptions should be repealed, but also that no power should exist in the state government to grant exemptions other than those mentioned in the Constitution." It will be observed that the classes of property which shall be exempt from taxation are specifically mentioned, but neither one of those classes, by any principle of interpretation can be made to include the property of either an insane, idiotic, infirm, or indigent person. It is manifest, therefore, that the property of none of these classes of persons is exempt under the provisions of the Constitution, and exemptions cannot be enlarged by interpretation. "The presumption is that all exemptions intended to be granted were granted in express terms. In such cases the rule of strict construction applies, and in order to relieve any species of property from its due and just proportion of the burdens of the government the language relied on, as creating the exemption, should be so clear as not to admit of reasonable controversy about its meaning, for all doubts must be resolved against the exemption." *Judge v. Spencer*, 15 Utah, 242.

But counsel for the defendants maintain that an abatement of taxes, as provided in the statute, is not an exemption as provided in the Constitution, that "abatement" does not mean the same thing as "exemption," and that therefore, the statute is not in excess of legislative authority, and is valid. It is true that the terms "exemption" and "abatement," in their literal sense, have different shades of meaning. This is so, to a certain extent, of the meaning of these terms, as employed in the Constitution and statute; for an exemption prevents any assessment or levy of tax in the first instance, and in that way relieves the property from the burden of taxation, while in the case of an abatement the property is relieved of its share of the burdens of taxation after the assessment has been made and the tax levied. The difference in the sense of these terms, therefore, relates to the method, rather than the effect; for the ultimate result, whether by exemption or abatement, is precisely the same. In either case the property is relieved from the burden of taxation. Now it is apprehended that the intention of the framers of the Constitution, by exempting certain property, was not so much to prevent an assessment and levy of tax thereon as to free it from the burden of maintaining the government. When the tax is abated or remitted after it has been levied, the

same object is accomplished; and therefore the mandates of the Constitution, that such burdens "shall be equal and uniform" on all property within the state, except such as is exempt by the fundamental law, and that "every person and corporation shall pay a tax in proportion to the value of his, her, or its property," may be violated by either method. It is true that the statute does not permit the abatement of all the tax, as does an exemption under the Constitution; but it is equally true that if the legislature has power to enact a statute releasing property, not exempt by the paramount law, from a portion of the tax, it has power to enact one abating all the tax on such property. The same legal principles apply in either case. The meaning and intent manifest from the Constitution are that no property shall be relieved from the burden of maintaining the government, except such as was defined and specified for exemption by that instrument. No one would contend for a moment that the legislature of this state has power in express terms to exempt property from taxation, other than that enumerated for exemption in the Constitution; and yet in the enactment of the statute in question the legislature has undertaken to indirectly exempt property not so enumerated. This is an attempt to do indirectly that which could not be done directly, and the statute therefore is in violation of the Constitution, and is void, as in excess of legislative authority. To prevent the legislature from exempting property not included within the exemptions of the Constitution, express words of inhibition were not necessary. The positive direction that "all property . . . not exempt under the laws of the United States, or under this Constitution, shall be taxed," and that the rate of assessment and taxation shall be "uniform and equal," so that "every person and corporation shall pay a tax in proportion to the value of his, her, or its property," with the enumeration of the property exempted, contains an implication against an exemption of any other property by the legislature. That direction itself operates as a restraint upon the legislative power. *Cooley, Const. Lim.* p. 209; *Konold v. Rio Grande W. R. Co.* 16 Utah, 151.

A similar question to the one herein considered was before the supreme court of California in *Wilson v. Sutter County Supers.* 47 Cal. 91. In that case the board of supervisors, under a provision of a statute requiring the board to remit certain taxes in certain taxing districts, made an order remitting taxes in accordance with that statute. The court held that the order, and the clause of the statute under which it was made, were in violation of the provisions of the Constitution that "taxation shall be equal and uniform throughout the state," and that "all property in this state . . . shall be taxed in proportion to its value, to be ascertained as provided by law." The court, in its opinion, said: "An order which remits the taxes upon any property within the district, causes the taxation within the district to be unequal, and is virtually an exemption of such property from taxation; and if the order remits a part of the tax on such property, the result is the same, it differing only in degree. The clause of the 20th section of the act above

mentioned, providing that said board in their discretion, and for good cause shown, shall remit such other tax in said district as may to them seem just and proper, and the order of the board of supervisors, purporting to remit such taxes are, in our opinion, repugnant to the provisions of the Constitution above cited, and must be held null and void." *Cooley*, Taxn. 180, 204; *Zanesville v. Richards*, 5 Ohio St. 589; *Exchange Bank v. Hines*, 8 Ohio St. 1; *Hunsaker v. Wright*, 80 Ill. 146; *Gunnison County Comrs. v. Owen*, 7 Colo. 467.

In arriving at the conclusion that the provision of the statute in controversy is null and void, we were not unmindful of the fact that the question whether an enactment of the legislature is void because of its repugnancy to the Constitution is always one of much delicacy, and in a doubtful case should seldom,

if ever, be decided in the affirmative. Where, however, the mind is convinced of the unconstitutionality of the law, the duty which devolves upon the court to declare it so is imperative, even where, as in this case, the statute appears to be in consonance with justice and humanity. That the law itself would be beneficent can be of no avail in this case because its effect and operation would be to exempt property, against the mandate of the fundamental law.

We are of the opinion that *the demurrer to the petition must be overruled*, and that a writ of prohibition must issue, restraining absolutely further proceeding under the clause of the statute herein declared void.

It is so ordered.

Zane, Ch. J., and Miner, J., concur.

WASHINGTON SUPREME COURT.

Peter ANDERSON, *Reapt.*,

INLAND TELEPHONE & TELEGRAPH COMPANY, *Appt.*

(..... Wash.)

A telephone company's lineman who is injured by contact with a span wire charged with electricity by a trolley wire an insulator of which was broken is chargeable with negligence which will preclude his recovery of damages, where he failed to test the insulator, although he had apparatus by which he could do it, and knew that there was no inspector, other than the linemen, to make such tests.

(July 1, 1898.)

APPEAL by defendant from a judgment of the Superior Court for Spokane County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Blake & Post for appellant.

Messrs. Wirt W. Saunders and W. J. Thayer for respondent.

Dunbar, J., delivered the opinion of the court:

The respondent, a servant of the Inland Telephone & Telegraph Company, brought an action against the said telephone company and the Spokane Street-Railway Company. The complaint alleges that, at the time the accident occurred, the plaintiff was a lineman in the employ of the Inland Telephone & Telegraph Company; that the two defendants used in common a pole located on the corner of Olive and Hamilton streets, in the city of Spokane; that the telephone company used said pole for holding up telephone wires, and the street

railway company had fastened to said pole a span wire or guy wire, which ran to the pole from the trolley wire used by the street-railway company; that the plaintiff ascended said pole for the purpose of stringing a wire on the pole, and, while on the pole, came in contact with the span wire belonging to the street-railway company, touched the same, received an electric shock, and fell to the ground, breaking his leg, as a result of said fall; that the wire which plaintiff touched, which belonged to the street-railway company, was not designed or intended to carry electricity, but was used as a support for the trolley wire used by said street railway company, but, through the careless and negligent acts of the street-railway company, said wire was at the time charged with a strong current of electricity, and was negligently left by the street railway company uninsulated, and in a dangerous and unsafe condition; that both of the defendants knew, and by the exercise of reasonable care might have known, and that plaintiff did not know, and by the exercise of reasonable care could not have known, the fact that said wire was charged with electricity. Upon the trial of the cause, by stipulation, the street railway was dismissed from the action, and a judgment was obtained against the appellant, the Inland Telephone & Telegraph Company. From such judgment this appeal is taken.

The contention of the respondent is that it is the duty of the master to furnish the employee with a safe place to work, and with safe and suitable machinery or appliances, and that this duty is a continuing one, which is imposed upon the master during employment. There is no doubt that this proposition of law is a correct one, and it may be stated as a corollary to the proposition enunciated above, that the law charges the master with knowledge which he ought to have had; and it is settled law that

NOTE.—As to negligence of person in touching electric wire in highway, see note to *Denver Consol. Electric Co. v. Simpson* (Colo.) 81 L. R. A. 566.

As to contributory negligence of employee, in touching wire, see *Western U. Tele. Co. v. McMullen* (N. J.) 82 L. R. A. 851.

As to contributory negligence in touching wires
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on or in building, see *Griffin v. United Electric Light Co.* (Mass.) 82 L. R. A. 400; also *McLaughlin v. Louisville Electric Light Co.* (Ky.) 84 L. R. A. 812.

As to negligence of linemen, see also *Bergin v. Southern N. E. Teleph. Co.* (Conn.) 89 L. R. A. 122.

he ought to know that which by the exercise of reasonable care he would have discovered. Also, it may be accepted as universally conceded law that the responsibility of the master cannot be transferred to another, and that when a duty is imposed upon him, and another is employed by him to perform that duty, the negligence of the agent will be imputed to the master. But this case must be considered with reference to another universally accepted proposition, *viz.*, that, when a servant enters into an employment which is necessarily hazardous, he will be presumed to have assumed all the ordinary risks incident to such service; and the fact that the service is necessarily a dangerous one does not increase the master's liability if the injury resulted from the natural and ordinary incidents of the undertaking, presuming, of course, that the servant is a person of mature years and common understanding. The trouble in this case is not so much to determine what the law is in regard to the duties of master and servant as it is to apply the group of circumstances in the case to the law. It is the insistence of the appellant that, under the circumstances of this case, there was no duty resting upon the master to inspect the insulator which was the cause of the current flowing from the trolley wire to the span wire. It may be stated here that the insulator, which was a porcelain one, broke, by reason of which the guy wire came in contact with the charged wire of the railway company, and this guy wire, being attached to the post which the respondent was climbing, was the wire with which he came in contact. We have examined with particular care both the record in this case, and the cases cited by respondent and appellant, and all other authority bearing upon the case which we have been able to find, but have not been able to find a case exactly in point, it being conceded by the authorities generally that the proper application of well-known principles governing the responsibilities of masters depends largely upon the circumstances of each case. But, from such an investigation as we have been able to make, we are forced to the conclusion that no absolute duty rested upon the master in this case to prevent the charging of this guy wire, or, in other words, to preserve inviolable the insulators, so far as the safety of the respondent is concerned. The respondent here was a lineman, and had been in the employ of the company for something over two years, working first as a groundman, and for two years or more had been working as a lineman.

It is contended by the respondent that the question of whether or not the respondent was an inspector is a question of fact, upon which the testimony is conflicting, and that, therefore, the verdict of the jury upon that proposition is binding upon the court. We think, in any event, the judgment would have to be reversed by reason of the instructions given by the court; but, with the view that we take of the master's liability under the undisputed testimony, it will not be necessary to notice these errors. It is true that the respondent testified that he was not an inspector, and that he also testified, notwithstanding the fact that he had alleged in his complaint that he was a lineman, that he was not a lineman; but the

testimony was evidently with reference to a definition or a statement of the lineman's duty as given by Mr. Hopkins, the superintendent of the telephone company, and the later testimony, not only of the appellant, but of the respondent and his witnesses, shows conclusively, it seems to us, that, while not nominally an inspector, the duties of a lineman embraced the duties of an inspector. Corporations of this kind act through employees. Necessarily, they cannot act in any other way. An inspection of their lines and posts and insulators must be made by the employees. In this case it is an admitted fact that there was no regular inspector and no inspectors other than the linemen. It is true that some of the railroad cases cited by the respondent decided that it was the duty of the company under certain circumstances to have inspectors, but we think none of those cases are in point here. In this case the respondent and the other linemen testified that they knew that the line or wire which occupied the insulator jointly with the wire with which respondent came in contact was charged with electricity. The respondent testified that he knew the power of electricity, and the danger that would be incurred by coming in contact with a live wire that he knew that, if the insulator broke, the result would be that the wire which he touched would be charged; and he knew also that porcelain insulators frequently did break. It seems to us that this brings him within the rule which we have announced above,—that when he accepted the employment, that was necessarily hazardous, he assumed this risk, which, under all the testimony, was an ordinary risk, and that he did not exercise the discretion which he ought to have exercised in testing this wire. The testimony shows that, shortly after the accident, one of the appellant's witnesses, Mr. Dart, observed the insulator, and separated it from the wires, and it was made an exhibit in court. He also testified that the insulator when it was exhibited was in the same condition that it was immediately after the accident, when he first discovered it. About one half of the insulator was gone, and there was some contention developed in the trial as to whether the broken part of the insulator was towards the post which respondent climbed; and it was conceded this might have been detected by a lineman who was accustomed to looking at such things, if the broken part of the insulator had been next to the post. We think, and such was the opinion of the lower court who heard the testimony, that it is demonstrated that it was a physical impossibility for the broken part of this insulator to have been in the opposite direction from the post without making a complete insulation. This, therefore, must be considered an established fact in the case. The respondent says that he glanced at the insulator when he went to ascend the post, but did not give it any particular attention, and did not make any test. The testimony of the other linemen was—and it is not controverted—that linemen carried apparatus by which they could test insulators, and that they understood that they had to look out for themselves so far as danger was concerned. It appears from the testimony that the respondent must have known that no other

inspector was kept by the company, and, even if there had been, it is impracticable for an inspector to make tests that would protect workmen at all times. An inspector cannot be maintained at every insulator. An insulator might be tested and found sound at one hour of the day, and the next hour it might be broken, so that it would not insulate the wires, and the only way in which workmen could be protected would be to make these tests themselves; and it was testified in this case by the respondent that it would only have required a moment's time. While there is no gainsaying the rule that under ordinary circumstances the employee has the right to rely upon the fact that the master will furnish him a safe place to work and safe appliances, yet the law does not intend that this shall be a blind and unreasonable reliance, but that reasonable men shall exercise in a reasonable manner the faculties of which they are possessed. It seems to us it would only have been such reasonable exercise of prudence upon the part of the respondent in this case to have tested this wire before he touched it.

While there has been possibly some conflict in authority over cases which, in principle, were something like the case at bar, we think the great weight of authority sustains the view which we have taken. The first case cited by appellant—*Flood v. Western U. Teleg. Co.* 131 N. Y. 603, was an action for the death of the servant while working as lineman on the telegraph pole, caused by leaning his weight on one of the cross-arms, so that it broke, causing him to fall. The court there decided that the defendant's inspectors (and it seems conceded in that case that they had inspectors) were not required to climb each pole, and examine the arms; and the deceased knew this, having been employed by defendant for several years, part of the time as inspector, and the rest of the time as a lineman. The court, among other things, said: "The linemen all discharge their duties in the daytime. They have frequent occasion to climb the poles, and work about the arms, and obviously they are the persons who are expected to see the condition of the arms, and if they find them insufficient, to replace them, or to report the fact." And so in this case it was the linemen, and the linemen only, who were in the habit of climbing these poles; and under the undisputed testimony, there being no one else to inspect them, it was the duty of the linemen, before taking hold of the wire which might become dangerously charged with electricity, to test the same. So well understood are the general duties of a lineman, and the opportunities which he has for examining the poles and the instruments with which he works, that it was held in *McGorty v. Southern N. E. Teleg. Co.* 69 Conn. 635, that a lineman in the employ of the telephone company could not recover for an injury caused by the fall of a pole upon which he was at work, notwithstanding a prior statement by the foreman that he had been up the pole, and that it was safe, where plaintiff knew that it was the rule and custom for each lineman to test the pole for himself, and that suitable appliances were at hand for making such test, and for securing the pole in case the lineman doubted its safety.

41 L. R. A.

It seems to us that the circumstances of this case are parallel with the circumstances surrounding the case at bar, although there is an attempt by respondent in his brief to distinguish them. It was true that the trial court found in that case "that it was the rule and custom, in this branch of the work, that 'each lineman should look out for his own safety in climbing poles,'" but the undisputed testimony in this case is to the same effect. *Bergin v. Southern N. E. Teleg. Co.* 70 Conn. 54, 89 L. R. A. 193, was a case where a telephone company and an electric railroad company used the same pole for their wires; and the court held that the law did not absolutely require the telephone company, as between it and its linemen, to inspect and test guy wires and circuit breakers put in by such railroad company, to discover whether they were in a safe condition, but whether the employer or employee should discharge such duty depended on the circumstances of the particular case. In commenting on the testimony in that case, the court said: "Linemen are employed by the telephone company, among other things, for the purpose of doing work which is dangerous, by reason of the possible contact of the telephone wires with highly-charged wires of the street railway or other companies. The linemen are to do their own testing in such work; the telephone company has no other men than the linemen to do the testing, as the linemen knew; there was nothing to prevent Delaney [who was the plaintiff in the case] from testing the guy wire; and the linemen on this job were furnished with all the tools, appliances, and wires with which to test wires of the electric street-railway company." This case seems to us in principle to be almost parallel with the case at bar. It is insisted by the respondent that the first case cited (*Flood v. Western U. Teleg. Co.* 131 N. Y. 603), is inconsistent with the previous case in the same court (*viz. Bushby v. New York, L. E. & W. R. Co.* 107 N. Y. 374), in which it was held that the defendant was liable to a brakeman on account of a wooden stake breaking because of a latent defect. We think the circumstances of this latter case were altogether different, and it was evidently considered by the court deciding the case of *Flood v. Western U. Teleg. Co.* 131 N. Y. 603, that no inconsistent principles were applied in the two cases, for the former case is not overruled or mentioned in the latter opinion. *Dizon v. Western U. Teleg. Co.* 68 Fed. Rep. 630, was a case where the plaintiff was an employee of the telegraph company, and, when engaged with others in stringing wires on its poles, was instructed to climb a pole belonging to another company, to get certain wires out of the way. While descending, after performing the work, he fell, in consequence of one of the spikes being insufficiently secured. It was held that the danger from which the accident resulted was one of the risks of plaintiff's employment, which was assumed by him, and for which his employer was not liable. That case, however, is not as strong a case in favor of the master as the case at bar, for there the plaintiff was directed by the foreman, who was at the time acting for the defendant. The court laid down the rule in that case as follows: "The employer is not an in-

suror of the safety and sufficiency of the tools, machinery, or appliances furnished to the employee for his use, nor is he a guarantor of the safety of the place where or upon or about which the employee is required to work. The duty cast by law upon the employer is to use ordinary and reasonable care to furnish safe and sufficient tools, machinery, and working places. If he has done this, he has performed the full measure of his duty. The employee, in order to recover for defects in the appliances or working places of the business, must allege and prove that the appliance was defective, or the working place insecure; that the employer had notice or knowledge thereof, or that, by the exercise of ordinary and reasonable care, he might have had such notice or knowledge; and that the employee did not know of the defect, and had not equal means of knowing with the employer." The last sentence in this proposition must be given as much force as the preceding ones; for if the employee does know of the defect, or has equal means of knowing with the employer, then, certainly, it is his unquestioned duty to investigate before proceeding. In *Griffin v. Ohio & M. R. Co.* 124 Ind. 326, the rule was announced that, "where the danger is alike open to the observation of all, both the master and servant are upon an equality; and the master is not liable for an injury resulting from the dangers of the business." In this case, certainly, the danger was not only as open to the observation of the respondent as it was to the master, but the undisputed testimony shows that the master obtained his knowledge of the danger through the respondent and his fellow servant. In *Larson v. McClure*, 95 Wis. 538, it was held that, "when the danger is alike open to the observation of all, both the master and servant are upon an equality, and the master is not liable for an injury resulting from the dangers incident to the employment." In *Bedford Belt R. Co. v. Brown*, 142 Ind. 659, the court said: "Every service has its own peculiar hazards, and the law does not hold the master accountable for such hazards as ordinarily and naturally belong to any service,"—and quoted approvingly *Day v. Cleveland, C. O. & St. L. R. Co.* 137 Ind. 206, where it was said: "In a case where the servant is one of mature age and experience, as in this case, the law never imposes the duty on the master of becoming eyes and ears for his servant, where there is nothing to prevent the servant from using his own eyes and ears to avoid danger. . . . The law requires that men shall use the senses with which nature has endowed them; and when without excuse one fails to do so, he alone must suffer the consequences, and he is not excused where he fails to discover the danger if he made no attempt to employ the faculties nature has given him." The rule is thus announced in *Wood, Mast. & Serv.* § 328: "When a servant is employed upon work which, equally, within the knowledge of the master and the servant, is of a dangerous nature, the master is not liable for the consequences of an accident occurring to the servant in the course of that employment, unless there be negligence on the part of the master, and the absence of rashness on the part of the servant. A servant is bound to exercise his own skill and judgment, so as to

protect himself in the course of his employment, and the master is not regarded as warranting, generally, his safety. He is himself bound to exercise proper care, and cannot claim indemnity from the master for an injury resulting to him which might have been prevented if he had himself been reasonably vigilant." Substantially the same principle is announced in § 866, *et seq.*: "A master is not liable for injuries to his servant while using machinery in the employment . . . if the servant has the same knowledge of its defects, or the danger incident to its use, as the master [or if, in the exercise of due care, he ought to have such knowledge], and, at or before the time the accident occurred there was nothing to indicate any danger such as demanded or suggested precautions which were omitted" by the master. In this case it was equally within the knowledge of the master and the servant that this was a dangerous employment, and it cannot be said that there was negligence on the part of the master, and absence of rashness on the part of the servant, or that the servant used his skill, to protect himself in the course of his employment. He had sufficient skill, according to the undisputed testimony, to protect himself, and he had the apparatus at hand for testing the insulator and the wires. "If the servant is to recover damages," says Mr. Beach, in his work on *Contributory Negligence* (§ 289), "he, like any other plaintiff, comes into court under the legal obligation of showing, or having it sufficiently appear, that his own negligence has contributed in no legal sense to the injury." And in § 346 of the same work it is said: "Knowledge on the part of the employer, and ignorance on the part of the employee, are of the essence of the action; or, in other words, the master must be at fault and know of it, and the servant must be free from fault and ignorant of his master's fault, if the action is to lie. The authorities all state the rule with these qualifications." There is a wilderness of authority to the same effect, but it would serve no good purpose to reproduce it here. We have examined with patience the authorities cited by the respondent, and, except in one or two cases, notably cases with reference to damages arising from the falling of posts, which we think are in conflict with the cases cited on that subject by the appellant and noticed above, they are not in point. In all of them it appeared that the injury was caused by defects or dangers which were not apparent to the servant, or which would not have been apparent to him if he had exercised ordinary care,—such care as was consistent with the dangers incident to the employment. The citation from 7 Am. & Eng. Enc. Law, p. 880, to the effect that "it is the duty of a master, not only in the first instance to make reasonable efforts to supply his employees safe and suitable machinery, tools, etc., but also thereafter to make like efforts to keep such machinery, etc., in safe and serviceable condition, and to that end he must make all needed inspections and examinations," and 2 Bailey, *Personal Injuries* relating to Master & Servant, §§ 2619, 2620, to the same effect, are, of course, accepted as the law; but we do not think that acceptance will avail the respondent in this case, for the reason, as we before inti-

mated, that these tests were made through the linemen for this company. The same rule is announced in *Comben v. Belleville Stone Co.* 59 N. J. L. 228, cited by appellant, where it is announced that the rule is subject to the qualification that the servant is without knowledge of the danger, and cannot observe and acquire the knowledge in the exercise of ordinary care in the employment. This qualification of the rule runs through all the cases.

The respondent alleges in his complaint that the plaintiff did not know, and by the exercise of reasonable care could not have known, the fact that said wire was charged with electricity. By this allegation he recognized the principle of law which we have just enunciated, and it was necessary for him to make this fact appear. We think, from an investi-

gation of the whole case, that it appears from undisputed testimony that plaintiff did not exercise reasonable care in the investigation of the dangers which he knew were incident to his employment, and that had he exercised such care, and made the tests which reasonable prudence would have dictated, he would have had knowledge of the danger which beset him.

The accident was unfortunate, and the result most lamentable; but, with our view of the law governing the case, *the judgment must be reversed*, and the cause is remanded to the lower court, with instructions to dismiss the same.

Scott, Ch. J., and Gordon, Reavis, and Anders, JJ., concur.

WEST VIRGINIA COURT OF APPEALS.

NORFOLK & WESTERN RAILWAY
COMPANY, *Plf. in Err.*,

v.

PINNACLE COAL COMPANY.

(.....W. Va.....)

- *1. In the absence of legislative enactment, a justice of the peace has no authority to determine the rate of freight charges of a railroad corporation.
2. Although a justice of the peace has jurisdiction of civil actions of debt, he exceeds his legitimate powers whenever he extends such jurisdiction to include matters of controversy or causes of action unknown to the common law, and unauthorized by legislative enactment.
3. Where an enactment of the legislature which authorized such causes of action has been repealed, the jurisdiction of the justice of the peace over the same is repealed therewith, and he cannot, under the pretense of deciding whether such enactment has been repealed or not, take jurisdiction of such causes of action, and, if he does so, he is guilty of exceeding his legitimate powers, subjecting him to restraint by prohibition.
4. Under pretense of determining its jurisdiction, an inferior tribunal cannot usurp a jurisdiction which is denied to it, nor, having jurisdiction of the subject-matter in controversy, abuse or exceed its legitimate powers.
5. The jurisdiction of inferior tribunals is fixed by law, and for such a tribunal, even though in good faith, to extend its jurisdiction beyond the limitations of law, is to make it guilty of usurpation and abuse of power.
6. In all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject-matter in controversy, or, having such jurisdiction, exceeds its legitimate powers, prohibition now lies

as a matter of right, and not as a matter of sound judicial discretion.

7. Subsections 7, 8, & 82c, chap. 54, Code 1891, as to classification of freight and rates of charges therefor, are repealed by chapter 17, Acts 1895.

(Brannon, P., dissents.)

(April 2, 1896.)

ERROR to the Circuit Court for Mercer County to review a judgment in favor of plaintiff in an action brought to recover for an alleged overcharge for transporting coal. *Reversed.*

The facts are stated in the opinion.

Messrs. A. W. Reynolds and Johnston & Hale, for plaintiff in error:

The law upon which judgment for the Pinnacle Coal Company was rendered by justice of the peace W. T. Epperly was not in force, having theretofore been repealed by the act of the legislature passed February 16, 1895, and approved February 21, 1895; and the amount of the judgment being less than \$15, the Norfolk & Western Railway Company, the defendant in said action, had no remedy by appeal, certiorari, or otherwise than by writ of prohibition.

The entire act of 1895 shows an intention to legislate upon the whole subject, and the act does, in fact, cover the whole subject regulating the freight charges to be made by common carriers for the transportation of freights within this state, and was intended as a substitute for the former act. The later act is so complete as to contain a provision to secure its enforcement by fine for any violation of its provisions. It is not dependent in any particular upon the provisions of the former act.

Where the legislature has by an act covered the whole subject under consideration in such manner as to show that it was intended that the later act shall be a substitute for the former, the former act is repealed by implication, not-

*Headnotes by DENT, J.

NOTE.—In connection with the discussion in the present case as to the want of jurisdiction in a case which is based on a repealed statute, see the note 41 L. R. A.

to *Hovey v. Elliott* (N. Y.) 39 L. R. A. 449, in which is considered the jurisdiction of a court to render a decision which is unconstitutional.

withstanding the two acts may not be repugnant in all the parts.

King v. Cornell, 106 U. S. 395, 27 L. ed. 60; *Red Rock v. Henry*, 106 U. S. 596, 27 L. ed. 251; *United States v. Clafin*, 97 U. S. 546, 24 L. ed. 1082; *Philadelphia v. Kates*, 150 Pa. 30; *Philadelphia v. Congers*, 150 Pa. 35; *Totten v. Nighbert*, 41 W. Va. 801; *Herron v. Carson*, 28 W. Va. 62.

If the coexistence of two sets of affirmative provisions would be destructive of the object for which the later set was passed, or if the same right would be made dependent on conflicting conditions, the earlier set will be impliedly repealed by the later.

23 Am. & Eng. Enc. Law, p. 485.

The justice had no jurisdiction of the action, as it was statutory and proceeded upon a statute which had been repealed. In pronouncing judgment against the Norfolk & Western Railway Company he made a new creature in the law and created an action existing neither at the common law nor by statute of West Virginia.

Bodley v. Archibald, 38 W. Va. 229.

Under § 1, chap. 110, of the Code of West Virginia of 1891, a writ of prohibition lies as a matter of right in all cases of usurpation and abuse of power when the inferior court has not jurisdiction on the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.

This court has never hesitated to grant the writ of prohibition in any case where, as in the case at bar, a justice of the peace or other inferior tribunal has exceeded his or its legitimate powers, and there is no other remedy for the aggrieved party.

McConiha v. Guthrie, 21 W. Va. 184; *Ensign Mfg. Co. v. Carroll*, 80 W. Va. 532; *Wood County Ct. v. Boreman*, 34 W. Va. 362; *Wilkinson v. Hoke*, 39 W. Va. 403.

In other states, where there was no such broad and wise legislation as exists in West Virginia, the courts have nevertheless interfered in proper cases, either where there was no jurisdiction in the inferior tribunal, or where there was jurisdiction, but the inferior tribunal had gone beyond its legitimate power.

Appo v. People, 20 N. Y. 531; *Sweet v. Hubbert*, 51 Barb. 312; *Baldwin v. Cooley*, 1 S. C. N. S. 256; *People, Higgins, v. McAdam*, 22 Hun, 559; *Long v. San Francisco City & County Super. Ct.* 102 Cal. 449; *State, St. Louis, K. & N. W. R. Co., v. Withrow*, 133 Mo. 500; *St. Louis, K. & S. R. Co. v. Wear*, 135 Mo. 230, 33 L. R. A. 841.

In a proper case for prohibition the want of jurisdiction or the excess of power by the inferior tribunal may be made to appear by the averment and proof of facts *dehors* the record of the proceedings before such inferior tribunals.

Bodley v. Archibald, 38 W. Va. 229.

Dent, J., delivered the opinion of the court:

The case of the Norfolk & Western Railway Company against the Pinnacle Coal Company and others presents but a single important question, and this is: When the legislature enacts a statute fixing a maximum rate of freight charges for railroad companies, and

afterwards repeals such enactment, has a justice of the peace the jurisdiction, under the pretense of deciding whether such enactment has been repealed, to take cognizance of causes of action arising thereunder, hold such law still in force, and render judgment against alleged offending railroad companies for overcharge of freight? Our statute greatly simplifies the common-law remedy of prohibition. It is as follows (Code, § 1, chap. 110): "The writ of prohibition shall lie, as a matter of right, in all cases of usurpation and abuse of power when the inferior court has not jurisdiction of the subject-matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." Two important changes are made in the common law: (1) The writ is no longer a matter of sound discretion but a matter of right; (2) it lies in all proper cases, whether there is other remedy or not. Prior to this enactment, which bears date in 1892, it was recognized as a concurrent remedy with appeal, writ of error, etc., only to be resorted to, however, when such other writs were inadequate. *Swinburn v. Smith*, 15 W. Va. 501; *High, Extr. Legal Rem. §§ 770, 771; People, Ducheneau, v. House*, 4 Utah, 369; *People, Yearian, v. Spiers*, 4 Utah, 385. These two Utah cases hold that when a justice is proceeding to try a case of which he has no jurisdiction, prohibition is the proper remedy, although an appeal would lie, as the latter is neither a speedy nor adequate remedy. The reason why it is given as a concurrent remedy at common law is found in *High, Extr. Legal Rem. § 765*: "Nor is it a writ of right, granted *ex debito justitiæ*, but rather one of sound judicial discretion, to be granted or withheld according to the circumstances of each particular case." The statutes of some other states, notably California, preserve the common-law doctrine intact by the addition of the words where there "is not a plain, speedy, and adequate remedy in the ordinary course of law." Cal. Code Civ. Proc. §§ 1102, 1103. Our statute contains no such words of limitation for the better reason that the legislature recognized the fact that in cases of usurpation of denied or abuse of conceded power on the part of an inferior tribunal prohibition alone would furnish a plain, speedy, and adequate remedy, as it acts directly on the tribunal as well as the litigant. Appeals, writs of error, and certiorari do not directly reach and cure the evil, for the reason that it may become chronic, epidemic, and highly damaging before these ordinary writs may be made effective. In cases of mere error, irregularity, or mistake, however gross, prohibition does not lie; not because, as is oftentimes erroneously stated, there exist other adequate remedies, or such remedies are inhibited, but for the reason that there has been no usurpation or abuse of power. In all cases within the purview of the statute, prohibition lies as a matter of right without regard to other remedies. In applications for prohibition under the statute, the only important question for inquiry is as to whether the inferior tribunal is guilty of "usurpation and abuse of power" beyond its jurisdiction, or, having jurisdiction of the subject-matter, has it exceeded its "legitimate powers?" An affirmative answer grants the writ as a matter of right, while a negative answer refuses it,

though the applicant be bereft thereby of all remedy. In the present case, if the justice had jurisdiction of the matter in controversy, and did not exceed his legitimate powers, the writ must be denied; otherwise it issues as a matter of right, without regard to other remedies. According to law, constitutional and statutory, a justice of the peace is given jurisdiction of all civil actions except where the amount claimed, exclusive of interest and costs, exceeds \$300, or the title to real estate is involved, or the action is for false imprisonment, malicious prosecution, slander, verbal or written, breach of marriage contract, or seduction. This includes all actions for the recovery of money when such recovery is authorized by common-law or statutory enactment. And it impliedly follows that he has no jurisdiction of any cause of action unknown at common law, and not authorized by statute. The legislature has the right to create new causes of action for the recovery of money, but a justice of the peace has not, and when he attempts to create a new cause of action he usurps legislative functions, and, if he illegally extends a certain class of actions within his jurisdiction to include a new cause of action of his own creation, he is guilty of exceeding his legitimate powers. Nor can he excuse himself by claiming that he acted in good faith in accordance with the law, as he understood it, and had the right to decide it; for it is not a question of good faith or honest purpose, but of excess of legitimate powers, and usurpation of jurisdiction over a subject-matter of which the law gives him no control, and ignorance of law is no justification therefore. In every case of usurpation or abuse of power the inferior tribunal always determines jurisdiction in its own favor, and, so with excess of legitimate power, and, if its holding affords the criterion to go by, there could never be any justification for the writ of prohibition; but it is because such court erroneously determines its own jurisdiction that the writ issues. High, Extr. Legal Rem. § 780. It always goes against a judicial tribunal and judicial action, and not that which is merely ministerial. A court that usurps jurisdiction only errs, but its error is of such a grievous nature as to call for prompt redress from a supervising tribunal. The statute uses the language "subject-matter in controversy." What is the subject-matter in controversy but the cause of action in this case,—“overcharges of freight?” The mere money demand is neither the cause of action nor the subject-matter of controversy. It is simply the measure of damages. While the controverted fact is the right of the railroad company to fix its freight charges. This is a right that can only be taken away from it by reasonable legislative enactment. And if the maximum fixed by the legislature is unreasonably low, the enactment has been lately held, in a case not yet reported, by the Supreme Court of the United States, to be void, as depriving the company of its property without due process of law. *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819. The question of the constitutionality of the act under consideration could not now be raised, since it has been repealed. And yet a right which is denied to a state legislature is claimed to be within the jurisdiction of a justice of the peace. In short, 41 L. R. A.

that he is clothed with the power to say when the charges of a railroad company are reasonable, simply because he has jurisdiction of money demands, and, if the amount for which he gives judgment is less than that for which an appeal lies, the company is without remedy. This would be nothing less than legal robbery. The action of the justice is justified under the color of law. A repealed statute is as though it never existed, and does not furnish color of law any more than if it had never been enacted. The only color of law the justice has is his own opinion. Nor does prohibition lie until this opinion takes the form of a judgment. It is said in High, Extr. Legal Rem. § 780: “When it does not appear that the tribunal against which the writ is sought has entertained jurisdiction of the matter in controversy, or that it has done any act showing an intention so to do, the relief will be denied, since it is not to be presumed that such tribunal will act in a matter over which it has no jurisdiction.” The justice must first err in his decision before he can be prohibited. Errors in excess of legitimate powers or abuse of jurisdiction are subject to prohibition, but errors of judgment in the proper trial of a matter within jurisdiction are not, such as insufficiency of process or service, or statement of cause of action, weight of evidence, or regularity or form of judgment, or necessary rulings during the progress of the trial,—nonjurisdictional. It is said in High, Extr. Legal Rem. § 767: “In the exercise of the jurisdiction by prohibition it is important to distinguish between the nature of the action which it is sought to prohibit, and the sufficiency of the cause of action as stated in the proceedings in the pending litigation. The nature of the action itself determines the jurisdiction of the court over the subject-matter, regardless of the sufficiency of its presentation or statement. If, therefore, the action is of such a nature as to fall within the jurisdiction of an inferior court, prohibition will not lie merely because of insufficiency in the statement of the cause of action in the pleadings, or because of insufficient proof to sustain the cause of action as stated.” There is a vast difference between stating a good cause of action imperfectly and stating an illegal cause or ground of action. In the former case the justice would have jurisdiction, and in the latter case he would not have, except to deny the want thereof; and the claim that he assumed jurisdiction in good faith in ignorance of law would not excuse him. A justice of the peace manufactures jurisdiction for himself just as much where he creates new causes of action unknown to the common law, and unauthorized by statute, as where he separates a claim beyond his jurisdiction into several causes of action within his jurisdiction. *Bodley v. Archibald*, 88 W. Va. 229. In the latter case strict justice may be done, though the justice act erroneously in assuming cognizance of such actions, but in the former he cannot do justice otherwise than by denying jurisdiction.

For these reasons the judgment of the Circuit Court is reversed, and the writ of prohibition as prayed for is awarded.*

*That subsections 7, 8, § 82c, chap. 54, Code 1891, as to classification of freight and rates of charge,

Brannon, P., dissenting:

An action was brought by the Pinnacle Coal Company against the Norfolk & Western Railroad Company before a justice of Mercer county to recover for overcharge for carriage of coal from Bramwell to Bluefield, a distance of 18 miles, and judgment was rendered for plaintiff for \$11.67 and costs, and then the defendant applied to the circuit court for a writ of prohibition to prohibit the justice from carrying the judgment into execution, and, a rule having issued to show cause why such prohibition should not be awarded, upon demurrer to the petition and motion to discharge the rule, the rule was discharged, thus refusing the writ of prohibition. The right of plaintiff to recover depends upon whether the rate of charge on coal is to be under subsection 8, § 82c, chap. 54, p. 562. Code 1891, or under § 2, chap. 17, Acts 1895; and that depends on the question whether the act of 1895 repeals said Code provision as to freight charge. I regard it as a question of repeal by implication, although counsel argues that it is not, but is an express repeal, because the later act contains the clause, "All acts and parts of acts which conflict with any of the provisions of this act are hereby repealed;" but as to apply this clause, we must first determine that the prior act does conflict with the later, such conflict would work a repeal by implication under general principles of construction without that clause. The inconsistency between the acts must be clear, so that the two cannot each be executed, to work repeal by implication. *Sturm v. Fleming*, 31 W. Va. 701.

The subjects covered by the Code are the classification of the various articles of freight and the charges thereon, and these are the subjects dealt with by the act of 1895, and therefore the matter seems to fall under the doctrine referred to in *State v. Mines*, 38 W. Va. 126, that "a subsequent statute revising the whole subject matter of a former one and evidently intended as a substitute for it, though it contains no express words to that effect, must, on principles of law as well as in reason and common sense, operate a repeal of the former law." See *Totten v. Nightbert*, 41 W. Va. 801; *Red Rock v. Henry*, 106 U. S. 596, 27 L. ed. 251. I repeat that these two laws make full and ample provision upon two subjects, and the only two they deal with,—that is, classification for the purpose of charge for transportation of all articles of freight, and the rates of such charge. Said subsection 7, § 82c, chap. 54, of the Code, says that "goods, merchandise, and all other kinds of property shall be classified; for the purpose of transportation, as follows"; then enumerating a large number of articles in various classes, and providing for unenumerated articles, plainly covering all articles transportable. The act of 1895 is just as wide, as it commands "a general classification of goods, merchandise, and all other kinds of property for the purpose of transportation." Now, turn to the subject of charges. The Code, in

subsection 8, says that all railroad corporations, according to the classification in subsection 7, shall be limited to certain charges, covering the whole field of charge. The act of 1895, in § 2, does the same, providing for a tariff of rates on all the articles classified under § 1. Therefore I repeat that both statutes deal with, and contain complete provision for, classification and charges on all subjects capable of transportation, and thus the rule of law above specified applies. Are these acts inconsistent with each other? They are irreconcilably so. Both provide for classification, but while the Code itself made that classification, the act of 1895, while likewise requiring a classification, says the railroad company or other carrier shall make it, but so make it as to conform to the classification in general use on that railroad for interstate transportation under the act of Congress known as the interstate commerce act of February 4, 1897. This was done to harmonize the classification of articles of transportation within this state with the classification used on the same road for freight shipped from points in this state to points in other states, or from other states to points in this. Thus, the act of 1895 does not itself make a classification, whereas the Code did.

Next as to charges. The Code itself fixes a maximum rate per ton per mile, varying according to distance by sections of 50 miles, the charge diminishing for each 50 miles of transportation, and varying also with classification, articles in one of the several classifications being inflexibly charged a different rate from those in another classification. The act of 1895 requires the road to be cut up into sections of 10 miles, contemplating that rates may be made to vary according to distance. The rates are to be fixed by the company; and this act does not, like the Code, say just what rates shall be charged, only saying that the average rate for all classes of freight under the classification directed by the act shall not exceed five cents per ton per mile, except that coal and some other articles named shall not exceed three cents. Thus, different rates from those inflexibly fixed by the Code itself may be charged on the same articles. Thus the classification under the two acts may be different, articles under one class in the Code falling in another under the later act; and the length of sections measuring the charge are actually different, and the charges may be different. They cannot both coexist and be executed without jar and confusion. The act of 1895 plainly repeals and takes the place of said Code provision as to classification of articles of freight and the charges. The justice applied the wrong law to the case before him, and gave a judgment unwarranted by law. It was error of law.

But does prohibition lie to prohibit the enforcement of this judgment? I think not. It is urged that no appeal lies, nor certiorari, and, if prohibition is not granted, there is no redress. That is so. The law says that, unless the amount in controversy, exclusive of interest and costs, exceeds \$15, no appeal shall lie. The law thus says that public policy demands the close of litigation with the first judgment in small matters, no matter how gross the error. In such case, we do not look at the de-

are repealed by chapter 17, Acts 1895, is too plain for argument, for they are inconsistent therewith, and expressly repealed by § 5 of said last-named act. As to this, see Judge Brannon's dissenting opinion.

gree of error in the judgment. The legislature has in this instance applied the maxim *De minimis non curat lex* (concerning very small things the law has no care). Counsel endeavors to bring the case under the old rule that prohibition lies where the inferior court has no jurisdiction, and bases this position on the theory that the action was a statutory one, and the statute to sustain it had been repealed. The action was not statutory. It was in nature an action of assumpsit for money had and received, an action to recover money. True, the statute fixed the rate of charge, and for excessive charge gave action, and, if there had been no statute to fix charges, there would be no action. In no other sense is it a statutory action. If there had been no statute fixing rate, and yet an action had been brought for overcharge, you would not say it was a statutory action. It would simply be a common-law action for the recovery of money on insufficient ground to warrant judgment. So the repeal of the statute made the action, in nature, just such an action. I do not see how it can be said, when a man brings a suit in any court basing his claim on a statute claimed by him to be in force, in a court which would have jurisdiction if it were still in force, and it is finally decided that the law was repealed, that the court proceeded without jurisdiction. It proceeded without valid cause of action, but within its jurisdiction. Who would say that in *Curran v. Owens*, 15 W. Va. 208, an action by a wife to recover damages for the sale of liquor to her husband, the circuit court had no jurisdiction because of the repeal of the statute on which alone the action rested? The question of a repeal of a law is a nice question of law oftentimes; and if, when held to have been repealed, the whole thing is void because of want of jurisdiction, vital principles would be reversed. You may as well say that when an action is based on the existence of a fact, and it is disproved, there is no jurisdiction. So where the action is predicated upon the supposed continued existence of a statute or rule of law decided by the court in the end not to exist. There is jurisdiction nevertheless. The contention of counsel fails to discriminate between want of jurisdiction and want of cause of action.

It has been often laid down that no prohibition lies as for want of jurisdiction, if the court has jurisdiction of cases of the same general nature, unless it abuses its jurisdiction by exceeding its legitimate powers. Mere error or irregularity of the court in its rulings, as holding there is cause of action to sustain a judgment when there is not, will not call for prohibition, but it must be redressed by appeal or writ of error. *Wood County Ct. v. Boreman*, 84 W. Va. 362; *Fleming v. Kanawha County Ct. Comrs.* 81 W. Va. 608. In this connection I put the proposition that, as prohibition does not lie where an appeal will lie, and as, if this judgment had been \$15, an appeal would lie, so, as it is less, it does not lie; in other words, the nature of the question as to the application of the writ of prohibition is the same where the judgment is under as where it is over the amount of \$15. The amount does not give character to the judgment.

The railroad's counsel would also put the

right to prohibition on § 1, chap. 110, Code, giving prohibition both where the court has no jurisdiction and where, having jurisdiction, "it exceeds its legitimate power." I think this latter clause does not enlarge the scope of the writ, and is only declaratory of the common-law office of the writ. This clause that the writ lies where the court "exceeds its legitimate power" cannot be used to extend the writ to every case of mere error. It must amount to an abuse or usurpation of power, where the court, in exercising lawful jurisdiction, does some collateral act, which under no circumstances it could do; not where it simply mistakes a bad for a good cause of action in law. Notice that the section does not merely give the writ where the court "exceeds its legitimate powers," but tells what it means by exceeding its powers, saying that the excess must amount to "usurpation and abuse of power," as it opens by giving the writ in cases of "usurpation of power" in those instances where there is no jurisdiction at all, or where, if there is, the court exceeds its power so far that there is no color of law for it, but it amounts to "usurpation or abuse of power." It is important to note those words when construing the words "exceeds its legitimate powers." I see that as far back as Blackstone the law gave prohibition, not only where the court had no jurisdiction to entertain a case at all, but that "if, in handling matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of England," the writ lay. 3 Bl. Com. p. 112. This was the law before our act. 19 Am. & Eng. Enc. Law, p. 263. Note that the Code says, "exceeds its legitimate powers," meaning doing some act outside the court's power as set by law, which under no color of law pertinent to the lawful exercise of its just power it could do; something not colorably sheltered by its powers in the case, but beyond them, so that it is as if there were no jurisdiction at all. Now, mere misjudgment in a case is not an excess of legitimate power. The mistaken decision as to the validity of cause of action is not only not an act done in excess of legitimate power, but clearly within it; for the law commands the court or justice to say whether the cause of action is in law good or bad. High, Extr. Legal Rem. § 767, says: "It is never allowed except in cases of a usurpation or abuse of power." In other words, the remedy is employed only to restrain courts from acting in excess of their powers, and if their proceedings are within the limits of their jurisdiction, prohibition will not lie. If, therefore, the inferior court has jurisdiction of the subject-matter in controversy a mistaken exercise of that jurisdiction or of its acknowledged powers will not justify a resort to the extraordinary remedy by prohibition." In § 767a, High says: "The nature of the action" is the test. "If, therefore, the action is of such a nature as to fall within the jurisdiction of an inferior court prohibition will not lie merely because of insufficiency in the statement of the cause of action in the pleadings, or because of insufficient proof to maintain the cause of action as stated." That is just this case. The justice was bound to decide whether there was in law sufficient cause of action to give judgment; in fact he

could not possibly exercise his plain jurisdiction without deciding that matter; and to say that in so deciding he "exceeded" his "legitimate powers" is utterly untenable. He did just that which the law commanded him to do—decided the case, doing nothing outside his powers. He only erred. *Buskirk v. Cabell County Circuit Ct. Judge*, 7 W. Va. 91, upholds this doctrine, saying: "Prohibition can only be interposed in a clear case of excess of jurisdiction on the part of some inferior judicial tribunal. Where the matter is clearly within the jurisdiction of the inferior court, a mere error in the proceedings may be ground of appeal or review, but not prohibition." In *McConiha v. Guthrie*, 21 W. Va. 184, decided under this act now cited to sustain this application, the doctrine is held that there must be in the proceedings something done which "clearly exceeds its legitimate powers in some collateral matter arising in the cause over which it has no authority; but unless it has so exceeded its authority on an application for such writ the court will not inquire whether it has decided right or not." It further says: "The inferior court . . . has the right and authority to determine whether or not it has acquired jurisdiction of the particular case . . . and any error committed in that regard will not be an excess or abuse of its jurisdiction, but an error in adjudicating a matter within its legitimate authority." I do not see that the *McConiha Case*, or any of the cases

since the enactment in 1881 of the act in question, tend to stretch the writ of prohibition to what is really nothing but mere error or irregularity. Frequent are the applications to this and other courts to do so, and I have said so much on the subject for that reason, though well I know the subject has been hitherto fully discussed. In *McConiha v. Guthrie* a prohibition was allowed where there was jurisdiction, but the court was condemning land which the law prohibited, and it was adjudged an act in excess of authority, and placed on that ground. In *Wilkinson v. Hoke*, 39 W. Va. 408, the circuit court rendered a judgment where the statute prohibited, and it was held to be acting in excess of its legitimate power, which is given as the ground of decision. The defendant company seeks by prohibition to reverse a recovery so small that statute law in Code, chap. 50, § 163, and chapter 110, § 2, enacts that it shall be final and irreversible, even though wrong; but we cannot allow this. In my judgment, the decision in this case takes from the justices' courts a jurisdiction plainly given by the Constitution to entertain an action of assumpsit for money overcharged by a railroad for freight. So a circuit court would not have jurisdiction. This decision says there must be a statute to give justices power to fix railroad rates. The Constitution and statute already give the power, not to "fix" in the first instance but to decide whether those charged in a given instance are unlawful.

WISCONSIN SUPREME COURT.

W. H. STACY *et al.*, *Appts.*,

v.

Thomas LABELLE, *Reopt.*

(.....Wis.....)

An action against an Indian belonging to a tribe and a particular reservation, brought on contract in favor of a white man, is within the jurisdiction of a state court, in the absence of any Federal statute or treaty to the contrary.

(May 3, 1898.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Shawano County in favor of defendant in an action brought to recover the contract price of certain goods sold and delivered by plaintiffs to defendant who claimed that he was an Indian over whom the state court had no jurisdiction. *Reversed.*

The facts are stated in the opinion.

Mr. F. M. Guernsey, with **Mr. Eugene M. Wescott**, for appellants:

There is no statute depriving state courts of jurisdiction over Indians in civil cases.

The only statute at all referring to such jurisdiction is § 2126, U. S. Stat. 1878.

There is no provision regulating making of contracts with Indians in these statutes, ex-

cepting §§ 2103 and 2104, and these sections have been definitely decided to refer simply to contracts for services to Indians relative to their lands or claims against the United States.

Rev. Stat. p. 493, Gould & Tucker's notes and cases there cited; *Gho v. Jules*, 1 Wash. Terr. 328; *Ke-tuc-e-mun-guah v. McClure*, 123 Ind. 541, 7 L. R. A. 782; *Godfrey v. Scott*, 70 Ind. 259.

An Indian residing in the United States is not a foreign citizen or subject within § 2 of article 3 of the General Constitution, and cannot as such maintain a suit in the circuit courts of the United States.

Karrahoo v. Adams, 1 Dill. 844; *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. ed. 25.

There is no such restraint in the statutes of Congress; none in the enabling act of this state; none in the statutes of this state; and none in any treaty made by and between the government of the United States and the Menominee Indians.

State v. Doxtater, 47 Wis. 278.

Courts have power to appoint guardians over persons and property of Indian wards, members of an Indian tribe.

Farrington v. Wilson, 29 Wis. 383; *Quinney v. Stockbridge*, 33 Wis. 505.

If a statute which creates a right does not expressly indicate a remedy, one is implied, and resort may be had to the common law or the general method of obtaining relief which has displaced the common law.

Sutherland, Stat. Constr. p. 427; *Wiley v. Keokuk*, 6 Kan. 94.

NOTE.—For jurisdiction over crimes by or against Indians, see note to *State v. Campbell* (Winn.) 21 L. R. A. 189.

41 L. R. A.

Indians are referred to as persons in—

U. S. Const. art. 1, § 2; and *Elk v. Wilkins*, 112 U. S. 94, 28 L. ed. 648; *United States v. Crook*, 5 Dill. 458; *United States v. Shaw Muz*, 2 Sawy. 364; *Sutherland*, Stat. Constr. § 229.

Where, as in this case, Indians are within the boundaries of a state, the power of Congress is probably restricted to a mere regulation of intercourse.

10 Am. & Eng. Enc. Law, p. 439.

Granting that Congress has such power if it has not seen fit to make any regulation inhibiting contracts and trade with the Indians in this state, nor limiting the jurisdiction of the state courts in actions at law over them, the courts of this state have such jurisdiction.

Stokes v. Rodman, 5 R. I. 405; *Swartel v. Rogers*, 3 Kan. 877; *Wiley v. Keokuk*, 6 Kan. 94; *Wiley v. Man a-to-wah*, 6 Kan. 111; *Ketuc e-mun guah v. McClure*, 122 Ind. 541, 7 L. R. A. 782; *Godfroy v. Scott*, 70 Ind. 259; *Gho v. Jules*, 1 Wash. Terr. 326; *Elk v. Wilkins*, 112 U. S. 94, 28 L. ed. 648.

Mr. G. C. Dickinson, for respondent:

To the Congress of the United States is reserved the power to regulate commerce with the Indian tribes.

U. S. Const. art. 1, § 8, subs. 3.

Commerce with the Indian tribes means or includes commerce with the individuals composing those tribes.

United States v. Holliday, 3 Wall. 407, 18 L. ed. 182.

An examination of the treaties made between the United States government and this tribe of Indians, shows that the relation of guardian and ward was created, and has been and is now recognized by the contracting parties.

Treaty of 1817; Treaty of 1832; Treaty of 1835; Treaty of 1837; Treaty of 1849; Treaty of 1854.

The state courts have no civil jurisdiction over the Indian tribes, or the individual members thereof.

Cherokee Nation v. Georgia, 5 Pet. 1, 8 L. ed. 25; *Worcester v. Georgia*, 6 Pet. 516, 8 L. ed. 484; *United States v. Thomas*, 151 U. S. 577, 38 L. ed. 276; *United States v. Holliday*, 3 Wall. 407, 18 L. ed. 182; *United States v. Pariello*, 48 Fed. Rep. 670; *United States v. Boyd*, 68 Fed. Rep. 577; *United States v. Mullin*, 71 Fed. Rep. 682; *Morris v. Missouri P. R. Co.* 78 Tex. 17, 9 L. R. A. 349, referred to in *Eingartner v. Illinois Steel Co.* 94 Wis. 77, 34 L. R. A. 503; *Carter v. United States* (Ind. Terr. App.) 37 S. W. 228; *United States v. Payne*, 4 Dill. 387; *Mungosah v. Steinbrook*, 3 Dill. 418; *Gray v. Coffman*, 3 Dill. 593; *United States v. Mackey*, v. Coze, 18 How. 100, 15 L. ed. 299.

The policy of the executive and other political departments of the government in its relations and intercourse with the tribe should be considered and followed by the court.

United States v. Holliday, 3 Wall. 407, 18 L. ed. 182; *United States v. Boyd*, 68 Fed. Rep. 577; *Kansas Indians*, 5 Wall. 737, 18 L. ed. 667.

Their condition can only be changed by treaty stipulations or a voluntary abandonment of their tribal organization.

Kansas Indians, 5 Wall. 737, 18 L. ed. 667.

Suppose judgment is entered in this action against the defendant, and execution is issued

thereon. The officer entering upon the reservation, armed with the execution, will not be protected by that process.

A removal of horses, cattle, or other stock might subject him to a criminal prosecution under the United States laws.

U. S. Rev. Stat. 1878, § 2138.

If it be true that the property in the possession of the Indian upon the reservation cannot be seized under process issued by the state courts, then it cannot be interfered with while off the reservation.

State v. Campbell, 53 Minn. 354, 21 L. R. A. 169; *United States v. Holliday*, 3 Wall. 407, 18 L. ed. 182; *Kansas Indians*, 5 Wall. 737, 18 L. ed. 667.

A garnishee proceeding has been commenced in aid of this action. A citizen of the state residing off the reservation has been garnisheed. If judgment is entered against the garnishee can it be pleaded in bar to an action brought by the United States against the garnishee to recover judgment for the amount of money claimed to be due and owing the defendant from the garnishee?

United States v. Winans, 78 Fed. Rep. 72; *United States v. Boyd*, 68 Fed. Rep. 577; *United States v. Mullin*, 71 Fed. Rep. 682.

The Indian is not an alien.

Karraho v. Adams, 1 Dill. 344; *Paul v. Chilsoquit*, 70 Fed. Rep. 401.

The United States courts have no jurisdiction over the Indians. They can neither sue nor be sued therein.

Elk v. Wilkins, 112 U. S. 96, 28 L. ed. 644.

Cassoday, Ch. J., delivered the opinion of the court:

This action is to recover the balance of \$279.65 due on account for goods, wares, and merchandise sold and delivered by the plaintiffs as copartners, to the defendant, between July 1, 1888, and October 17, 1889. The defendant answered, and alleged, in effect, that he bought the goods, wares, and merchandise as partner with another, and that he was an Indian belonging to the Menominee tribe; that he resided with the tribe upon the reservation; and that the same was under the charge, direction, and control of the United States Indian agent,—and prayed that the action be abated and dismissed. The cause was thereupon referred to a referee to hear, try, and determine; and, upon the cause being tried before the referee, he found, as matters of fact, in effect, that there was due to the plaintiffs from the defendant the amount claimed, with interest from October 17, 1889; that the defendant was an Indian, and belonged to the tribe, and resided upon the reservation; that there was nothing in any treaty with the tribe, nor any act of Congress, to prevent the state courts from taking jurisdiction; and hence that the plaintiffs were entitled to judgment. The trial court modified the findings of the referee, but not essentially as to any question of fact, but found more in detail as to the status of the defendant as an Indian, and to the effect that the tribe held the reservation by treaty for their exclusive use and occupancy; that the same was under the charge, direction, and control of an Indian agent of the United States; that the goods and merchandise men-

tioned were furnished, sold, and delivered to the defendant by the plaintiffs on the reservation while Stacy was engaged in business as Indian trader on the reservation under and by virtue of the permit and license issued by the United States to him as such Indian trader; that the defendant was a Menominee Indian, and a member of the tribe, born upon the Menominee reservation, and enrolled as such; that his mother lived upon the reservation, and was a member of the tribe; that his father was a white Frenchman, and not a member of the tribe. As conclusions of law, the court found, in effect, that the treaties and acts of Congress precluded the state courts from taking jurisdiction in a case like this, and that the trial court had no jurisdiction over the defendant in this action, and ordered judgment against the plaintiff, dismissing this action, but without costs. From the judgment entered thereon, accordingly, the plaintiff brings this appeal.

Undoubtedly Congress has power "to regulate commerce with the Indian tribes" U. S. Const. art. 1, § 8. Under this clause of the Constitution it must be conceded that Congress has power to regulate all traffic and commercial intercourse among or with Indians, even when the tribe is located wholly within the limits of a single state. *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *United States v. Holliday*, 8 Wall. 407, 18 L. ed. 182; *United States v. Mayrand*, 154 U. S. 532, and 18 L. ed. 699. In making such regulations Congress may, undoubtedly, give to the Federal courts exclusive jurisdiction. State courts may be precluded from taking jurisdiction in such cases, not only by congressional enactments, but by treaty between the particular tribe and the Federal government; since such treaty, when made, under the Constitution becomes a part of "the supreme law of the land." U. S. Const. art. 6; *Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483; *United States v. Forty-three Gallons of Whiskey*, 98 U. S. 188, 23 L. ed. 846; *Ex parte Crow Dog*, 109 U. S. 556, 27 L. ed. 1080; *Farrington v. Wilson*, 29 Wis. 383. But it does not follow from such mere grant of such powers to the Federal government that the state courts are precluded from taking jurisdiction in such cases, as seems to have been held by the trial court. On the contrary, the Supreme Court of the United States has frequently held, as was declared in the *Federalist* before the adoption of the Constitution, in effect, that the powers delegated to the Federal government were exclusive of the powers reserved to the states in only three classes of cases. One class is where the particular power granted is therein expressly stated to be exclusive; another class is where the power is granted in one clause, and then in some other clause or clauses, the states are expressly prohibited from exercising the like authority; and the other class is where the power granted is, inherently and absolutely, repugnant to the exercise of a like power by the states,—as, for instance, powers which cannot be fully exercised within the limits of a single state, like the power "to regulate commerce with foreign nations and among the several states." No. 31 *Dawson's* (No. 32) *Federalist*; *Cooley v. Philadelphia Port Wardens*, 12 How.

318, 18 L. ed. 1004; *Gilman v. Philadelphia*, 8 Wall. 718, 18 L. ed. 96; *Henderson v. New York*, 93 U. S. 259, 23 L. ed. 548; *Mobile County v. Kimball*, 103 U. S. 691, 26 L. ed. 288; *Leisy v. Hardin*, 135 U. S. 100, 108, 109, 34 L. ed. 128, 132, 8 Inters. Com. Rep. 36. Manifestly, the case at bar does not belong to either of those classes. In this last case the distinction is clearly made by Chief Justice Fuller. Acting upon the principles suggested, Congress has expressly provided that "the jurisdiction vested in the courts of the United States," in the eight particular classes of cases therein mentioned, should "be exclusive of the courts of the several states." One of the classes of cases so mentioned is, "Of all crimes and offenses cognizable under the authority of the United States;" and another is, "Of all suits for penalties and forfeitures incurred under the laws of the United States." U. S. Rev. Stat. § 711. With certain exceptions, those statutes provide that "the general laws of the United States, as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country." *Id.* § 2145. But that "section shall not be construed to extend to [crimes committed by one Indian against a person or property of another Indian,—nor to] any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." *Id.* § 2146. The exclusive jurisdiction of the Federal courts was further extended to certain other crimes committed by Indians by the act of March 3, 1885 (23 Stat. 385, chap. 341, § 9). For a construction of these statutes, see *Re Wilson*, 140 U. S. 575, 35 L. ed. 518; *Re Mayfield*, 141 U. S. 107, 35 L. ed. 635; *Famous Smith v. United States*, 151 U. S. 50, 38 L. ed. 67; *Westmoreland v. United States*, 155 U. S. 545, 39 L. ed. 255. In speaking of the statute as it stood before the act of 1885, Mr. Justice Miller said: "It does not interfere with the process of the state courts within the reservation, nor with the operation of state laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation." *United States v. Kagama*, 118 U. S. 883, 30 L. ed. 280. It has frequently been held that, except in so far as the jurisdiction of state courts has been restricted by Federal legislation or treaty, they may take jurisdiction even of crimes committed by Indians. *State v. Doxtater*, 47 Wis. 278; *State v. Harris*, 47 Wis. 298; *People v. Ketchum*, 78 Cal. 685. Counsel has not cited any Federal statute nor treaty which prohibits state courts from taking jurisdiction of an action on contract against an Indian, as in the case at bar, and we find none. The plaintiff Stacy was not an Indian agent, but he was licensed and expressly authorized to sell goods to Indians as an Indian trader. U. S. Rev. Stat. §§ 2128–2132. The goods for which this action was brought were therefore properly sold to the defendant. In the absence of any Federal statute or treaty to the contrary, and upon the principles stated,

we must hold that a state court may take jurisdiction of an action on contract in favor of a white man, and against an Indian belonging to a tribe and a particular reservation. *Stokes v. Roimon*, 5 R. I. 405; *Swarzell v. Rogers*, 3 Kan. 374; *Ingraham v. Ward*, 56 Kan. 550; *Godfrey v. Scott*, 70 Ind. 259; *Ke-tuc-e-mun-guah v. McClure*, 122 Ind. 541, 7 L. R. A. 782; *Gho v. Jules*, 1 Wash. Terr. 326. In one of these

cases it was held that "the fact that the lands of the defendant, who is an Indian, are not liable to levy and sale under a judgment, is no ground for refusing a judgment against him."

The judgment of the Circuit Court is reversed, and the cause is remanded, with directions to enter judgment in favor of the plaintiffs, and against the defendant, in accordance with the findings of the referee.

OHIO SUPREME COURT.

CINCINNATI, HAMILTON, & DAYTON
RAILROAD COMPANY, *Plff. in Err.*,

v.

Village of BOWLING GREEN.

(57 Ohio St. 386.)

- * 1. Where a railroad company is operating a railroad, the track of which extends within the limits of any incorporated city or village in this state, such city or village is authorized by § 2494, Rev. Stat., to require such railroad company to light that part of its track which lies within the corporate limits, although the company so operating such railroad is neither the owner nor the lessee thereof.
2. The city or village has authority in such case to prescribe the kind of light that shall be employed for that purpose.
3. Where, in such case, an electric-light plant is in operation within such city or village, lighting its streets and furnishing light to its inhabitants, an ordinance is not unreasonable because it requires a railroad company to use in lighting its track the particular kind of lamp and illuminating material in use for lighting the streets of such city or village.
4. An ordinance prescribing that "the number of hours that said electric lights shall be required to be lighted during each period of twenty-four hours shall be the same as the said council does now, or may hereafter, require for electric lamps within the limits of said village for lighting streets, shall be lighted," is sufficiently definite to advise the railroad company of what it is required to do.
5. An electric-light company, owning an electric plant, and engaged in furnishing light to the inhabitants of a city or village, and in lighting the streets thereof, has so far devoted its property to a public use that it is bound to furnish light within such city or village impartially to all applicants, at a reasonable price.

(November 17, 1897.)

ERROR to the Circuit Court for Wood County to review a judgment affirming a judgment of the Court of Common Pleas in

* Headnotes by BRADBURY, J.

NOTE.—Compelling railroad to light track in city.

A city has no power, independently of statutory provision, to pass an ordinance requiring railroad companies to light their tracks within the city limits. *Shelbyville v. Cleveland, C. C. & St. L. R. Co.* 146 Ind. 66.

But the legislature, in the exercise of the police power, may constitutionally require railroad companies to light such portions of their railroads as 41 L. R. A.

favor of plaintiff in an action brought to compel defendant to reimburse to plaintiff the amount which it had paid for electric lights which it was defendant's duty to furnish. *Affirmed.*

Statement by **Bradbury, J.:**

This action was brought in the court of common pleas of Wood county by the village of Bowling Green to recover of the railroad company, plaintiff in error, a sum of money to reimburse the village for expenditures incurred by it in maintaining electric lights at certain places that by ordinance it had required the railroad company to maintain, and which the latter had neglected to do. The village prevailed in the court of common pleas, and the judgment there rendered in its favor was affirmed by the circuit court. To reverse the judgments thus rendered is the object of the proceedings in this court.

Messrs. Swayne, Hayes, & Tyler, for plaintiff in error:

The legislature cannot vest in the municipal corporations of this state the power to require railroad companies to light any portion of their tracks by the use and maintenance of a particular kind of a light.

The ordinance is void because it limits and unreasonably interferes with the right of the plaintiff in error to contract.

Wheeling Bridge & Terminal R. Co. v. Gilmore, 8 Ohio C. C. 658.

It is void because unreasonable in its requirements, in that electric lights are not necessary to accomplish the purpose designated by the statute.

1 Beach, Mun. Corp. § 90; *State, Atty. Gen., v. Cincinnati Gaslight & C. Co.* 18 Ohio St. 262.

Mr. R. B. Moore, for defendant in error: An ordinance cannot be held to be unreasonable, which is expressly authorized by the legislature. The power of a court to declare an ordinance unreasonable and therefore void is practically restricted to cases in which the ordinance was passed under the supposed incidental power of the corporation merely.

are within the limits of a city or incorporated village. *Cincinnati, H. & D. R. Co. v. Sullivan*, 22 Ohio St. 154.

And, under the police power, the legislature may authorize cities to require railroad companies to light their crossings throughout the corporate limits. *Shelbyville v. Cleveland, C. C. & St. L. R. Co.* 146 Ind. 66.

A law designed for such a purpose is of the same nature as laws requiring railroad companies

A Coal-Float v. Jeffersonville, 112 Ind. 19; 1 Beach, Pub. Corp. § 513.

The franchise of erecting poles and wires in the streets and ways of a city or village and furnishing electric lights to the inhabitants thereof, being in the nature of a public use, or natural monopoly, carries with it the duty to supply all with light impartially and at reasonable rates.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; 2 Beach, Priv. Corp. §§ 830, 831, 834-836; *Spring Valley Water Works v. Schottler*, 110 U. S. 847, 28 L. ed. 173; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979; *St. Louis v. Bell Teleph. Co.* 96 Mo. 623, 2 L. R. A. 278; *State, Webster, v. Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 404; *Central U. Teleph. Co. v. Bradbury*, 106 Ind. 1.

Bradbury, J., delivered the opinion of the court:

The plaintiff in error, a railroad corporation, was operating a line of railway within this state, part of which lay within the incorporated village of Bowling Green, defendant in error. The village, deeming it necessary that a part of the railway track lying within its limits should be lighted, and there being then an electric-light plant in operation in said village, on December 21, 1891, passed the following ordinance:

"Ordinance.

"An ordinance to provide for the lighting of the track of the Cincinnati, Hamilton, & Dayton Railroad Company (operating the Bowling Green Railroad Company), within the corporate limits of the incorporated village of Bowling Green, Ohio.

"Sec. 1. Be it ordained by the council of the incorporated village of Bowling Green, Ohio, that the Cincinnati, Hamilton, & Dayton Railroad Company, possessing and operating a line of railway within the corporate limits of said village, be, and it hereby is required,—the same being deemed necessary by said council,—to light a portion of its said railway within the corporate limits of said village, with electric lights, by causing one electric lamp with the necessary attachments, similar in all respects to the electric lamps and attachments now used in lighting the streets of said village of Bowling Green, Ohio, by erecting over said railway tracks within the limits of said village at each of the following places, to wit: At the intersection of said track with the Ridge road, Adams street, Ordway avenue, Pearl street, West Wooster street, Wallace avenue, Morton avenue, and the Brown road, and by lighting said lamps with electric lights as hereinafter provided.

to fence their tracks, to build cattle guards, to whistle at road crossings, to stop at railroad crossings, to keep flagmen at street crossings, to provide spark arresters for engines, to regulate rate of speed through towns and cities, to keep headlights of certain reflecting power upon engines, to place bell and whistle upon engines, to provide bridges between cars, to provide certain kind of lighting apparatus for cars, and to keep on hand certain means of escape in case of collision, fire, etc. *Cincinnati, H. & D. R. Co. v. Sullivan*, 38 Ohio St. 154.

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"Sec. 2. The number of hours that said electric lights shall be required to be lighted during each period of twenty-four hours shall be the same as the said council does now, or may hereafter, require for electric lamps within the limits of said village for lighting streets, to be lighted.

"Sec. 3. The work of lighting said parts of said railway shall be begun within twenty days after the date on which said company shall be notified of the passage of this ordinance, and the clerk of said village is hereby directed to cause notice to be given said railway company of the passage of this ordinance according to law, and in case said company shall fail to comply with the requirements of the same for a period of twenty days from the delivery of said notice, then said village of Bowling Green, Ohio, shall cause said lamps to be erected and said lighting to be done at the expense of said railway company, and the said railway company shall pay to the said village, the full costs thereof, which shall be a lien upon all the real estate and leasehold interests of said the Cincinnati, Hamilton, & Dayton Railroad Company, situate or being within Wood county, Ohio."

On January 9, 1892, notice of the adoption of the ordinance was duly given to the railroad company. The twenty days prescribed by the ordinance having elapsed, and the railroad company neglecting to comply with the provisions thereof, the village, about the 1st of March, 1892, caused an electric lamp, of the kind prescribed, to be placed at each of the five points specified by the ordinance, and thereafter, until the 1st of the ensuing September, maintained lights therein. The railroad company failing to pay the expense incurred in this behalf, the village passed the following ordinance:

"An ordinance to assess the cost of lighting the Cincinnati, Hamilton, & Dayton Railway, upon the property thereof.

"Sec. 1. Be it ordained by the council of the incorporated village of Bowling Green, Ohio, that the following cost and expense of lighting the Cincinnati, Hamilton, & Dayton Railway, and incurred under the ordinance for that purpose, heretofore passed by this council, to wit: Five arc lights for the months of March, April, May, June, 1892, \$132.05, be, and the same is hereby, levied and assessed upon all the real property and leasehold interests of the Cincinnati, Hamilton, & Dayton Railway Company, situated in the county of Wood, in the state of Ohio; and if the same be not paid within ten days from the date hereof, the city solicitor is hereby directed to cause the same to be collected by an action brought for that purpose in a court of competent jurisdiction.

Thus, Ohio Rev. Stat. § 2494, authorizing a village to require a railroad company whose tracks run through it to light its tracks, constitutes a reasonable exercise of police power, and is not unconstitutional as imposing a heavy burden without due process of law, and as failing to provide for notice and hearing with relation to questions of fact under the Federal Constitution. *Cleveland, C. C. & St. L. R. Co. v. St. Bernard*, 15 Ohio C. C. 388.

And a municipal corporation may require a railroad company operating its road within its limits to light its tracks at street intersections, and on

"Sec. 2. This ordinance shall take effect and be in force from and after its passage and legal publication."

The railroad company failing for more than ten days to pay the sum thus demanded, this action was begun in the court of common pleas to enforce its payment. A number of defenses were interposed by the railway company, upon which the cause went to trial. No substantial dispute was had, however, over any fact which we deem necessary to establish a right of recovery in the village. The evidence disclosed that the plaintiff in error, at the time the ordinance was passed, and ever since, operated a line of railroad that extended into the village; that the ordinance prescribing the lights was duly passed, and notice thereof duly given to the plaintiff in error; that it did not maintain the prescribed lights; that the same were, during the period for which recovery was sought, maintained by the village; that the village had not been reimbursed for the money expended in that behalf; and that the city so-

licitor had been authorized to sue for its recovery. The right of the village to a recovery rested upon the facts just recited, and was established whenever those facts were established, provided the village had authority to require the railroad company to maintain the lights in question. The real defense was a denial of this authority.

The provisions of the statute upon which the village depends for its authority in the matter reads as follows:

"Sec. 2494. When it is deemed necessary by the council of any city or village to have any bridge or railway, located in whole or in part, in such corporation, owned, possessed, or operated by any individual, company, association, or corporation, or any portion of the same, lighted, the council shall pass an ordinance for that purpose, requiring the individual, company, association, or corporation owning, possessing, or operating the same, to light such bridge or railway within a specified time.

proper notice procure the lighting to be done, in case of failure on the part of the railroad to do so, at the expense of such company. Cincinnati, H. & D. R. Co. v. Bowling Green, 9 Ohio C. C. 524.

So, the Indiana act of 1893, p. 302 (Burns's Rev. Stat. 1894, § 5173), authorizing cities to require all railroad companies to maintain lights at crossings on its tracks within their limits similar to those maintained by such city, authorizes an ordinance providing for electric lights where the city maintains electric lights. Shelbyville v. Cleveland, C. C. & St. L. R. Co. 148 Ind. 66.

And in Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611, involving the validity of an ordinance of a city requiring a railroad company to keep a flagman by day and a red lantern by night at a point where its track crosses a street, it was held that the general assembly, when the public exigency requires it, has power to regulate corporations in their franchises so as to provide for the public safety, and the exercise of such right in no manner interferes with or impairs the power conferred by their acts of incorporation, but that such regulations must be what they purport to be, police regulations, and must be reasonable.

The fact that electric lighting was undiscovered at the time a law was enacted authorizing municipal corporations to require railroads to light their tracks within their limits does not affect the right of the municipal corporation to require such lighting to be done by electricity. Bowling Green v. Cincinnati, H. & D. R. Co. 10 Ohio C. C. 64.

And the court, in an action by a village against a railroad company for the recovery of amounts paid for lighting the railroad track within the limits of the corporation as required by an ordinance enacted under a statute authorizing municipal corporations to require railroad companies to light their tracks within their limits, will take judicial notice of the fact that the legislature intended that the village might require electric lighting, though at the time that the act was passed electric lighting was undiscovered. Bowling Green v. Cincinnati, H. & D. R. Co. 10 Ohio C. C. 64.

All questions as to the expedience, necessity, or justice of the enactment of a police regulation subjecting railroad companies to the burden of lighting their roads within the limits of cities and villages through which they pass, must be determined by legislative, and not by judicial, discretion. Cincinnati, H. & D. R. Co. v. Sullivan, 22 Ohio St. 154.

But it is the duty of the courts to pass upon the reasonableness of the acts of a municipal corporation requiring railroads passing through it to be

lighted. Cleveland, C. C. & St. L. R. Co. v. St. Bernard, 15 Ohio C. C. 538.

And the question whether an ordinance of a city requiring a railroad company to keep a flagman by day and a red lantern by night at the point where its track crosses a street is a reasonable regulation, which may be the subject of police powers, is a judicial one, though the law-making power is the sole judge, when the necessity exists for such regulation, and when, if at all, it will exercise the right to enact such laws. Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611.

A general power granted by the legislature to a municipality to require railroad companies operating within their limits to light their tracks at crossings, the manner of lighting being left to the discretion of the municipality, must be exercised by the municipality in a reasonable manner. Shelbyville v. Cleveland, C. C. & St. L. R. Co. 148 Ind. 66.

And the power of municipal corporations to require railroad companies to light their tracks, though including the right to prescribe the kind of light to be used, does not authorize the casting of an unreasonable burden upon a railroad company because of the character of the lights or their location. Cleveland, C. C. & St. L. R. Co. v. St. Bernard, 15 Ohio C. C. 538.

Nor does a power to require lights at railroad crossings for the security and safety of citizens imply that cities may require thereunder, arbitrarily and without control or restraint, lights either in volume or at times entirely unnecessary to that end. Cleveland, C. C. & St. L. R. Co. v. Connersville, 147 Ind. 277, 37 L. R. A. 175.

And while a municipality has the right to fix the place and kind of lights to be erected by a railroad company under Ohio Rev. Stat. § 2494, authorizing it to require the company to light its tracks, in so doing it must exercise it with reference to the safety and protection of the public in crossing such railroad, and so as not to interfere with the just rights of the railroad company in managing its trains and locomotives in passing through such corporation. Cleveland, C. C. & St. L. R. Co. v. St. Bernard, 15 Ohio C. C. 538.

And while a measure of discretion is allowed in the common council of a municipality under an act authorizing it to require a railroad company to light crossings within its limits for the security and safety of citizens as to the streets requiring lights and the volume of light necessary, the exercise of that discretion does not admit of requirements which are far beyond any reasonable necessity.

"Sec. 2495. The ordinance shall specify the manner in which such bridge or railway shall be lighted, the number and style of lamp posts, lights, and fixtures, and the time such lights shall be kept burning in each twenty-four hours."

The railroad company contested the legality of the steps taken by the village upon a number of distinct grounds. One of these grounds was that it did not own the railway which it was required to light. In this connection it appeared that the railroad company, plaintiff in error, owned a line of railway extending from Cincinnati to Dayton, in this state, and had leased the Dayton & Michigan Railroad, with which it connected Dayton, and which extended northward from Dayton to Toledo, passing about 5 miles westward of the village of Bowling Green, and that a short line of railway had been built, which extended from a point on the latter railroad into the village of Bowling Green, defendant in error. The track which it was required to light was part of this

short line of railroad. Of this short line it averred it was neither owner nor lessee, and for that reason denied the power of the village to charge it with the expense of maintaining the lights in question. This defense would be complete if the statute (§ 2494, *supra*), authorized municipalities to charge this burden upon such railroad company only as owned or had leased the railroad to be lighted. However, the authority conferred by the statute is not thus limited, but extends to any company that may be operating the railroad. According to the terms of the statute (§ 2494), the village had no concern respecting the title of anyone in or to the railroad in question. It had power to charge whatever company it found operating the railroad without inquiry as to the character of its title, and this is what it did in the present instance. The ordinance states, and the petition alleged, that the plaintiff in error was managing and operating the railroad in question, and this statement and allegation is nowhere disputed in the record. We hold,

Cleveland, C. C. & St. L. R. Co. v. Connersville, 147 Ind. 277, 37 L. R. A. 175.

And an ordinance enacted by a municipal council under a statute authorizing it to require railroad companies operating within its limits to light its track at crossings or highways, requiring that they should be lighted by electric lights of the arc pattern, the kind of light being limited only to such as should be maintained by the municipality, is invalid as confining the company to a particular kind of electric light, and as interfering with the company's freedom of contract in providing such electric lights as it might prefer. *Shelbyville v. Cleveland, C. C. & St. L. R. Co.* 146 Ind. 66.

So, a statute authorizing municipalities to require railroad companies to light their crossings throughout the corporate limits for the purpose of protecting citizens from passing trains, does not authorize an ordinance requiring every railroad to maintain light wherever a track of such railroad company crosses a street in the municipality, without reference to whether the security or safety of citizens requires it or not. *Shelbyville v. Cleveland, C. C. & St. L. R. Co.* 146 Ind. 66.

And an ordinance of a city requiring a railroad company to keep a flagman by day and a red lantern by night at a point where its track crosses a street is not a reasonable regulation which can be upheld under police power, where the crossing is an ordinary one, and there is but a single track on which only the usual trains pass at intervals some distance apart, and it does not appear that the crossing is unusually dangerous. *Toledo, W. & W. R. Co. v. Jacksonsville*, 87 Ill. 37, 16 Am. Rep. 611.

And a city cannot, under the power granted by Ind. act 1896, p. 302, authorizing it to require lights at railroad crossings for the security and safety of citizens, require a railroad company whose only schedule train at night passes through the city at 8 o'clock, to light each street crossed by its road at the crossing from dark to dawn with an arc lamp of 2,000 candle power. *Cleveland, C. C. & St. L. R. Co. v. Connersville*, 147 Ind. 277, 37 L. R. A. 175.

And a railroad company is not liable for the expense of lighting its tracks under a municipal requirement that the tracks be lighted with lights of a certain candle power, where such power is so great as to obscure the headlight upon locomotives and render it impossible for railroad employees to manage the trains so as to protect the lives of the passengers intrusted to their care, and to endanger persons crossing the railroad because they are unable to see the headlights of approaching trains.

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Cleveland, C. C. & St. L. R. Co. v. St. Bernard, 15 Ohio C. C. 588.

In *Cleveland, C. C. & St. L. R. Co. v. St. Bernard*, 15 Ohio C. C. 588, the principal case was distinguished upon the ground that in that case the question as to the power of the light used did not seem to have been raised, and the case seems to turn upon the kind of light, whether electricity, gas, or otherwise, which might be used in the village.

So, an ordinance requiring railroad companies to light their tracks within the limits of a municipality on the same schedule plan adopted and used by the municipality, enacted under a statute authorizing cities to require railroad companies to keep and maintain lights on all nights that the common council may direct, is objectionable in not providing when lamps shall be lighted and how long they shall continue to burn. *Shelbyville v. Cleveland, C. C. & St. L. R. Co.* 146 Ind. 66.

In that case *Cincinnati, H. & D. R. Co. v. Sullivan*, 32 Ohio St. 152, was distinguished upon the ground that in the latter case the ordinance was strictly followed, and in no way transcended the powers conferred by statute.

An ordinance passed by a municipal council under Ohio Rev. Stat. § 2494, requiring a railroad company to light its bridges or crossings within the municipal limits must specify the time within which such lighting must be done. *Lake Erie & W. R. Co. v. St. Mary's*, 14 Ohio C. C. 202.

And the omission in an ordinance passed by a municipal council under that statute to specify the time within which the same shall be done, cannot be supplied by a notice from the municipal clerk provided for by § 2496 thereof. *Lake Erie & W. R. Co. v. St. Mary's*, 14 Ohio C. C. 202.

The Ohio statute authorizing municipal corporations to require railroads passing through their limits to light their roads, however, does not require the municipality itself to furnish the light in case of failure to do so on the part of the company; it may employ others to do the lighting. *Cincinnati, H. & D. R. Co. v. Bowling Green*, 9 Ohio C. C. 524.

A municipal corporation has the legal right, under the Ohio statute, to require the lighting of a railroad track at a street crossed by the railroad company, and if the company neglects to perform the requirement, it may erect the necessary lamps and furnish the light at the expense of the railroad company, and collect it by suit if necessary. *Bowling Green v. Cincinnati, H. & D. R. Co.* 10 Ohio C. C. 64.

therefore, that by the statute (§ 2494) the village, finding the plaintiff in error managing and operating a railroad within its limits, was authorized to charge it with the duty of maintaining these lights, though it neither owned nor had leased the railroad the track of which was to be lighted. This section of the statute (§ 2494) was before this court in the case of *Cincinnati, H. & D. R. Co. v. Sullivan*, 32 Ohio St. 152, and was held to constitute a reasonable exercise of police power, and therefore constitutional. The ordinance in question specifies the points at which lights are to be maintained, and prescribes the kind of light, and the lamps and attachments to be employed. Electricity must be used, and the lamps and attachments must be in all respects similar to those used in lighting the streets of the village.

Plaintiff in error contends that these provisions are unreasonable, in that they deprive it of the power of determining the kind of light to be used and of contracting on its own behalf; that the system of lamps and attachments which the ordinance prescribes are the subject of patents, and that the exclusive right to use them within the village has been granted to the Bowling Green Electric Light & Power Company; and that, therefore, the plaintiff in error was put wholly within the power of such company by the ordinance, and will be compelled to pay whatever price the company chooses to establish or charge for the lights required.

As respects the objection to the ordinance on account of its specifying the kind of light to be used, the statute (Rev. Stat. § 2495), among other provisions, requires the ordinance to "specify the manner in which such . . . railway shall be lighted. . . . This language seems broad enough to authorize the municipality to prescribe the kind of light to be employed for that purpose,—whether electricity, gas, or any other material or means that may be reasonably adapted to the purpose. The power of selecting the kind of light to be used can be exercised, of course, only where more than one kind is available. This power must reside somewhere, either in the railroad company or the municipality. The power to require the lighting of a railroad track is a branch of the police power of the state. If the terms of this section (§ 2495) of

the Revised Statutes, granting the power to municipal bodies, should not be broad enough to expressly authorize them to prescribe the kind of light to be employed, yet, as the power to compel a railroad company to light its track at all implies authority to require it to be efficiently done, it would seem to necessarily follow that, within reasonable limits, the power to prescribe the kind of lights rests with the municipal authorities. They, of course, in this respect, could not cast an unreasonable burden on the railroad company.

Doubtless, an ordinance would cast upon a railroad company an unreasonable burden, and for that reason would be void, if it prescribed an electric light, when the municipality contained no electric plant or other convenient means of generating electricity; otherwise each municipality, large or small, through which a railroad might pass, could compel those who operated the road to erect a plant to generate the light thus required. There was, however, in the village of Bowling Green, at the time the ordinance under consideration was passed, an electric light and power company, operating an electric plant, and therefore the means was at hand that would enable the railroad company to comply with the requirements of the ordinance in this respect, and therefore such requirement was not in itself unreasonable.

Did the ordinance unreasonably limit the right of the railroad company to contract on its own behalf, or unreasonably place it within the power and subject it to extortion at the hands of the electric light and power company, of which it must procure the lights? True, the railroad was required to adopt electricity as the means of illumination, and was confined to the kind of lamps and their attachments then in use in said village. If the exclusive right to use within the village these lamps and attachments had been granted by the patentees to the Bowling Green Electric Light & Power Company, and this company had an absolute power to fix the price that it could exact for the use of its light and lamps, then the contention of the railroad company would find strong support in reason and justice. It may be conceded, however, that the lamps and their attachments, as well as the system of lighting, in use in the village of Bowling Green, were all protected by patents,

And legislation authorizing villages or cities to require railroad companies to light their tracks within their corporate limits, and in case of failure or refusal by such railroads to do so, to themselves light such tracks within their limits at the expense of the owners of such railroads, and by ordinance to declare such expense to be a lien upon any and all of the real estate of the delinquent companies within their limits, is valid, and not in conflict with constitutional provisions. *Cincinnati, H. & D. R. Co. v. Sullivan*, 32 Ohio St. 154.

And a provision that the expense of lighting a railroad track by a municipality within its limits, which the railroad company had refused to light, shall be a personal liability which may be recovered by suit in the name of the corporation, and that the lien therefor upon real estate may be enforced in any court having general jurisdiction in the name of the corporation, provides for due process of law. *Cincinnati, H. & D. R. Co. v. Sullivan*, 32 Ohio St. 154.

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A statutory liability of a railroad company arising from failure to comply with a police regulation that it light its tracks within the limits of a municipality, or in default thereof that the municipality shall light them at its expense, however, cannot be enforced as a tax upon the company under the taxing power. *Cincinnati, H. & D. R. Co. v. Sullivan*, 32 Ohio St. 154.

But a statutory provision that city councils may direct the manner in which the expense of lighting a railroad track which the railroad company had refused to light shall be assessed, and that when assessed the amount shall be a lien on the real estate of the railroad company, is intended to give a village council power to declare such expense a lien, etc., and the use of the word "asses" is not to be taken as an attempt to convert such expense into an actual tax or legal assessment or charge imposed in the exercise of the power of taxation. *Cincinnati, H. & D. R. Co. v. Sullivan*, 32 Ohio St. 154.

and that the Bowling Green Electric Light & Power Company had the exclusive right to their use within that village, and yet the power of extortion would not follow necessarily. The light and power company have acquired in the village rights that are in the nature of a monopoly. The use to which it has devoted its property is one in which the public have an interest, and it requires the use of the streets and alleys of the village to conduct and distribute electricity to its lamps for illuminating purposes; and, in addition to this, power to appropriate private property has been conferred on it. Rev. Stat. § 8471a. Both reason and authority deny to a corporation clothed with such rights and powers, and bearing such relation to the public, the power to arbitrarily fix the price at which it will furnish light to those who desire to use it. 2 Beach, Priv. Corp. § 884-836; *Zanesville v. Zanesville Gas-light Co.* 47 Ohio St. 1; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Spring Valley Water Works v. Schottler*, 110 U. S. 847, 28 L. ed. 173; *Gibbs v. Consolidated Gas Co.* 130 U. S. 408, 32 L. ed. 984; *St. Louis v. Bell Teleph. Co.* 96 Mo. 623, 3 L. R. A. 278; *State, Webster, v. Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 404; *Central U. Teleph. Co. v. Bradbury*, 106 Ind. 1.

The Bowling Green Electric Light & Power Company was bound to serve all of its patrons alike; it could impose on the plaintiff in error no greater charge than it exacted of others who had used its lights. The village had authority to fix the rates to be charged by the company for lights. Rev. Stat. § 2478. If the village authorities should fail to act in this respect, and the plaintiff in error and the light and power company could not agree upon a price, the latter, by an appeal to the courts of the state, could compel the former to furnish the lights at a reasonable price. Therefore the provision of the ordinance requiring the plaintiff in error to use the lamps and attachments then in use in the village was not unreasonable. Notwithstanding that the sole right to use the lamps and attachments pre-

scribed may have been vested in the Bowling Green Electric Light & Power Company, yet, as that company was bound to furnish light to all its patrons on terms that must be both reasonable and impartial, the ordinance requiring the use of such lamps and attachments should in that respect be deemed reasonable. The right to make contracts on its own behalf is doubtless a valuable one to the plaintiff in error, and, if there had been two or more electric-light plants in the village, an attempt to dictate to plaintiff in error which of them it should choose might have presented an interesting question. There was but one, however, and the only choice open to plaintiff in error was between building a new plant or taking light of the company then established in the village. If that company had an exclusive right to use the lamps and attachments prescribed, then no choice was open to the plaintiff in error, and it would be compelled to procure the lights of that company. This, however, from a practical point of view, was of little or no concern, because, while the circumstances surrounding the plaintiff in error compelled it to take the lights of this particular company, yet the latter was also compelled to furnish them at a reasonable price. The state, under these circumstances, must yield its police power,—a power existing for the benefit of all its citizens,—or the right of a railroad company to an unlimited power of contracting must give way. This is not the only instance in which its powers in this respect are curtailed for the public good. This is notably the case in respect of its power to contract concerning the transportation of freight and passengers. The ordinance in question requires that the lights to be furnished by the plaintiff in error shall be kept lighted during the same hours that the street lamps of the village may be kept lighted. This, we think, is sufficiently definite to clearly inform the plaintiff in error of what was required of it in this respect. The ordinance, we think, imposes no unreasonable burdens on the plaintiff in error.

Judgment affirmed.

And while an averment in an action by a village against a railroad company to recover amounts claimed by the village on account of lighting the track of a railroad company at the crossing of certain streets that the company was required to light, and to erect certain electric lights by causing one electric light to be placed at each of certain crossings similar in all respects to those used by the village in lighting its streets, is open to the criticism that it is not a certain averment of any particular style of lamp, and would probably sustain a motion to make the complaint more definite and certain, it is sufficient on demurrer. *Bowling Green v. Cincinnati, H. & D. R. Co.* 10 Ohio C. C. 64.

And a judgment in an action brought by a village against a railroad company for amounts assessed upon the company for lighting its tracks under an ordinance requiring the company to do so or in default thereof authorizing the municipality to light

them at its expense, will be reversed, and the case remanded with an opportunity to amend where it is not averred in the petition, and there is no evidence in the record to show what, if any, was the expense to the municipality of placing and manufacturing the lights. *Lake Erie & W. R. Co. v. St. Mary's*, 14 Ohio C. C. 203.

An ordinance requiring all railroad companies to provide for the safety of citizens and others by maintaining electric lights at designated points imposing a penalty for every train run over such crossing where a light is not maintained, covers the whole subject, and effects the repeal of an ordinance previously existing requiring railroad companies to maintain an electric light of a specified power at each point where the road crosses a street, imposing a different fine for its violation. *Terre Haute & L. R. Co. v. South Bend*, 146 Ind. 230.

F. H. B.

RHODE ISLAND SUPREME COURT.

STATE of Rhode Island, *ex rel.* Gardner T. SWARTS,

v.

Walter E. MYLOD.

(.....R. I.)

The practice of Christian Science, consisting of prayer for divine assistance, the encouragement and direction of the thoughts of the patient, without recommending or administering any drug or medicine, or giving him any course of physical treatment, is not a violation of Gen. Laws, chap. 165, prohibiting the practice of medicine or surgery in any of its branches without a certificate from the state board of health.

(July 18, 1898.)

CERTIFICATION by the District Court for the Sixth Judicial District for the opinion of the Appellate Division of a constitutional question raised in a prosecution of defendant for practising medicine contrary to the provisions of Gen. Laws, chap. 165. *Judgment for defendant.*

The facts are stated in the opinion.

Mr. Charles F. Stearns for the State,
Mr. George A. Littlefield, for the defendant:

A question involving the constitutionality of a statute should be determined only when it is impossible to dispose of a cause on its merits otherwise.

6 Am. & Eng. Enc. Law 2d ed. p. 1084.

A legislative act should not be declared unconstitutional unless the point is presented in such form as to render its decision imperative.

Weimer v. Bunbury, 80 Mich. 218; *Inkster v. Carver*, 16 Mich. 488.

The statute does not apply to the defendant.

If the statute had been intended to apply to other people than ordinary physicians and surgeons the fact would have been indicated within it, as is the case in some other states.

Smith v. Lane, 24 Hun, 632.

If there is any doubt whether the statute includes the defendant, the benefit of it must be given to him.

Our present statute regulating the practice of medicine was passed only after many years of agitation. It was made to apply only to medicine and surgery. It would be most surprising now to have read into it between the lines every other remedial influence.

Bosworth, J., delivered the opinion of the court:

The defendant was adjudged probably guilty in the district court of the sixth judicial district upon complaint of Gardner T. Swarts, secretary of the state board of health. Said complaint which was made under chapter 165, R. I. Gen. Laws, alleges that the defendant, at Providence, on the 26th day of November, 1897, "did then and there practise medicine and surgery for reward and compensation, without lawful license, certificate, and author-

ity, and not being then and there duly registered according to law." The defendant upon arraignment, pleaded not guilty, and subsequently, and before judgment, raised a question of the constitutionality of said chapter 165, which question in accordance with the provisions of chapter 350, R. I. Gen. Laws, was certified and transmitted to the appellate division of the supreme court for decision.

R. I. Gen. Laws, chap. 165, provides for the registration of physicians, and its object is to regulate the practice of medicine and surgery. Under this chapter, authority to practise medicine and surgery is through a certificate issued by the state board of health, and said board, upon application, and without discrimination against any particular school or system of medicine, is required to issue such certificate to any reputable physician practising, or desiring to begin the practice of medicine or surgery in this state, who possesses certain specified qualifications. Section 2 of said chapter, in part, is as follows: "Sec. 2. It shall be unlawful for any person to practise medicine or surgery in any of its branches, within the limits of this state, who has not exhibited and registered in the city or town clerk's office of the city or town in which he or she resides, his or her authority for so practising medicine as herein prescribed, together with his or her age, address, place of birth, and the school or system of medicine to which he or she proposes to belong." Section 8 of said chapter is as follows: "Sec. 8. Any person living in this state or any person coming into this state, who shall practise medicine or surgery or attempt to practise medicine or surgery in any of its branches, or who shall perform or attempt to perform any surgical operation for or upon any person within the limits of this state for reward or compensation in violation of the provisions of this chapter, shall upon conviction thereof be fined \$50, and upon each and every subsequent conviction shall be fined \$100 and imprisoned thirty days, or either or both, in the discretion of the court; and in no case, where any provision of this chapter has been violated, shall the person so violating be entitled to receive compensation for services rendered. To open an office for such purpose, or to announce to the public in any other way a readiness to practise medicine or surgery in this state, shall be to engage in the practice of medicine within the meaning of this chapter." For the state, Everett Hall testified, substantially, that he called upon the defendant at his residence, and asked to be cured of malaria; that the defendant said that he was Dr. Mylod; that the defendant sat looking at the floor, with his eyes shaded, as if engaged in silent prayer, for about ten minutes, and then, looking up, said, "I guess you feel better;" that defendant gave him a book entitled "A Defense of Christian Science;" that he gave defendant \$1; that defendant did not recommend nor administer any drug or medicine, nor take his pulse or temperature, nor do any of the things usually done by physicians. Clarence Vaughn, in behalf of the state, testified that he called upon the defendant at his residence on two occasions, and requested to be cured of the grippe; that he gave defendant

NOTE.—The case of *State v. Buswell*, 40 Neb. 158, which the court in the present case distinguishes, is reported in 24 L. R. A. 68.

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\$1 each visit; that defendant said he was Dr. Mylod; that defendant gave him a card stating the defendant's office hours, and describing defendant as a Christian Scientist, but not in any way referring to defendant as a physician; that defendant did not take his pulse or temperature nor do any of the other things that physicians do in treating disease, but seemed to be sitting in silent prayer; that defendant gave him a book entitled "An Historical Sketch of Metaphysical Healing;" that defendant told him to look, not on the dark side of things, but on the bright side, and to think of God, and it would do him good, since thought governs all things. Dr. Gardnier T. Swarts, secretary of the state board of health, testified that the defendant is not a registered physician, that said defendant does not have authority to practise medicine in Rhode Island, and that physicians often cure disease without the use of drugs or medicine. For the defense, the charter of the Providence Church of Christ, Scientist, was introduced in evidence, and the defendant testified, substantially, that he is the president and first reader or pastor of said church; that said church has been organized and has held regular religious services for seven years; that said church belongs to the sect known as Christian Scientists, in whose belief God and Jesus Christ and the Bible hold a supreme place; that the principal distinguishing difference between Christian Scientists and other sects consists in the belief of the former regarding disease, which they believe can be reduced to a minimum through the power of prayer; that the public religious services of said church consist of silent prayer, music, reading of the Scriptures and of extracts from "Science and Health," by Mary G. Baker Eddy; that he, beyond a greater realization of truth which his longer study of Christian Science may have given him, professed to have no greater power over illness than that possessed by any member of his church; that he did not tell the witnesses Hall and Vaughn that he could cure them, nor did he call himself a doctor; that he did not attempt to cure them by means of any power of his own; that he assured them that it is God alone who heals, acting through the human mind; that all he did was to engage in silent prayer for them, and to endeavor to turn their thoughts to God and towards the attainment of physical perfection; that the efforts made for them were precisely the same in character as those which he makes for his congregation at public services of his church; that he does not practise medicine, nor attempt to cure disease; that he has no knowledge of medicine or surgery; that, as a Christian Scientist, he never recommended to anyone a course of physical treatment; that he has only the method of prayer and effort to encourage hopefulness, for all who come to him in public or private, and whatever disease they imagine they have; and that his ministrations often can be and are rendered as effectively in the absence as in the presence of the beneficiary. Other witnesses were called, but there was no material variance in the testimony except that the witnesses Hall and Vaughn testified that the defendant said he was Dr. Mylod, which testimony was contradicted by the defendant.

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The constitutional question raised by the defendant is that under § 8, art. 1, R. I. Const., which secures to him religious freedom, he had a right to perform the acts shown by the testimony to have been performed, and that, therefore, said chapter 165, R. I. Gen. Laws, under which said complaint was made, is unconstitutional if, and in so far as, it provides a penalty for the performance of said acts. This question, properly, cannot be considered by the court unless said chapter 165 is sufficiently broad to include within its prohibitive provisions the acts of the defendant, for the defendant cannot question the constitutionality of said chapter unless his rights would be affected by its enforcement. *State v. Snow*, 8 R. I. 64. There is no testimony tending to show that the defendant practised or attempted to practise surgery, or that he made any diagnosis or examination to ascertain whether the witnesses Hall and Vaughn were suffering from disease, or that he administered or prescribed any drug, medicine, or remedy, or that he claimed any knowledge of disease, or the proper remedies therefor. Upon the testimony, the only claim that can be made by the state is that upon a card handed to one of the witnesses appeared the name and office hours of the defendant; that the defendant said he was Dr. Mylod; that he offered silent prayer for the witnesses Hall and Vaughn, who claimed to be suffering from disease; that he gave said witnesses each a book in which, presumably, the principles of Christian Science were taught, explained, and defended; that he told the witness Vaughn, substantially, to look on the bright side of things, and think of God, and it would do him good; and that he accepted compensation for his services. Did these acts of the defendant constitute the practice of medicine, in violation of chapter 165, R. I. Gen. Laws? It is the duty of the court to give effect to the intention of the lawmaking power as embodied in the statutes. The legislature is presumed to mean what it has plainly expressed, and, when it has so expressed its meaning, construction is excluded. It is only when the meaning of a statute is obscure, or the words employed are of doubtful meaning, that, in order to give effect to the legislative intention, the duty of construction arises. In the construction of penal statutes a well-established rule is that words and phrases must be taken in their ordinary acceptation and popular meaning, unless a contrary intent appears. While the words of such statutes are not to be restricted in meaning within the narrowest limits, neither are they to be extended beyond their common interpretation; and, if there is a reasonable doubt as to whether the acts done are within the meaning of the statute, the party accused of its violation is entitled to the benefit of that doubt. Endlich, *Interpretation of Statutes*, §§ 329, 330. It follows, therefore, that the acts complained of are excluded from the operation of said chapter 165 unless the words "practice of medicine," taken in their ordinary or popular meaning, include them, or unless it appears from said chapter that the legislative intent was to give to said words a meaning broader and more inclusive than the popular one.

Medicine in the popular sense, is a remedial

substance. The practice of medicine, as ordinarily or popularly understood, has relation to the art of preventing, curing, or alleviating disease or pain. It rests largely in the sciences of anatomy, physiology, and hygiene. It requires a knowledge of disease, its origin, its anatomical and physiological features, and its causative relations; and, further, it requires a knowledge of drugs, their preparation and action. Popularly, it consists in the discovery of the cause and nature of disease and the administration of remedies or the prescribing of treatment therefor. Prayer for those suffering from disease, or words of encouragement, or the teaching that disease will disappear and physical perfection be attained as a result of prayer, or that humanity will be brought into harmony with God by right thinking and a fixed determination to look on the bright side of life, does not constitute the practice of medicine in the popular sense. The state, however contends that said chapter 165, taken as a whole, indicates a legislative intention to give to the words "practice of medicine" a meaning broader than the popular one. In support of this contention it calls attention to the provision contained in § 8 of said chapter that "to open an office for such purpose [that is, for the practice of medicine or surgery], or to announce to the public in any other way a readiness to practise medicine or surgery in this state, shall be to engage in the practice of medicine within the meaning of this chapter." In view of this provision, the state contends that to practise medicine it is not necessary to use internal or other remedies, nor to make diagnoses, nor to have a patient, but that the opening of an office for the practice of medicine, or the announcement of a readiness to engage in such practice, constitutes a practice of medicine; and therefore, as the statute applies not only to those who actually practise, but also to those who announce in any way a readiness to practise, the state contends that the legislature intended to give a broader than the generally accepted meaning to the words "practice of medicine." We are unable to agree with this contention. Without passing upon the provision referred to, and whatever its significance, it certainly cannot be construed to broaden, in a general sense, the meaning of the words "practice of medicine." The most that can be claimed for it is that it operates to broaden the offense created by said chapter 165, so that the attempt or the announcement of a readiness to practise medicine becomes equivalent to the actual practice.

The state further calls attention, in support of its contention, to § 6 of said chapter, which provides that "nothing in this chapter shall be so construed as to discriminate against any particular school or system of medicine;" and it argues that, as the statutory prohibition relates to the practice of medicine "in any of its branches," and that as certain diseases—such as insanity and nervous prostration—are treated by the so-called "regular school" without the use of drugs, and that as all schools recognize the study of mental conditions as affecting bodily health as forming a distinct branch of medicine, the legislative intention to give to the words "practice of medicine" a construction sufficiently broad to include the practice

of Christian Science is clearly manifest. The words of the provision against discrimination, like the words "practice of medicine," must be taken in their ordinary sense and meaning. It is a matter of common knowledge that among medical men there are defined differences regarding the treatment of disease. These differences have resulted in different schools or systems of medicine. A recognition of the existence of such differences, however, does not broaden the meaning of the words "practice of medicine" to include the practice of that which, in the popular sense, is not a practice of medicine. Neither does the statutory reference to the practice of medicine "in any of its branches" affect the meaning of the words in question. While it is true that the study and treatment of mental disease constitute one of the departments or branches of medicine in which the influence of the mind over the body is recognized, yet mere words of encouragement, prayer for divine assistance, or the teaching of Christian Science as testified, in the opinion of the court, does not constitute the practice of medicine in either of its branches, in the statutory or popular sense. To give to the words "practice of medicine" the construction claimed for them by the state, in the opinion of the court, would lead to unintended results. The testimony shows that Christian Scientists are a recognized sect or school. They hold common beliefs, accept the same teachings, recognize as true the same theories and principles. If the practice of Christian Science is the practice of medicine, Christian Science is a school or system of medicine, and is entitled to recognition by the state board of health to the same extent as other schools or systems of medicine. Under said chapter 165 it cannot be discriminated against, and its members are entitled to certificates to practice medicine provided they possess the statutory qualifications. The statute, in conferring upon the state board of health authority to pass upon the qualification of applicants for such certificates, does not confer upon said board arbitrary power. The board cannot determine which school or system of medicine, in its theories and practices, is right; it can only determine whether the applicant possesses the statutory qualification to practise in accordance with the recognized theories of a particular school or system. It would be absurd to hold that under said chapter 165, which provides against discrimination, the requirements necessary to entitle an applicant to a certificate were such that the members of a particular school or system could not comply with them, thus adopting a construction which would operate, not as a discrimination only, but as a prohibition. On the other hand, to hold that a person who does not know or pretend to know anything about disease, or about the method of ascertaining the presence or the nature of disease, or about the nature, preparation, or use of drugs, or remedies, and who never administers them, may obtain a certificate to practise medicine, is to hold that the operation of the statute is to defeat the beneficial purposes for which it was enacted.

The cases cited by the state do not sustain its contention. In *Nelson v. Harrington*, 72

Wis. 591, 1 L. R. A. 719, the plaintiff brought suit against the defendant, who was a clairvoyant physician, to recover damages for alleged unskilful treatment. In testimony it appeared that the defendant held himself out as a healer of disease, and accepted compensation; that he determined the nature of the disease for which he treated the plaintiff, and the character of the remedies he administered, while in a mesmeric state or trance condition. The court held that the defendant was bound to exercise reasonable skill, and that the knowledge of the plaintiff of his methods was no defense to the action. In *Bibber v. Simpson*, 59 Me. 181, which was an action brought to recover compensation for services, the opinion of the court is as follows: "The services rendered were medical in their character. True, the plaintiff does not call herself a physician, but she visits her sick patients, examines their condition, determines the nature of the disease, and prescribes the remedies deemed by her most appropriate. Whether the plaintiff calls herself a medical clairvoyant, or a clairvoyant physician, or a clear-seeing physician, matters little; assuredly, such services as the plaintiff claims to have rendered purport to be, and are to be deemed, medical, and are within the clear and obvious meaning of Rev. Stat. 1871, chap. 18, § 8, which provides that 'no person except a physician or surgeon, who commenced prior to February 16, 1881, or has received a medical degree at a public medical institution in the United States, or a license from the Maine Medical Association, shall recover any compensation for medical or surgical services, unless previous to such services he had obtained a certificate of good moral character from the municipal officers of the town where he then resided.' The plaintiff has not brought herself within the provisions of this section and cannot maintain this action." In *Wheeler v. Sawyer* (Me. 1888) 15 Atl. 67, the plaintiff, a Christian Scientist, brought suit to recover for services. Section 9, chap. 18, Rev. Stat. 1883, is the same as section 8, chap. 18, Rev. Stat. 1871, except that it does not relate to physicians and surgeons practising prior to February 16, 1831. The plaintiff had received the certificate of good moral character required by statute. The court said: "We are not required here to investigate 'Christian Science.' The defendant's intestate chose that treatment, and received it and promised to pay for it. There is nothing unlawful or immoral in such a contract. Its wisdom or folly is for the parties, not the court, to determine." In *State v. Buswell*, 40 Neb. 158, 24 L. R. A. 68, the defendant was indicted for the unlawful practice of medicine. In Nebraska (Laws 1891, chap. 35), the practice of medicine, surgery, and obstetrics is prohibited except by persons possessing certain qualifications. Section 17 of said chapter 35, in part, is as follows: "Sec. 17. Any person shall be regarded as practising medicine within the meaning of this act who shall operate on, profess to heal, or prescribe for or otherwise treat any physical or mental ailment of another." The defendant was a Christian Scientist, and the evidence against him upon which the state relied was similar in character to that in the case under consideration. The trial court instructed the jury that,

in order to convict the defendant, they must find that the defendant had practised medicine, surgery, or obstetrics, as those terms are usually and generally understood, and the state excepted. The supreme court, in sustaining the exception, uses the following language: "Governed by this instruction, the jury could not do otherwise than acquit, for there was no proof to meet its requirement." Again: "The statute does not merely give a new definition to language having already a given and fixed meaning. It rather creates a new class of offenses in clear and unambiguous language, which should be interpreted and enforced according to its terms." Again: "Under the indictment the sole question presented upon the evidence was whether or not the defendant within the time charged had operated on or professed to heal, or prescribe for, or otherwise treat any physical or mental ailment of another." The decision of the Nebraska court, therefore, is that, while the practice of Christian Science is not a practice of medicine as those terms usually and generally are understood, yet that, under the section above quoted, the practice of Christian Science, being a treatment for physical or mental ailments, is a violation of the law. In Missouri the statute requires that before a person may lawfully practise medicine or surgery he must file a copy of his diploma with the clerk of the county court, and it further provides (Rev. Stat. § 6304) that any person, not qualified, who shall practise medicine or surgery, shall not be permitted to recover compensation for services rendered "as any such physician or surgeon." In *Davidson v. Bohman*, 87 Mo. App. 576, the plaintiff having brought suit to recover for services, the question raised was whether the services were performed by the plaintiff as a physician. The plaintiff had practised medicine lawfully for nearly thirty years, first as an allopathic physician and later as an electric physician. He had a diploma from an electric medical college, but had failed to file a copy of it as required by law. The services for which he claimed compensation consisted of electric treatment. The bill for services furnished the defendant described the plaintiff as "Dr. T. P. Davidson," and the plaintiff called a medical practitioner to testify to the value of the services in question. The court of appeals, upon the testimony, held that the services were performed by the plaintiff as a physician, and that, not being qualified to practise, he could not recover. The assumption of the title of "doctor," if defendant assumed such title, was not unlawful. Chapter 165 does not, in terms, prohibit the use of the word "doctor" by any person, whatever his business or profession may be. Its use is entirely immaterial in any case, unless under such conditions or circumstances, or in such connection, that it may serve as an announcement or indication of a readiness to engage in the practice of medicine or surgery. The object of the statute in question is to secure the safety and protect the health of the public. It is based upon the assumption that to allow incompetent persons to determine the nature of disease, and to prescribe remedies therefor, would result in injury and loss of life. To protect the public, not from theories, but from

the acts of incompetent persons, the legislature has prescribed the qualifications of those who may be entitled to perform the important duties of medical practitioners. The statute is not for the purpose of compelling persons suffering from disease to resort to remedies, but is designed to secure to those desiring remedies competent physicians to prepare and administer them. See *Smith v. Lane*, 24 Hun, 682.

The opinion of the court is that the words

"practice of medicine," as used in R. I. Gen. Laws, chap. 165, must be construed to relate to the practice of medicine as ordinarily and popularly understood, and that *the acts of the defendant do not constitute a violation of said chapter*. The court therefore cannot properly pass upon the constitutional question raised, for the rights of the defendant would not be affected by any conclusion at which the court might arrive.

TENNESSEE SUPREME COURT.

Joseph SMITH, *Plff. in Err.*,

STATE of Tennessee.

(.....Tenn.....)

A state statute providing for separate but equal accommodations for the white and colored races on railroads is a valid police regulation, and applies both to intra and inter state travel.

(March 12, 1898.)

ERROR to the Criminal Court for Davidson County to review a judgment convicting defendant of violating the statute providing for the assignment of negroes to separate cars upon railroad trains. *Affirmed*.

The facts are stated in the opinion.

Messrs. Smith & Maddin, for plaintiff in error:

The states have no power to regulate interstate commerce.

State Tonnage Tax Cases, 12 Wall. 204, 20 L. ed. 870; *Hall v. De Cuir*, 95 U. S. 491, 24 L. ed. 549; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 558, 30 L. ed. 244, 1 Inters. Com. Rep. 81.

Transportation of passengers is as much commerce as transportation of property, and the interstate transportation of persons is interstate commerce. The state may not regulate such commerce since it is national in its character, and requires uniformity of regulations.

Louisville, N. O. & T. R. Co. v. State, 66 Miss. 662, 5 L. R. A. 182, 2 Inters. Com. Rep. 615; 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Hall v. De Cuir*, 95 U. S. 491, 24 L. ed. 549; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 564, 30 L. ed. 246, 1 Inters. Com. Rep. 81; Black. Const. Law, 196; *Passenger Cases*, 7 How. 283, 12 L. ed. 702; *People v. Raymond*, 84 Cal. 492.

Railroad companies may establish regulations providing that colored passengers shall occupy separate coaches from white passengers, provided such coaches are equal in every respect to those occupied by white passengers.

Hutchinson, Carr. § 542; 2 Wood, Railroads, ed. 1894, p. 1200; *Memphis & C. R. Co. v. Ben-*

son, 85 Tenn. 633; *Chesapeake, O. & S. W. R. Co. v. Wells*, 85 Tenn. 613; *West Chester & P. R. Co. v. Miles*, 55 Pa. 209; *Day v. Owen*, 5 Mich. 520, 72 Am. Dec. 62; *Chicago & N. W. R. Co. v. Williams*, 55 Ill. 185, 8 Am. Rep. 641; *Houck v. Southern P. R. Co.* 88 Fed. Rep. 226, 4 Inters. Com. Rep. 441; *McGuinn v. Forbes*, 37 Fed. Rep. 639; *The Sue*, 22 Fed. Rep. 843; *Murphy v. Western & A. R. Co.* 23 Fed. Rep. 637; *Logwood v. Memphis & O. R. Co.* 28 Fed. Rep. 818.

A state may enact a law requiring railroad companies to provide separate equal accommodations for the two races and to assign passengers to their proper coach, if such law be confined in its application to domestic passengers, to wit, those who get aboard the train within the state, destined entirely within the state, to a point within the state.

Ex parte Plessy, 45 La. Ann. 80, 18 L. R. A. 639; *Plessy v. Ferguson*, 163 U. S. 540, 41 L. ed. 257; *Louisville, N. O. & T. R. Co. v. State*, 66 Miss. 662, 5 L. R. A. 132, 2 Inters. Com. Rep. 615, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 565, 30 L. ed. 247, 1 Inters. Com. Rep. 81.

A state statute which undertakes to compel common carriers to furnish separate coaches for passengers of different races, and to compel the passenger to occupy the coach designated for his race or leave the train, is, if applied to interstate passengers, an attempt to regulate interstate commerce, and is void.

Hall v. De Cuir, 95 U. S. 485, 24 L. ed. 547, Reversing *De Cuir v. Benson*, 27 La. Ann. 1; *State, Abbott, v. Hicks*, 44 La. Ann. 776; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 81; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715; 2 Wood, Railroads, ed. 1894, p. 1200; *Carrey v. Spencer*, 5 Inters. Com. Rep. 636, 72 N. Y. S. R. 108; *Miller v. New Jersey S. B. Co.* 58 Hun. 424.

Mr. G. W. Pickle, Attorney General, for the State.

Snodgrass, J., delivered the opinion of the court:

The plaintiff in error was indicted and convicted under the act of 1891 (chap. 53), for un-

NOTE.—As to the rights of colored passengers, see note to *Ex parte Plessy* (La.) 18 L. R. A. 639; also *Chilton v. St. Louis & I. M. R. Co. (Mo.)* 19 L. R. A. 266; and *Smith v. Chamberlain* (S. C.) 19 L. R. A. 710.

41 L. R. A.

The case of *Ex parte Plessy* (La.) 18 L. R. A. 639, was affirmed by the Supreme Court of the United States in *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256.

lawfully falling, neglecting, and refusing to assign certain negroes to the car and compartment of car used on the Louisville & Nashville Railroad for colored passengers, and for permitting them to ride in the car and compartment thereof assigned to white passengers. He appealed, and contests here the correctness of the judgment, upon the ground that the act referred to is invalid, as a regulation of interstate commerce, and in violation of the Constitution of the United States on that subject (art. 1, § 8), which vests in Congress the power to regulate commerce with foreign nations and among the states and with the Indian tribes. It is insisted, and the authorities cited to the effect, that the states have no power to regulate interstate commerce, and that the transportation of passengers from points without to points within the state or outside is such commerce, and beyond the power of state regulation. It is admitted that the act, so far as it operates to regulate commerce within the state, is valid, but it is urged that it is invalid as applied to the case of these passengers taken into the car without the state to be brought within or transported through it, as was the case in this instance; and it is urged that the question is so decided by the Supreme Court of the United States in the case of *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547. If the contention of plaintiff in error as to the effect of this decision was correct, we would hold that decision conclusive, and reverse the judgment, for we not only recognize the right of that court to determine that question, but we regard its adjudications as always correct within its province, until reversed or changed by itself, and accord to them that unhesitating respect which is due the Supreme Court of the United States as our own highest court for the settlement, and rightful settlement, of all questions which our Federal Constitution and laws submit to its judgment. If there be any courts of the states which question or attempt to avoid them, either as unauthorized or unjust, because not in harmony with any judicial or political theory of their own, this court is not one of them. We bow to its decisions, not only as right, but as just and proper expositions of the constitutional or legal questions it decides, treating it, not as a foreign tribunal, because national, in contradistinction to state, but as our own, and entitled to as much consideration as if it were organized to determine such questions alone for this state, and, more, because it is the supreme power which we have created for the ultimate settlement of all such controversies in all the states of our common government. But we are of the opinion that the question here involved was not decided in the case referred to, and, upon the aspect here presented, was not even considered. The question there was this: Under the Constitution of Louisiana, all persons were given equal rights and privileges upon any conveyance of a public character, and the legislature of that state provided substantially that all persons should be carried together in public conveyances. A carrier engaged in interstate commerce under a regulation adopted for that purpose by itself provided separate accommodations for white and colored passengers through that state and others adjacent. A colored passenger applied

for transportation from New Orleans to Hermitage, both points within the state of Louisiana, and, being refused accommodations on account of her color in the cabin specially set apart for white persons, brought suit in the eighth district court for the parish of New Orleans under the Louisiana act to recover damages for her mental and physical sufferings. She obtained a judgment for \$1,000. Defendant appealed to the supreme court of the state, and the judgment was affirmed. The case was carried to the Supreme Court of the United States under § 709 of the Revised Statutes. That court held that the law as construed by the state court (which construction was conclusive upon the Supreme Court of the United States) gave to all persons traveling in Louisiana upon public conveyances, though engaged in interstate commerce, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color, and dealt with it upon that aspect alone as an effort to regulate interstate commerce by the state, and not as a police measure, which it was not, and in which aspect, therefore, it was not considered. It was held to be a regulation of interstate commerce and to be void, because such power was vested alone in Congress to be exercised; and, whether it had done so or not, the state could not do it by such a law. The court said in that case: "There can be no doubt but that exclusive power has been conferred upon Congress in respect to the regulation of commerce among the several states. The difficulty has never been as to the existence of this power, but as to what is to be deemed an encroachment upon it; for, as has been often said, 'legislation may, in a great variety of ways, affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution.' *Sherlock v. Alling*, 93 U. S. 103, 23 L. ed. 820; *State Tax on Railway Gross Receipts*, 15 Wall. 284, 21 L. ed. 164. Thus, in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, it was decided that a state might regulate the charges of public warehouses, and in *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94, of railroads situate entirely within the state, even though those engaged in commerce among the states might sometimes use the warehouses or the railroads in the prosecution of their business. So, too, it has been held that states may authorize the construction of dams and bridges across navigable streams situate entirely within their respective jurisdictions. *Willson v. Blackbird Creek Marsh Co.* 2 Pet. 245, 7 L. ed. 412; *Pound v. Turk*, 95 U. S. 459, 24 L. ed. 525; *Gilman v. Philadelphia*, 8 Wall. 713, 18 L. ed. 96. The same is true of turnpikes and ferries. By such statutes the states regulate, as a matter of domestic concern, the instruments of commerce situated wholly within their own jurisdictions, over which they have exclusive governmental control, except where employed in foreign or interstate commerce. As they can only be used in the state, their regulation for all purposes may properly be assumed by the state, until Congress acts in reference to their foreign or interstate relations. When Congress does act, the state laws are superseded only to the extent that they affect commerce outside

the state as it comes within the state. It has also been held that health and inspection laws may be passed by the states (*Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23), and that Congress may permit the states to regulate pilots and pilotage, until it shall itself legislate upon the subject. (*Cooley v. Philadelphia Port Wardens*, 12 How. 299, 13 L. ed. 996). The line which separates the power of the states from this exclusive power of Congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. Judges not unfrequently differ in their reasons for a decision in which they concur. Under such circumstances it would be a useless task to undertake to fix an arbitrary rule by which the line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved." Nothing better illustrates the last suggestion of the learned judge than his own view as enforced by citations in the particular case. The proposition suggested was the power of the state to regulate internal commerce, and upon this he indiscriminately cited cases so holding along with those which did hold a wider power to exist in the state when it belonged to that class known as the police power, which he was not considering. The Louisiana Constitution and act were not dependent upon, or in the exercise of, such a power. A requirement that all persons who travel shall travel together is not in any sense a police regulation. It is easy to perceive how it might conduce to the comfort, health, or safety of persons traveling to be separated; but no reason of this kind can be found, nor any other of a police nature, for requiring that all should be crowded or mixed together; and, presumably, therefore, as it did not arise, no such question was made. It certainly was not considered or decided in that case. The reference to authorities (some of which do relate to it) was only on a proposition as to the state's right to legislate upon domestic matters, but the reference included several which showed that such a right, if exercised under a valid law in respect to matters included in the police powers of the states, might be lawfully exercised, if so directed, although it seriously affected interstate commerce. No such distinction was there made, though later it was done, and with great force, by the same court. As already said, it was not presented as a police regulation. It was not such, but was a regulation, pure and simple, of interstate commerce. It was not an act passed in the exercise of a police power. It was based upon no such power, nor did it purport to be. The decision that it was, hence, not a valid law, was a matter of course.

But in the same opinion, Judge Waite, to enforce the idea of the impropriety of such a state regulation, read an argument supposed to be applicable to any regulation or any law affecting the transportation of passengers, showing the great hardship and inconvenience to which interstate carriers would be subjected upon a different construction. He said: "If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of

great inconvenience and unnecessary hardship. Each state could provide for its own passengers, and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments." This was a very persuasive view on the mere question of confining a state's regulation of commerce to its own borders, when no necessity of health, comfort, or safety, and no proper police regulation, was involved. It is urged here, and has been so urged in all such cases since, but the argument has been distinctly rejected by the Supreme Court of the United States in several cases where the law considered was one enacted under the police power, and was, of course, a reasonable exercise of that power. The question was practically a new one when the opinion of Judge Waite was delivered, and the application of the rule as to the power of the states to affect interstate commerce by legislation was in the formative state, and in much confusion, as he himself shows. Since that time it has been much considered and debated, and many opinions have been delivered, which mark far more distinctly and far more accurately "the line which separates the powers of the states from this exclusive power of Congress," which at that time the learned judge observed to be so uncertainly and indistinctly marked. The cases subsequent to this in connection with it and those preceding have established three distinct propositions: First, that any legislation by a state, whether it be or not in the exercise of the police power, though it incidentally and remotely affect interstate commerce without constituting a regulation of it, may be valid; second, that in the reasonable exercise of the police power a state may impose burdens upon interstate commerce which occasion both inconvenience and hardship to the carrier, provided Congress has not directly acted upon the same subject; third, that laws passed under the police power of the state for the reasonable regulation of travel and transportation are not regulations of interstate commerce in the objectionable sense, under the Constitution. Specifically, they have also settled, fourth, that laws providing for the separation of the white and colored races in public conveyances, giving each equal privileges of travel and accommodation are reasonable and are valid exercises of state authority under the police powers, although they affect and impose burdens upon interstate commerce. *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256; *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 858; *Gladson v. Minnesota*, 166 U. S. 427, 41 L. ed. 1067; *Louisville, N. O. & T. R. Co. v. Mississippi*, 183 U. S. 587, 38 L. ed. 784, 3 Inters. Com. Rep. 801. In the first of these cases, such a statute, not applying to interstate commerce, was upheld as a police regulation which was reasonable, and as not obnoxious to the 18th or 14th Amendments to the Consti-

tution of the United States. Judge Harlan dissented with the ability and vigor for which that distinguished judge is noted, and with the vehemence and want of strict accuracy, pardonable because general, if not universal, in unanswered dissent, in which he supposed instances of unreasonable exercise of that power in opposition to the argument that its reasonable exercise was justified, and was not obnoxious to the Federal Constitution, which proposition alone the majority opinion maintained. But the decision in the second case commented upon here—*Hennington v. Georgia*—was delivered by Judge Harlan, and in this, with great clearness and accuracy, the distinction was asserted between general legislation to regulate commerce and special reasonable legislation under the police power to provide for the health, safety, well-being, comfort, and morals of the public, and that the right of the state to exercise this power existed, and that, if such legislation did not go beyond the necessities of the case, it was valid, at least until Congress interferes. He enforces this view with much strength of reasoning and citation of authority, and indeed, reiterates a view which may go beyond this, for in the conclusion of his opinion he says: "Local laws of the character mentioned have their source in the powers which the states reserved, and never surrendered to Congress, of providing for the public health, the public morals, and the public safety, and are not within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce." It is worthy of note here that the judge is not limiting the field of state legislation to questions of health, morals, and safety. These happen merely to be those subjects of police legislation which he enumerated in the particular statement quoted, but elsewhere he had spoken of those relating to the order, the comfort, and the well-being of the public; but neither does this addition make the list complete. What was intended, and all that was intended, to be expressed was that those subjects included in the police power of the state were not surrendered to Congress by the grant of any other powers not expressly including any one or more of them. The body of the opinion is devoted, though, to maintaining the proposition suggested that the power remains in the state until Congress has acted. In reference to this he says: "The distinction here suggested is not new in our jurisprudence. It has been often recognized and enforced by this court. In *Gibbons v. Ogden*, 9 Wheat. 1, 203, 210, 6 L. ed. 23, 71, 73, this court recognized the possession by each state of a general power of legislation that embraces everything within the territory of a state, not surrendered to the general government, 'all which can be most advantageously exercised by the states themselves.' Inspection laws, although having, as the court said in that case, 'a remote and considerable influence on commerce,' are yet within the authority of the states to enact, because no direct, general power over the objects of such laws was granted to Congress. So, also, quarantine

laws of every description, if they have real relation to the objects named in them, are to be referred to the power which the states have to make provision for the health and safety of their people." It is immaterial upon which theory it be treated as vested, whether upon that that the power never was vested in Congress to so regulate interstate commerce as to destroy the power of state police regulation, or whether upon the proposition that such power vested could not destroy it until exercised, the result is the same, for it is not pretended in the case under consideration that Congress, if it has the power, has yet undertaken to legislate on the particular subject, or to forbid the exercise by the state of the police power to control this question.

It was not a new suggestion that the power granted to regulate commerce was not unlimited, or was not intended to give Congress such power where the regulation attempted was contrary to the proper and reasonable police regulations of the different states. As pointed out by Judge Clifford in his concurring opinion in the case of *Ha't v. De Cuir*, referring to Chancellor Kent's analysis of the view of the Supreme Court of the United States in the case of *Gibbons v. Ogden*, there were three limitations or restrictions on the power conferred upon Congress to regulate interstate commerce. They were: "(1) That the power does not extend to that commerce which is completely internal, and is carried on between different parts of the same state, not extending to or affecting other states; (2) that the power is restricted to that commerce which concerns more states than one, the completely internal commerce of a state being reserved for the state itself; (3) that the power conferred does not prohibit the states from passing inspection laws or quarantine or health laws and laws for regulating highways and ferries, nor does it include the power to regulate the purely internal commerce of the state, or to act directly on its system of police,"—citing 1 Kent, Com. 12th ed. p. 437. Later, in commenting on the opinion, and contrasting it with another delivered by the same judge (Chief Justice Marshall), Judge Clifford says: "Evidently he had no occasion to refer to it or to any of its doctrines, as he properly described the creek over which the dam was erected as a low, sluggish water, of little or no importance, and treated the erection of the dam as one adapted to reclaim the adjacent marshes, and as essential to the preservation of the public health, and sustained the constitutionality of the law authorizing the erection, upon the ground that it was within the reserved police powers of the state." But we need not pursue this subject further, for, as already stated, whether these powers remain always in the state as not granted, or whether they remain until congressional action, is immaterial. In either event, the law we are considering is valid so far as this constitutional objection goes. It remains only to consider whether it is a proper and reasonable exercise of the police power of the state, for, as was said in *Plessy v. Ferguson*, 163 U. S. 587, 41 L. ed. 256, "every exercise of the police power must be reasonable, and extend only to such laws as are enacted in

good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."

The caption and body of the act (Acts 1891, chap. 52) are as follows:

An Act to Promote the Comfort of Passengers on Railroad Trains by Requiring Separate Accommodations for the White and Colored Races.

Sec. 1. Be it enacted by the general assembly of the state of Tennessee that all railroads carrying passengers in the state (other than street railroads) shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger cars for each passenger train or by dividing the passenger cars by a partition so as to secure separate accommodations, provided that any person may be permitted to take a nurse in the car or compartment set aside for such persons: provided that this act shall not apply to mixed and freight trains which only carry one passenger or combination passenger and baggage car, provided always that in such cases the one passenger car so carried shall be partitioned into apartments, one apartment for the whites and one for the colored.

Sec. 2. Be it further enacted that the conductors of such passenger trains shall have power and are hereby required to assign to the car or compartments of the car (when it is divided by a partition) used for the race to which such passengers belong, and should any passenger refuse to occupy the car to which he or she is assigned by such conductor, said conductor shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railroad company shall be liable for any damages in any court of this state.

Sec. 3. Be it further enacted, that all railroad companies that shall fail, refuse, or neglect to comply with the requirements of section one of this act shall be deemed guilty of a misdemeanor, and upon conviction in a court of competent jurisdiction, be fined not less than \$100 nor more than \$500, and any conductor that shall fail, neglect, or refuse to carry out the provisions of this act shall, upon conviction, be fined not less than \$25 nor more than \$50 for each offense.

Sec. 4. Be it further enacted that this act take effect ninety days from its passage the public welfare requiring it.

It will be seen that the act provides for sep-

arate accommodations, but for equal accommodations. It imposes no burden on either race, and gives to each the same privileges. Even in the matter of carrying nurses of another race, it gives to the colored passenger the same right to take a white nurse into the car for colored people that it does to the white passenger to take a colored nurse into that provided for white people. It is entitled, if that were material, "An Act to Promote the Comfort of Passengers." It may operate for this purpose, or to promote the safety of one or both, or to further the ends of good order. If it be true, as is sometimes said, that race prejudices exist here that make it uncomfortable or unsafe, or promotive of disorder, to mix the races in public conveyances, then both safety and good order are promoted, as well as comfort in their separation. The state is to judge of the necessity for such a regulation. Whether either or both should be uncomfortable, unsafe, or liable to the injury or annoyance of disorder by such intermixture in travel is not the question. The question is whether it, in fact, is so, or whether the state legislature reasonably deemed it so, and provided against the consequences. It is in these respects, therefore, entirely reasonable. No good reason can be perceived why such legislation is objectionable or why it might not even be extended. If California or any of the states of the West should take a like view as to intermixture of their Chinese population with that of native or white people in public conveyances, it seems clear that for the same reasons they might enact the same laws, and, indeed, yet others, for the separation of other races who might be hostile or prejudiced towards each other.

The argument that it imposes unnecessary burdens on the carrier, to which so much weight was given in the *De Quir Case*, is not relevant, if it be a police regulation of a reasonable and proper character. The same argument was made, and on this ground repudiated, in the cases of *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 858, and *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166.

We conclude, therefore, that the law is a reasonable police regulation, and applies both to intra and inter state travel; that it is not invalid for any reason, or obnoxious to the Federal Constitution; that the question is an open one under the decisions of the Supreme Court of the United States; and that there is no reversible error in the judgment of the court below. It is therefore *affirmed*.

VIRGINIA SUPREME COURT OF APPEALS.

SOUTHERN EXPRESS COMPANY, *Appt.*,
v.
COMMONWEALTH of Virginia, *ex rel.*
James A. WALKER.

(92 Va. 59.)

1. Pecuniary forfeiture under Code,

NOTE.—For fine as a cruel or unusual punishment, see *note to State, Garvey, v. Whitaker (La.)* 35 L. R. A. on page 567.
41 L. R. A.

section 1220, for the charge by an express company of greater rates than it is authorized to charge, is not within Const. art. 8, § 7, setting apart for a literary fund "all fines collected for offenses committed against the state."

2. A statute directing half of a forfeiture or fine to be paid to the informer does not violate Const. art. 8, § 7, setting apart as a permanent literary fund "all fines collected."

3. Code, section 1220, fixing at \$100 the minimum fine for the charge by an

express company of rates greater than it is authorized to charge, and failing to prescribe a maximum limit, does not violate Const. art. 1, § 11, prohibiting the imposing of "excessive fines."

4. The 8th Amendment to the Federal Constitution does not apply to the states.

(August 1, 1895.)*

ERROR to the Circuit Court for Wythe County to review a judgment in favor of relator in a proceeding to collect a forfeiture provided by statute for an alleged overcharge by defendant in freight rates. *Affirmed.*

The facts are stated in the opinion.

Messrs. Blair & Blair for plaintiff in error.

Messrs. Walker & Caldwell, for defendant in error:

Article 14, § 1, of the Amendments to the United States Constitution at no time has been construed to interfere with the police regulations of a state.

Bartemeyer v. Iowa, 18 Wall. 133, 21 L. ed. 930; *License Cases*, 5 How. 583, 12 L. ed. 291; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 161, 24 L. ed. 95.

The law applies to express companies doing a carrier business within the state, transporting goods from one point to another within that state. It applies to them as a class, and is general in its operation, and is enforceable in the usual modes established in the administration of government with respect to kindred matters.

Dent v. West Virginia, 129 U. S. 124, 32 L. ed. 626; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Missouri P. R. Co. v. Mackey*, 127 U. S. 209, 32 L. ed. 109.

The United States Constitution has no control of fines imposed by a state merely because they are excessive.

Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80.

The legislature is in no position to prejudge how large a forfeiture would be necessary to deter express companies from making excessive charges, so they contented themselves by fixing a minimum forfeiture and delegated the power to the juries of the state to decide what forfeiture would be necessary to keep these charges within the law.

The verdicts of juries are always under the control and supervision of the courts presiding, who see to it that the jury are not governed by passion or prejudice in arriving at their conclusions.

State v. Craig, 80 Me. 85; Code, §§ 8903, 3904.

That part of the forfeiture, and that alone, that is designated by the Code for the state shall go to the literary fund.

A fine is a punishment imposed by law upon one convicted of crime or misdemeanor.

The word may include a forfeiture or penalty recoverable in a civil action.

1 Bouvier, Law Dict. p. 662.

Forfeiture means a penalty recoverable in a civil action.

By the language of the Constitution, the

word "fine" clearly means fines imposed in criminal prosecutions.

State v. Indiana & I. S. R. Co. 133 Ind. 69, 18 L. R. A. 502; *State v. Pennsylvania Co.* 133 Ind. 700.

Actions to recover damages by way of a penalty are not criminal prosecutions, but strictly civil in their nature.

Spicer v. Rees, 5 Rawle, 119, 28 Am. Dec. 648; *Ott v. Jordan*, 116 Pa. 218.

Riely, J., delivered the opinion of the court:

There is but a single question involved in this case, and that relates to the constitutionality of § 1220 of the Code of Virginia. Its validity is assailed by the plaintiff in error on several grounds.

The first and main objection is based on § 7 of article 8 of the Constitution of the state, which sets apart, as a permanent and perpetual literary fund, among other resources, "all fines collected for offenses committed against the state." It is contended that the forfeiture provided for in § 1220 is embraced by the term "fines" so set apart by the Constitution, and that the gift of one half thereof for the use of the informer is a misappropriation or diversion, to that extent, of a fund which has been dedicated to the literary fund, and that the statute is therefore in conflict with the fundamental law, and invalid. This compels an inquiry into the meaning of the words quoted from the Constitution. What "fines" are here intended or comprehended? The answer is found in the language of the Constitution itself. They are "fines collected for offenses against the state;" that is, fines imposed by law as a punishment for crime. Fines constitute, in whole or in part, the punishment for many of the smaller offenses at common law, and also for many offenses created by statute, and these are the "fines" which the constitutional provision was designed to cover. It comprehends only those fines which are affixed as penalties for crime, and are recoverable upon the conviction of the offender, and does not embrace those pecuniary penalties or forfeitures provided by statute, that a popular or *qui tam* action (which is a civil action) may be brought to recover. Such is the forfeiture prescribed by § 1220, and which was sued for and recovered in this case.

Section 1215 prescribes the rates which an express company may charge, and § 1220 provides a pecuniary forfeiture for their violation. The gravamen of this suit is that the express company, in exacting payment of the defendant in error for a package carried by it, exceeded the rate allowed by law. For the express company to charge for carrying packages of goods and moneys is a perfectly legitimate act. It is in no sense criminal. The act complained of here is entirely innocent, in itself, and is only contrary to law because the charge exacted was greater than the statute allows. It is not characterized by the statute as a crime, or prosecuted and punished as such. This view is enforced by the provisions of § 1220, in that they do not dedicate the entire forfeiture for the use of the state, but direct that one half thereof shall be for the use of the informer, who is enabled to recover it by a civil suit in the name of the state, without a

*Affirmed by the Supreme Court of the United States November 1, 1897.

criminal prosecution and conviction. It is clear that the forfeiture in question is not a penalty for a crime,—“an offense committed against the state,”—but simply a forfeiture for an act which the lawmaking power of the state, in its wisdom, deemed necessary to prevent imposition upon its citizens; and, being so, it is not affected by the Constitution, and the legislature had the right to prescribe the forfeit, and then dispose of it at its pleasure, either wholly to the state or partly to the state and partly to the informer and others. The term “fines,” used in the Constitution, literally construed, does not comprehend forfeitures. “A fine is a pecuniary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanor.” 1 Bouvier Law Dict. 662. In chapter 31 of the Code the word “fine” includes a pecuniary forfeiture, penalty, and amercement; but that is by virtue of the special enactment (§ 745), and it could not affect the proper construction of the term “fines” as used in the Constitution.

The Constitution of Indiana contains a provision very similar to that under discussion in the Constitution of our own state. It provides that the common-school fund of the state shall consist of, and be derived from, “the fines assessed for breaches of the penal law of the state; and from all forfeitures which may accrue.” Article 8, § 2. A statute was enacted imposing a certain duty upon every corporation or person operating a railroad in that state, and affixing a penalty for its violation, to be recovered in a civil action in the name of the state, one half of which should go to the prosecuting attorney, and the remainder to be paid to the county in which the proceeding was had, and constitute a part of the common-school fund. It was contended in the case of *State v. Indiana & I. S. R. Co.* 138 Ind. 69, 18 L. R. A. 503, that the statute diverted or misappropriated the penalty contrary to the provision of the Constitution above referred to; but the court held that the “fines” specified in the Constitution had reference to fines assessed in criminal prosecutions, and that the penalty affixed to the statute for its violation was not a fine in that sense. It therefore sustained the constitutionality of the statute. This decision strongly corroborates the construction it has seemed to us should be given to the similar provision contained in § 7, art. 8, of our own Constitution. See also *State v. Pennsylvania Co.* 133 Ind. 700; and *Ott v. Jordan*, 116 Pa. 218.

But if the constitutional provision so relied on to invalidate § 1220 were susceptible of the construction contended for by the counsel for the plaintiff in error, it would not invalidate it. Such conclusion could only be reached by a very literal and narrow construction. The Constitution does not impose fines nor provide for their enforcement. To the legislature belongs the duty of providing for their enforcement and collection, and also of imposing them, except where they are imposed by the common law. It could not have been intended or expected by the framers of the Constitution that the laws imposing fines for offenses could be enforced or collected without cost or expense. They must have contemplated that fines, in being enforced and collected, should

bear the burden of such means as the legislature might deem best adapted to compel their enforcement and collection, and only intended to appropriate to the literary fund the amount coming to the state after deducting such part as the legislature may have set apart to secure their enforcement and collection. If the legislature possesses the right, as it does, to impose a fine or forfeiture, it has the power, as appurtenant to such right, to prescribe the proceeding or adopt the means deemed by it most likely to result in the enforcement of the fine or forfeiture. If it thought that its policy, as evidenced by the forfeiture provided for in § 1220, was more likely to be enforced by giving one half of the forfeiture for the use of the informer, it had the right to do so, and only such part as it reserved for the use of the state would be covered by the constitutional provision. This is not an appropriation or diversion of the fine to an object other than that to which the Constitution dedicates it. On the contrary, all of the fine, beyond what the legislature has deemed proper to set apart to stimulate the prosecution and secure the enforcement of the fine, goes to the literary fund, as required by the Constitution. Moreover, it has been the practice of the legislature, for a hundred years or more, in declaring forfeitures and fixing fines in certain cases, to provide, with the view of stimulating prosecutions in such cases, that an informer should be entitled to a part of the forfeiture or fine. Many such statutes were in the Code of Laws of the state, and in force, at the formation of the present Constitution, when § 7, art. 8, was introduced for the first time into the organic law. It is to be presumed that its framers were familiar with these statutes. And, being familiar with them, it could hardly be that they intended to invalidate them, or, by such indirection, to prohibit a long established policy of the legislature, but that they simply intended to dedicate to the literary fund that part of such forfeitures and fines which was reserved to the state. So, then, in neither view, is § 1220 repugnant to the Constitution.

It is next contended that the minimum fine of \$100 is excessive, and in violation of § 11, art. 1, of the Constitution, which provides that “excessive fines” ought not to be imposed. The imposition and regulation of fines belong to the legislature, and to its discretion and judgment the widest latitude must be conceded. Fines are to be fixed with reference to the object they are designed to accomplish. The degree of criminality of the offense, or the illegality or impolicy of the act, they are intended to punish or prevent, are elements that must enter into their consideration. The peace of society and the welfare of the people occasionally require that the legislature shall create new offenses, and affix penalties for their violation, or alter the penalties for others already existing. What is to be the legislative guide, in the performance of this duty, but its sound judgment and the wisdom of experience? And how can the courts with reason or propriety question the action of the legislature, or control or restrain its discretion, except where the minimum penalty is so plainly disproportioned to the offense or act for the violation of which it is affixed as to shock the sense of mankind?

Bearing in mind these considerations, which must affect the regulation of fines, and the discretionary power of the legislature, how can the court say that the minimum fine prescribed in § 1220 is excessive? By what standard is it to determine this question? A fine that would prove efficacious in the case of an individual, and beyond which it would appear to be excessive to go, would be likely to prove ineffectual in the case of a corporation, with its aggregated wealth and power, and its disposition to act, oftentimes, in an arbitrary manner, because of the inability of private persons to contend against its illegal and wilful acts. The minimum fine prescribed by § 1220 cannot be declared to be excessive by any standard which the courts can apply, and this objection need not be further considered.

It is further contended that the statute is unconstitutional in that it fails to prescribe a maximum limit to the forfeiture, and thus places it within the power of a jury, through caprice or prejudice, to mulct a corporation with a fine of so large an amount as practically to destroy it. If a supposition so extreme, and so unlikely ever to be confirmed, were to be verified, in consequence of the failure to fix a maximum limit to the forfeiture, still we are unable to see how that would render the statute obnoxious to the bill of rights, or § 11, art. 1, of the Constitution. How could the bare possibility that an excessive fine might be imposed by a jury invalidate

the statute? If so, a statute otherwise valid might be annulled by a possibility that might never happen. If a jury were to render a verdict so excessive as to contravene the inhibition of the Constitution, the wrong or vice would lie in the verdict, and not in the statute. And the objection overlooks the fact that, if a jury were to impose such a fine, it is the province of the court, and would be its duty, to set aside the verdict. The question as to an excessive fine is a judicial one, and does not affect the validity of the statute. When, if ever, any such fine is imposed by a jury, the corrective hand of the court will annul it, in accordance with the letter and spirit of the bill of rights.

The only remaining objection to the statute is that it is repugnant to article 8 of the Amendments to the Constitution of the United States. It is a sufficient answer to this objection to say that the Supreme Court of the United States has held, time and again, that the 8th article of the said Amendments has reference solely to powers exercised by the government of the United States, and does not apply to the states. *O'Neil v. Vermont*, 144 U. S. 323, 38 L. ed. 450; *Eilenbecker v. Plymouth County Dist. Ct.*, 184 U. S. 81, 38 L. ed. 801; *Perryer v. Massachusetts*, 5 Wall. 475, 18 L. ed. 608, and *Livingston v. Moore*, 7 Pet. 469, 8 L. ed. 751.

There is no error in the judgment of the Circuit Court, and it is therefore affirmed.

NEBRASKA SUPREME COURT.

UNITED STATES NATIONAL BANK of
Omaha, *Plff. in Err.*,

v.
J. H. GEER *et al.*

(55 Neb. 462.)

- *1. Where commercial paper is indorsed in blank, the terms of the contract may be shown by parol evidence to be different from that which the law implies in such cases.
2. A restrictive indorsement in unambiguous language cannot be contradicted or explained by evidence resting in parol.
3. A certificate of deposit indorsed by the payee, "Pay to the order of R. C. O. Cash, for account" of the indorser is a restrictive indorsement, vests no general property to the paper in the indorsee, but merely constitutes him an agent for the purpose of collecting; and parol evidence is not admissible to establish that the transfer of the title was absolute.

(*Harrison, Ch. J., and Irvine and Ryan, CC., dissent.*)

(June 23, 1895.)

ERROR to the District Court for Nuckolls County to review a judgment in favor of

*Headnotes by NORVAL and SULLIVAN, JJ.

NOTE.—For oral evidence as to intention of person indorsing commercial paper before delivery, see note to Fullerton v. Hill (Kan.) 18 L. R. A. on page 86.

41 L. R. A.

defendants in an action brought to recover the amount alleged to be due on a certificate of deposit which was alleged to have become the property of the plaintiff. *Affirmed.*

The facts are stated in the opinions.

Messrs. J. C. Cowin and W. D. McHugh for plaintiff in error.

Mr. O. H. Scott, for defendants in error:

Usage cannot make a contract where there is none, nor prevent the effect of the settled rules of law.

National Bank v. Burkhardt, 100 U. S. 692, 25 L. ed. 769; *Barnard v. Kellogg*, 10 Wall. 890, 391, 19 L. ed. 990.

The restrictive words of indorsement on the certificate of deposit gave notice of the trust ingrafted upon it, and if the Capitol National Bank passed it off for its own debt or in any other manner violative of the trust, the transferee would take it subject to the trust.

1 Dan. Neg. Inst. 3d ed. p. 625, art. 690; *Real v. Somerville*, 5 U. S. App. 14, 50 Fed. Rep. 650, 1 C. C. A. 593, 17 L. R. A. 291; *Fifth Nat. Bank v. Armstrong*, 40 Fed. Rep. 46.

It was an indorsement that destroyed the negotiability of the drafts except for purposes of collection, and gave notice to all parties through whose hands they passed that they were the property of the transmitting bank.

First Nat. Bank v. Reno County Bank, 3 Fed. Rep. 261; *Balbach v. Prelinghuyesen*, 15 Fed. Rep. 675; *White v. National Bank*, 102 U. S. 661, 26 L. ed. 252; *Hoffman v. First Nat. Bank*, 46 N. J. L. 604; *Blaine v. Bourne*, 11 R. I. 119, 23 Am. Rep. 429; *First Nat. Bank*

v. *First Nat. Bank*, 76 Ind. 561, 40 Am. Rep. 261; *Sweeney v. Easter*, 1 Wall. 173, 17 L. ed. 688; *Levi v. National Bank*, 5 Dill. 107; 1 Dan. Neg. Inst. §§ 386, 387.

If the paper is indorsed "For collection for account of the depositor," and then deposited and credit given, the mere fact that paper thus indorsed is credited by a bank to the depositor as cash, and the privilege is accorded to him of drawing against the credit, may not, as it seems, be sufficient to vest the bank with the title to such paper.

Manufacturers' Nat. Bank v. Continental Bank, 148 Mass. 553, 2 L. R. A. 699; *Levi v. National Bank*, 5 Dill. 107; *Balbach v. Frelinghuysen*, 15 Fed. Rep. 683; *Morse, Banks, & Banking*, §§ 584, 586.

In its letter acknowledging the receipt of the Shelby draft the Fidelity Bank stated that it had credited the same "subject to payment." This must be understood as meaning that the credit was merely provisional, that is, conditional on payment, and that it did not intend to assume the risk of payment, or give an absolute credit, or put itself in any other relation of the paper than that of an agent for collection.

Branch v. United States Nat. Bank, 50 Neb. 470.

The mere crediting of the amount of the draft upon the account of the transmitting bank will not give the collecting bank any claim thereon prior to its collection.

Fifth Nat. Bank v. Armstrong, 40 Fed. Rep. 46; *First Nat. Bank v. Reno County Bank*, 3 Fed. Rep. 257; *Freeman's Nat. Bank v. National Tube Works Co.* 151 Mass. 413, 8 L. R. A. 42.

Where a banker has received from his correspondent a draft indorsed for collection, which is indorsed in like manner to his correspondent, he cannot appropriate the proceeds collected thereon to the latter's debt to itself and refuse to pay the owner.

Blaine v. Bourne, 11 R. I. 119, 23 Am. Rep. 429; *City Bank v. Weiss*, 67 Tex. 331, 60 Am. Rep. 29; *Sweeney v. Easter*, 1 Wall. 166, 17 L. ed. 681; *White v. Miners' Nat. Bank*, 102 U. S. 659, 26 L. ed. 251; *First Nat. Bank v. Reno County Bank*, 1 McCrary, 491, 3 Fed. Rep. 257.

The Capitol National Bank could not in any event acquire title or ownership in the paper in controversy, being at the time of the receipt thereof irretrievably insolvent.

Cragie v. Hadley, 99 N. Y. 131, 52 Am. Rep. 9; *St. Louis & S. F. R. Co. v. Johnston*, 133 U. S. 566, 33 L. ed. 683; *Anonymous*, 67 N. Y. 598; *Peck v. First Nat. Bank*, 43 Fed. Rep. 357.

Messrs. J. W. Deweese and F. E. Bishop, also for defendants in error on motion for rehearing:

An indorsement for the "account of" or "for collection," does not pass the title, but is notice to everybody handling the paper that the title rests in the original party so indorsing.

If there is a conflict in the testimony, the finding of the jury or the trial court will not be interfered with on the questions of fact.

Chicago, B. & Q. R. Co. v. Steear (Neb.) 73 N. W. 466.

The question whether or not in sending the certificate in question to the Capitol bank the

Hebron bank parted with the title is settled by the indorsement and the letter of transmittal.

This is a question of fact.

Metropolitan Nat. Bank v. Loyd, 25 Hun. 101, 90 N. Y. 580; *Titus v. Mechanics' Nat. Bank*, 35 N. J. L. 589; *Re State Bank*, 56 Minn. 119; *Fifth Nat. Bank v. Armstrong*, 40 Fed. Rep. 46; *St. Louis & S. F. R. Co. v. Johnston*, 133 U. S. 566, 33 L. ed. 683.

This question of fact is to be determined, however, by the indorsement itself, if it is a restricted indorsement.

If the authorities generally are so unsettled on the question at issue concerning this indorsement that the courts would feel justified in disregarding them and looking to the Nebraska decisions alone, then we refer to *Branch v. United States Nat. Bank*, 50 Neb. 470. In this case it is said: Such a form of indorsement is not intended to give currency to commercial paper, but, on the contrary, operates to prevent further circulation, and passes to the indorsee such a title only as will enable him to demand payment and enforce collection of paper thus transferred, and the owner may in such case control the collection of his paper, and may intercept the proceeds thereof in the hands of an intermediate agent.

The Capitol bank could not change itself from agent to debtor.

Commercial Nat. Bank v. Armstrong, 39 Fed. Rep. 691, 148 U. S. 51, 37 L. ed. 364; *Re State Bank*, 56 Minn. 119; *First Nat. Bank v. Bank of Monroe*, 33 Fed. Rep. 411; *Beal v. Somerville*, 5 U. S. App. 14, 50 Fed. Rep. 650, 17 L. R. A. 291, 1 C. C. A. 598.

The indorsement was one merely for collection, and did not pass title.

First Nat. Bank v. Reno County Bank, 3 Fed. Rep. 257; *Balbach v. Frelinghuysen*, 15 Fed. Rep. 675; *Re Armstrong*, 33 Fed. Rep. 406; *Armour Packing Co. v. Davis*, 118 N. C. 548; *Boykin v. Bank of Fayetteville*, 118 N. C. 566.

The title of the certificate in question did not pass to the Capitol bank by the indorsement and letter of transmittal; the crediting of the amount to the Hebron bank on the books of the Capitol bank without collection, and the right to charge back to the Hebron bank on failure to collect, did not change the effect of the indorsement; and parol proof could not be received as competent to change the effect of the written indorsement and letter of transmittal.

Commercial Nat. Bank v. Armstrong, 148 U. S. 51, 37 L. ed. 364; *White v. National Bank*, 102 U. S. 659, 26 L. ed. 251; *Wells, F. & Co. v. United States*, 45 Fed. Rep. 338; *Cecil Bank v. Farmers' Bank*, 22 Md. 149; *Re State Bank*, 56 Minn. 119; *Bank of the Metropolis v. First Nat. Bank*, 22 Blatchf. 59; *First Nat. Bank v. First Nat Bank*, 76 Ind. 561, 40 Am. Rep. 261; *Freeman's Nat. Bank v. National Tube Works Co.* 151 Mass. 413, 8 L. R. A. 42; *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 554, 2 L. R. A. 699; *Claflin v. Wilson*, 51 Iowa, 15; *Third Nat. Bank v. Clark*, 23 Minn. 263.

After the first hearing in the case, **Irvine, C.**, on December 9, 1897, filed the following opinion:

This was an action by the United States National Bank of Omaha to recover the amount of a certificate of deposit for \$5,500 issued by the defendants Geer and Mease (partners in the banking business, at Nelson, under the name of the Commercial Bank) to the order of the defendant Craven, by him indorsed, and transferred to the defendant the First National Bank of Hebron. It is claimed by the plaintiff that the certificate was by the Hebron bank sold and transferred to the Capitol National Bank of Lincoln, and by the Lincoln bank to the plaintiff. The Hebron bank, by its answer, asserts ownership in itself; claiming that the Lincoln bank received the certificate merely as the agent of the Hebron bank for the purpose of collection, and that, the indorsement being restrictive, the Lincoln bank could not and did not pass title to the Omaha bank. The right to the certificate, as between these two parties, is the only matter in contest; there being no issues affecting the other defendants, except such as may be incidental to the controversy indicated. The district court found in favor of the Hebron bank, and entered judgment accordingly.

Similar questions have been presented to the courts with such frequency, and such variety of detail, that there now appear in the books an array of opinions which would be hopelessly confusing, were they to be considered as tending to establish general rules of law for determining such questions. They range all the way from those holding that, as between the parties even, title passes by the legal import of words used by way of indorsement, regardless of intent, to those practically resting the matter on the presumed motive of the indorser, disregarding entirely the form of the transaction and the contractual intent. While intermediate to these extremes are found many cases presenting marked resemblances to that before us, and solved in different ways by different courts, we are saved the necessity of an analysis of such cases for the purpose of deducing therefrom a general rule of law, by attention to a very simple proposition recognized, in effect, by counsel on both sides. A moment's reflection will show that the question is not what legal relations result from a deposit for collection alone, or from a sale or discount, but it is whether this was such a deposit or a sale; that is, whether title passed. The solution of this question rests in determining the common intent of the parties,—a question of fact, and not of law. Among the cases expressly, or by clear implication, treating the question as one of fact, are *Metropolitan Nat. Bank v. Loyd*, 25 Hun, 101, 90 N. Y. 580; *Titus v. Mechanics' Nat. Bank*, 85 N. J. L. 589; *Re State Bank*, 56 Minn. 119; *Fifth Nat. Bank v. Armstrong*, 40 Fed. Rep. 46; *St. Louis & S. F. R. Co. v. Johnston*, 183 U. S. 566, 88 L. ed. 688.

There is no conflict in the evidence. Such doubts as exist arise as to inferences from facts proved, and not as to the existence of those facts. For ten years preceding the events in controversy, the Hebron bank and the Lincoln bank had a continuous course of dealings with one another; the Hebron bank keeping an account with the Lincoln bank, and remitting to it, from time to time, drafts, checks, and other instruments, which were, either at once or

upon collection, placed to the credit of the Hebron bank. It is said that the banks were not "correspondents," but, so far as the evidence discloses, the only difference between their relations and those of banks confessedly occupying the relation in contemplation by witnesses who use that somewhat ambiguous term, was that, while the Hebron bank drew drafts for general banking purposes upon its correspondents at Omaha and eastern cities, it drew against its credit at the Lincoln bank only for the purpose of transferring funds to its so called correspondents, and not in favor of its customers generally. So far as the treatment of paper sent by the Hebron bank was concerned, there was no difference between its relations with the Lincoln bank and with its Omaha correspondent. We mention this fact merely because, in argument, some stress seems to be laid on the supposed difference in relations. There is no room for doubt that the motive which influenced the Hebron bank to maintain the account at Lincoln was to secure an economical method of collecting its "foreign paper," or, more accurately, to secure an economical and speedy method of realizing cash, or a credit equivalent thereto, upon such paper. The motive of the Lincoln bank appears only by inference. It collected paper at par, except where it was itself subjected to expense in favor of third parties, and then charged against the paper only the expense so incurred. It paid the Hebron bank interest on daily balances. It seems quite clear that its motive, therefore, was to obtain the temporary use of the property of the Hebron bank so intrusted to it, for banking purposes. Paper remitted was divided into two classes, styled by most of the witnesses, "cash items" and "collections;" by officers of the Hebron bank as "sight items" and "time items." It is certain, however, that the latter nomenclature was inaccurate, as the distinction was only partly based on the time of payment. In the cash items were included all the instruments presently payable, on solvent banks, and between individuals of known solvency, other paper belonging to the collection class. The classification was determined by the character of the paper, and not by the form of indorsement, or the terms of the transmitting letter. Thus, the form of indorsement on both classes seems to have been, "Pay to the order of R. C. Outcault, Cash., for account of First National Bank of Hebron, Nebr." In remitting printed forms were used, bearing after the address the words, "Inclosed please find for collection and ———." The blank was usually filled with the abbreviation "Cr." All witnesses agree that the language so employed was not regarded as of any significance in determining the disposition of the paper. If the paper fell within the collection class, it was noted on the Hebron bank's collection register as having been sent, and its number on that register was noted on the blank with which it was transmitted. On receipt by the Lincoln bank, it was entered on the latter's collection register, and the Hebron bank was by mail notified that it had been received, and would obtain "prompt attention." When collected, it would be credited to the Hebron bank, and the latter notified of the fact. The Hebron bank would then

charge its amount to the Lincoln bank. If the paper was a "cash item," the Hebron bank would charge it to the Lincoln bank at once, on remitting it; and the Lincoln bank would credit it to the Hebron bank immediately on its receipt, and notify the Hebron bank that it had been so credited. No further notice would be sent the Hebron bank, unless the paper should be dishonored, in which event its amount would be charged to the Hebron bank, and the latter so notified, the paper being returned. Interest was paid on the general balance, including, as it did, these cash items, which had been credited upon their receipt, but not yet collected. It would seem that, by the custom of banks in such cases, when a credited item is dishonored interest thereon is charged to the remitting bank from the time credit was given, and that the Lincoln bank was authorized by such custom to so treat the Hebron bank, but it would also seem that such right was never in fact exercised. During the period referred to, certain notes of the Hebron bank were rediscounted by the Lincoln bank; and, some of these not being paid at maturity, the Lincoln bank exercised, and the Hebron bank acknowledged, the right to immediately charge them back to the Hebron bank in the same manner as dishonored cash items. The balance at any time to the credit of the Hebron bank was subject to be drawn upon, including that amount representing credited, but uncollected, cash items. The officers of the Hebron bank testify that they habitually refrain from so drawing until a reasonable time should elapse for the collection of such items, and that they regarded the privilege of sooner drawing, as an act of courtesy, and not a legal right; but there can be little doubt that both banks regarded the apparent balance as an available fund, and that abstention from drawing by the Hebron bank, prior to the collection of items, was an act of convenience or prudence on its part, rather than the recognition by it that the apparent credit was premature.

On the 20th day of January, 1898, the Hebron bank, being then the owner of the certificate of deposit in controversy, remitted it, with other items, to the Lincoln bank. It was indorsed in the usual manner, "for account of" the Hebron bank and was transmitted, as usual, "for collection and credit." It was treated by both banks as a cash item, in the manner above described. On sending it, the Hebron bank charged it to the Lincoln bank; and, on receiving it, the Lincoln bank credited it to the Hebron bank, and notified the latter of that fact. It was received by the Lincoln bank on the 21st, and the same day transmitted to the plaintiff, the Omaha bank, under substantially similar circumstances, and in pursuance of similar usages and a similar course of dealing. The Lincoln bank charged it to the Omaha bank, and the latter credited it to the Lincoln bank. On the morning of the 21st the account of the Lincoln bank was overdrawn with the Omaha bank some \$1,900. Including the amount of the certificate, credits were that day given the Lincoln bank amounting to over \$3,000. The Omaha bank that day paid out on checks and drafts of the Lincoln bank, nearly \$17,000. It thus appears that the whole of the credit obtained by the certificate was

the same day exhausted by payments actually made in favor of the Lincoln bank. The Lincoln bank was hopelessly insolvent, to the knowledge of its officers, and was closed on the afternoon of the 21st, never to reopen. On the 23d, the certificate was presented to the Nelson bank, and payment refused, because of the claim interposed by the Hebron bank. Perhaps certain other facts of which the court takes notice are of some import. Nelson, where the certificate was payable, is in the county adjoining that in which Hebron is located, to the west, and the two towns are connected by a line of railroad. Lincoln is a considerable distance to the northeastward of both towns, and Omaha is still further northeast. It is not claimed that the diversion of paper from its natural geographical course is in itself any proof that it is being transmitted for other purposes than collection, but the fact that the Hebron bank found it profitable to send the paper through such a course indicates that the purpose of the Lincoln bank was to use the paper otherwise than as a direct collecting agent, and throws some light on the understanding of both parties as to what such use might be.

Certain aspects of the foregoing facts tend, it is argued, to stamp the transaction as one between a principal (the Hebron bank) and its agent for collection. One of these features is that the Lincoln bank was not what is known as a "correspondent" of the Hebron bank. As already indicated, we cannot conceive that any importance attached to this distinction, whatever it may be, because there can be no doubt that their arrangements contemplated the establishment of the relationship of debtor and creditor, at one time or another, with reference to this particular instrument or its proceeds. Next, it is argued that the arrangement between the banks was for a collection agency, and that, therefore, the transaction should be treated as in the nature of a collection. The motive of the Hebron bank in entering into its relations with the Lincoln bank was, as stated, undoubtedly to obtain the speedy conversion of foreign paper into cash, or its equivalent; but that this object was not intended to be effected by the specific collection and remission of each instrument forwarded is attested by every transaction between the two banks for a period of many years. It was probably immaterial to the Hebron bank whether it collected the paper through an agent for its own benefit or, in effect, sold it, and at once obtained credit therefor; and in any event the motive of the Hebron bank is not the controlling circumstance. It is perfectly clear that the real understanding between the banks was that the paper should become that of the Lincoln bank, to handle in its own way and for its own benefit, else we must suppose that it was acting in responsible business matters wholly gratuitously. Nor can we see that the practice and conceded right of the Lincoln bank to charge back dishonored items can be of any great weight in determining the nature of the contract. The Hebron bank was responsible as indorser on all such paper, and it seems to have been the practice of the Lincoln bank to take the necessary steps to charge the Hebron bank as such. That liability alone

justified the Lincoln bank in charging back dishonored paper against any credit then existing. It is argued that the credit given on receipt of cash items was, because of such practice, provisional only, and insufficient to bind either party; but it was so far absolute as to permit the Hebron bank to draw against such credit (in other words, to enforce payment by the Lincoln bank), and seems only to have been conditional in the sense that any purchase of negotiable paper is conditional when based on a responsible indorsement, and with the understanding that in case of dishonor the holder will look immediately to the indorser. Nor was the form of indorsement, under all the facts of the case, indicative of a transfer for collection merely. It is probably true—and we consider the case on the theory—that it was so restrictive as to charge the Omaha bank with notice of a reserve title in the indorser, if the title were reserved. But whatever may be the law elsewhere, it is the law of this state that as between the immediate parties the true relationship may be shown, notwithstanding the form or terms of the indorsement itself. *Roberts v. Snow*, 27 Neb. 425; *Dusenbury v. Albright*, 31 Neb. 845; *Salisbury v. First Nat. Bank*, 37 Neb. 872; *Holmes v. First Nat. Bank*, 38 Neb. 326; *Corbett v. Feizer*, 47 Neb. 269. This being so, when we consider the uniform course of business between these parties it seems that the real significance of the language of this indorsement was to pass the certificate, not for collection merely, but as the property of the Lincoln bank, for the purpose of its amount going forth with to the credit of the Hebron bank on the account kept therewith. The form of the transmitting letter certainly tends towards a remittance for collection, but in view of the admitted fact that all classes of paper were remitted under this same form, and that they were differently treated under this same instruction, we cannot permit this fact to control the more emphatic language conveyed by the acts of the parties. Stress is also laid on a note appearing on the printed form whereon acknowledgments were made by the Lincoln bank of the receipt and credit of such items. This was as follows: "This bank, in receiving collections elsewhere than in Lincoln, acts as your agent, and assumes no responsibility beyond that of due diligence on its part." But this somewhat vague notice applies by its terms to "collections" only, and the blank bore upon it a separate column for collection, on which this certificate did not appear; this like all cash items, appearing in a column headed "Credited." Thus the notice referred to made even more distinct the practical difference between the two classes of items, and showed, if it showed anything, that the cash items were not received for collection.

On the other hand, there are certain facts which to our mind unmistakably stamp the transaction as a sale, and none is inconsistent with that theory. That there were two classes of items, the classification being based manifestly on the practicability of immediately converting the paper into cash, or using it as such, without subjecting it to a process of collection, and that this instrument was treated by both parties as belonging to the

cash class; that credit was immediately given, before the Lincoln bank had disposed of the paper or collected its proceeds; that interest was paid upon this credit; and that it was subject to draft,—all these facts point towards a sale. Mere bookkeeping, it is true, does not control the question. Charges and credits may be made merely for convenience in bookkeeping. But when the evidence shows that they were not so made, that they were not made at all with items confessedly held for collection, and that when made as to other items, such entries were accompanied by such results as the payment of interest and the honoring of drafts, the matter is no longer one of bookkeeping, but is essential to the transaction itself. It is inconceivable that the Lincoln bank would collect gratuitously, and pay interest on, paper which it did not own, and before it was collected, for the privilege of performing this gratuitous service. It is absolutely certain that the Lincoln bank undertook such service, so advanced credit, and paid interest, for the privilege of using the paper for its own purposes and its own profit, as it did in this case, by selling it to the Omaha bank, and that the Hebron bank perfectly understood that this was the object, and that such paper was so treated. In the light of the usage of the banks the contract was, in effect, this: The remittance by the Hebron bank was a proposal to sell the certificate for its face; the Lincoln bank to immediately place so much at the disposal of the Hebron bank, and to pay interest thereon until the Hebron bank should demand the money or its equivalent; the Hebron bank assuming the ordinary liability of an indorser, with the express understanding added thereto that such liability should be subject to immediate enforcement in case of dishonor, by charging the amount against the credit maintained in the Lincoln bank. The mailed acknowledgment was an acceptance of that proposal. No clearer case of a transfer of title could well be contrived. For reasons stated at the outset, we do not consider cases adjudicated elsewhere as of any force in determining the facts of this case; but it is believed that all the cases holding, under somewhat similar circumstances, that title did not pass, present such differences in the facts as to render them readily distinguishable. For instance, in what is perhaps the strongest case cited (*Beal v. Somerville*, 5 U. S. App. 14, 50 Fed. Rep. 647, 1 C. C. A. 598, 17 L. R. A. 291, there was no agreement, express or implied, that the checks deposited should be treated as cash, or that the credit given might be drawn against. Interest was not paid. Other cases treat an indorsement "for collection" as controlling, and incapable of being extended by extrinsic evidence. Others neglect the fundamental rule that a deposit generally creates simply the relation of debtor and creditor, and is not a bailment.

It is suggested that as the Lincoln bank was at the time insolvent, to the knowledge of its officers, it was incapable of taking, and consequently of transmitting, title. This is stating the rule too strongly. The rule invoked is only the application of the general law of fraud in sales induced by false representations; keeping the bank open, and holding it out as ready to transact business, being

an implied representation of solvency. A sale made to such a bank would not be void. It would be, at the most, voidable, at the option of the vendor or depositor, and could not be avoided after the rights of innocent third parties had attached. As already intimated, the indorsement may have been so restricted that the Omaha bank could not claim as an innocent purchaser if title had not in fact passed to its vendor; but title did pass, and the Lincoln bank owned the certificate, unless and until the Hebron bank rescinded the sale. Before this happened, it could and did pass title to a stranger who parted with value therefor, and it was then too late for the Hebron bank to assert its right to rescind.

Reversed and remanded.

Norval and Sullivan, JJ., formulated the opinion of the court:

At the last term of this court a decision was entered in this case reversing the judgment of the trial court. Upon a proper application, a rehearing was granted, and the cause has been a second time submitted for our consideration. The issues involved, and the essential facts of the case, are stated with sufficient accuracy in the former decision, reported in 58 Neb. 67. In reversing the judgment below, we proceeded upon the theory that the form of the indorsement of the certificate of deposit was ambiguous and not conclusive, as to the intentions of the parties; that it was permissible to show by parol evidence the exact nature of the contract; and that the only inference to be drawn from the proofs established a sale of the draft, and not a bailment for collection. A careful re-examination of the record and questions thereby presented, assisted by the able argument of counsel, has convinced us that the former decision was erroneous. In the opinion it was said: "Whatever may be the law elsewhere it is the law of this state that, as between the immediate parties, the true relationship may be shown, notwithstanding the form or terms of the indorsement itself,"—citing *Roberts v. Snow*, 27 Neb. 425; *Dusenbury v. Albright*, 31 Neb. 345; *Salisbury v. First Nat. Bank*, 37 Neb. 872; *Holmes v. First Nat. Bank*, 38 Neb. 326; *Corbett v. Fetzner*, 47 Neb. 269.

The adjudications of this court do not warrant the statement of the rule as broadly as above indicated, nor do the decisions elsewhere support such a doctrine. The general rule is, and it has been frequently asserted by this court, that the terms of a written contract cannot be contradicted, varied, or explained by parol evidence of a prior or contemporaneous oral agreement between the parties. *Hamilton v. Thrall*, 7 Neb. 210; *Dodge v. Kiene*, 28 Neb. 216; *Watson v. Roode*, 30 Neb. 264; *Kaserman v. Fries*, 33 Neb. 427; *Mattison v. Chicago, R. I. & P. R. Co.* 42 Neb. 545; *Clarke v. Kelsey*, 41 Neb. 766; *Maxwell v. Burr*, 44 Neb. 81; *Commercial State Bank v. Antelope County*, 48 Neb. 496; *Waddle v. Owen*, 43 Neb. 489; *Nebraska Exposition Assn. v. Tounley*, 46 Neb. 893. It is true this court has more than once decided that, when the rights of bona fide purchasers of negotiable paper for value before maturity are not involved, it is competent to show by parol evidence in cases of indorse-

ment in blank of such paper that the terms of the agreement between the parties was other and different from that which arises by presumption of law. *Holmes v. First Nat. Bank*, 38 Neb. 326; *Corbett v. Fetzner*, 47 Neb. 269. The principle underlying these cases does not contravene the general rule recognized and applied by this and other courts that parol contemporaneous evidence cannot be received to contradict or vary the terms of a written instrument for the obvious reason that the contract of a blank indorsement is not expressed in writing, but rests in legal implications, and this prima facie presumption of law may be overthrown, as between the original parties to such an indorsement, by the admission of competent parol evidence establishing the real terms of the agreement. If the law conclusively presumed the liability created by an indorsement in blank of commercial paper, then, of course, the actual terms of the contract would not be a proper subject of inquiry, and neither party would be permitted to show by parol the true agreement. But the presumption of liability arising from such an indorsement is prima facie merely, and not conclusive; hence, as against all except bona fide holders for value, the true terms of the contract may be shown by evidence resting in parol. The indorsement of the Hebron bank on the certificate of deposit involved herein was an express written contract, not open to contradiction or explanation by proof of extrinsic facts, and conclusively proves an agency merely, and that the title and ownership of the paper never passed to the Capitol National Bank. This doctrine is sustained by an unbroken line of authorities. In *First Nat. Bank v. Reno County Bank*, 3 Fed. Rep. 257, it was distinctly decided that an indorsement of a bill of exchange directing the drawee to pay to another "on account of" the indorser, or "for collection," is a restrictive indorsement, carrying with it notice that the indorser did not thereby part with title to the paper, or to its proceeds when collected. To the same effect are *Beal v. Somerville*, 5 U. S. App. 14, 50 Fed. Rep. 647, 1 C. C. A. 598, 17 L. R. A. 291; *Hoffman v. First Nat. Bank*, 46 N. J. L. 605; *Cecil Bank v. Farmers' Bank*, 22 Md. 143; *Morse, Banks & Banking*, § 217; *Blaine v. Bourne*, 11 R. I. 119, 23 Am. Rep. 429; *Soreny v. Easter*, 1 Wall. 166, 17 L. ed. 681; *Balbach v. Frelinghuysen*, 15 Fed. Rep. 675; *First Nat. Bank v. First Nat. Bank*, 76 Ind. 561, 40 Am. Rep. 261; *White v. National Bank*, 103 U. S. 658, 26 L. ed. 250. *Leary v. Blanchard*, 43 Me. 269, was an action upon a promissory note, indorsed by the payee, "Pay to Arthur Leary, or order, for account of the Atlas Mutual Insurance Co." It was ruled that the indorsement was restrictive, and parol evidence was inadmissible to show that the transfer was absolute. A draft bore the following indorsement: "Pay Penn Bank, or order, for account of People's Bank, McKeesport, Pa., C. R. Stuckslager, Cashier. D. Gardner, As. Cash." This indorsement was before the court for consideration in *Freeman's Nat. Bank v. National Tube Works Co.* 151 Mass. 418, 3 L. R. A. 42, and it was held to be restrictive for collection, merely giving notice that the title and ownership of the paper had not passed from the

indorser. *Third Nat. Bank v. Clark*, 23 Minn. 263, was an action on a promissory note made payable to the order of the Williams Mower & Reaper Company, and indorsed by the payee to the Third National Bank of Syracuse, or order, for collection. It was adjudicated in that case that the indorsement was restrictive, and that parol evidence was not admissible to prove it absolute. *Rock County Nat. Bank v. Hollister*, 21 Minn. 885. In *Armour Bros. Bkg. Co. v. Riley County Bank*, 30 Kan. 163, there was involved the scope and effect of the following indorsement on a draft: "Pay W. H. Wyants, Esq., cashier, or order, for account of the Riley county bank of Manhattan, Kansas. J. K. Winship, Cashier." Parol evidence was offered to contradict the indorsement which, upon objection, was excluded by the trial court. Brewer, J., in delivering the opinion of the court on review, used this language: "The ruling of the district court was founded upon the idea that this indorsement is a restrictive indorsement, defining the rights and title of the indorsee, and not open to contradiction or explanation by parol testimony. In other words, this indorsement is a written contract, conclusive as against any parol testimony, and which shows absolutely that the plaintiff was not the owner, the real party in interest, but only held the draft as agent, and for purposes of collection. That this is a restrictive indorsement, and that it operated to transfer the draft to the plaintiff only as agent for purposes of collection, cannot be doubted. (Byles, Bills, p. 152; 1 Dan. Neg. Inst. § 698; *Blaine v. Bourne*, 11 R. I. 119, 23 Am. Rep. 429, and cases cited in the opinion). In this latter case, speaking of an indorsement almost identical with the one at bar, the court says: 'The indorsee is rather an agent of the indorser with power of substitution, and the bill is still in the possession of the indorser by his agent.' And again: 'The words are notice that the restricted indorsee has no property in the bill.' It will be perceived that this is not a mere blank indorsement, but one in which the contract is written out in full, and therefore, like any other written contract, not to be contradicted or varied by parol evidence (Greenl. Ev. §§ 277-281, and 282; 1 Dan. Neg. Inst. § 717), so that upon the face of the paper it appears affirmatively that the plaintiff is not the owner, but only an agent for collection." No case has come within the range of our vision which is in conflict with the adjudication already mentioned, nor is it believed that any decision can be found which lends support to the doctrine that it is competent to prove, in case of a restrictive indorsement like the one before us, that the actual contract was different from the one expressed in writing on the back of the certificate of deposit.

It is argued by counsel for plaintiff in error that the contractual rights of the parties are not expressed in the indorsement in question; that the law infers a contract therefrom. We quote from the brief: "When one writes upon the back of a negotiable instrument, 'Pay to the order of A. B. for account of,' and signs it, his contract is not set forth in the writing. His obligations under this indorsement, and the rights and duties of the indorsee under this indorsement, are not in any wise set forth in the indorsement. It is not a written contract

stating the mutual rights and obligations of the parties. The law merchant, in the case of this indorsement as in the case of one in blank, infers from the indorsement a certain contract, and it is this inferred contract which the law enforces when it holds the signer to the usual obligations. From a restrictive indorsement the law infers a certain contract; from an unrestricted indorsement the law infers a certain other contract. In both cases it must be clear the contract is inferred, and in no sense written." In this contention counsel are in error. This indorsement in unequivocal language shows that the title to the paper, except for the purposes of collection, was to remain in the Hebron Bank, and that the indorsee, the Capitol National Bank, was agent merely for collection. The rights of the parties under this indorsement do not rest upon any implication of law, but are determined by the contract of the parties as expressed in the indorsement. And to permit oral evidence to be received to show the agreement was different from that indicated by the language used would be in violation of the principle that a written contract may not be varied by parol. The same result would be reached whether the indorsement be regarded the entire contract, or said indorsement and letter transmitting the certificate of deposit be construed together. The letter of transmittal states that the certificate was "for collection and credit." These words clearly indicate that the transmission was for the purpose of collection, and, when collected, the proceeds were to be credited to the transmitting bank. Until the collection was made, the relation of debtor and creditor was not to exist. To hold otherwise would disregard the meaning of the word "collection." In *Branch v. United States Nat. Bank*, 50 Neb. 470, it was decided that the legal title of commercial paper indorsed "for collection" rests in the indorsee only to the extent of authorizing him to demand and enforce payment, and that the true owner of the paper so indorsed may control the same until paid in full, and may intercept the proceeds thereof in the hands of an intermediate agent.

The written contract is unambiguous, and it is unnecessary to resort to parol evidence to ascertain the true intention of the parties. An explicit written agreement cannot be contradicted or qualified by proof of any usage, custom, or course of dealing, while proof of them is permissible in cases of doubt where the contract is expressed in vague and ambiguous language. The indorsement in question, and the letter of transmittal, neither singly nor when considered together, show that the Hebron bank was divested of its title to the certificate of deposit in question. This is conceded by counsel for plaintiff in error, but they rely upon the prior course of dealing and the acts and conduct of the parties to overthrow the plain and unambiguous written contract of the parties, and to establish a transfer of title to the paper. As we have seen, evidence of such matters is not admissible. The fact that the Hebron bank repeatedly sent remittances to the Capitol National Bank, the paper containing restrictive indorsements the same as this, and from time to time drew against its remittances, and was allowed interest from the Capitol National Bank on its aver-

age balances, is insufficient to establish that the transfer of this paper was absolute. *Scott v. Ocean Bank*, 28 N. Y. 289; *Fifth Nat. Bank v. Armstrong*, 40 Fed. Rep. 46.

Upon principle and authority we are fully persuaded that the court did not err in finding that the Hebron bank never parted with its title to this certificate of deposit.

The judgment of reversal entered herein is vacated, and the judgment of the District Court is affirmed.

Irvine, C., dissenting:

I adhere to the former opinion. It seems to me that the opinion now held by the majority of the court logically overrules a number of earlier cases. If not, it certainly creates a distinction which is confusing, and which has no reason for its existence. It has been held that, as between the original parties, parol evidence is receivable to vary or to contradict the terms of a general indorsement, and also that such evidence may be received to show that the liability of those signing the note on its face is other than would be implied from the place and character of the signatures. The indorsement in this case is no more the expression of a complete contract than is a general indorsement. On its face it is simply an authority to the maker of the certificate to pay the same to R. C. Outcalt for the benefit in some way of the indorser. It is only by implication of law that these words acquire any of the distinctive features of a contract. To show that the reasons for allowing extrinsic evidence as between the parties apply as well to restrictive as to general indorsements, the following language from *Dye v. Scott*, 35 Ohio St. 194, 35 Am. Rep. 604, which has been quoted with approval by this court in *Holmes v. First Nat. Bank*, 38 Neb. 326, is pertinent: "If there was a contemporaneous contract between the parties upon which the indorsement was made, both reason and justice require that, as between themselves, the actual, and not the presumed, contract should be enforced; and, as between them, oral testimony should be admissible to prove the contemporaneous contract. This will not necessarily, or even probably, impair the currency or credit of the instrument as commercial paper. Prior parties to it will not be affected, nor will the rights of subsequent indorsees without notice

be impaired or limited in any degree." The above is a statement of a rule generally prevalent with regard to negotiable instruments. Often they are drawn contrary to the real relations of the parties for the very purpose of giving rights to transferees which could not be acquired were the true relations disclosed. A familiar instance is that of an accommodation note or an accommodation indorsement. In the case of the note the contract to pay a certain sum at a certain time is distinctly and fully expressed, and, where rights are claimed under the law merchant, the liability attaches. But if the payee himself should sue, he would be defeated by extrinsic evidence to show that, as between the parties, the note did not express the contract. In this case no rights are claimed under the law merchant. It is not sought to charge anyone upon or through the indorsement. The question is simply whether the Hebron bank sold the certificate to the Lincoln bank. To transfer negotiable paper no compliance with the law merchant is necessary. It may be transferred so as to pass the holder's rights by assignment like any other chose in action. If it had not been indorsed at all, recovery could be had by proof of a sale. If it had admittedly been first transmitted as a bailment for collection, and the Lincoln bank had afterwards bought it without further indorsement, that fact might be shown. The chief fallacy in the majority opinion lies in treating the case as if rights were claimed under the law merchant, whereas the law merchant is not necessarily involved in the case. The form of indorsement is merely evidence of what the contract was, but it was only a single step in the transaction, and is explained by the other evidence and the acts of the parties in such a way as not even to show a bailment. Other matters are somewhat fully discussed in the former opinion, and I do not care to again refer to them; nor shall I enter into a discussion of the authorities, except to the extent of repeating that an inspection of the numerous cases cited in the briefs will show that in nearly all of them extrinsic evidence was considered to ascertain the contract, and that the issue has been treated as one of fact in the light of such extrinsic evidence.

Harrison, Ch. J., and **Ryan, C.**, concur in the foregoing dissenting opinion.

ILLINOIS SUPREME COURT.

Re Petition of Daniel H. KOCHERSPERGER,
Collector, *Appt.*,

v.
Josephine B. DRAKE et al.

(167 Ill. 122.)

1. **A tax on the succession to property** of a deceased person is not a tax upon the property itself, but on the right of succession thereto.
2. **A statute creating classes of the property of deceased persons for the purpose of a succession tax**, although it exempts some classes from taxation and provides

different rates for other classes, but which is uniform as to all property in the same class, does not violate Const. 1870, art. 9, requiring property to be taxed according to value, since no person can take property by inheritance or devise except by statute, and the power of the state to regulate the question includes the power to create classes of such property.

(*Craig, J., dissents.*)

(May 11, 1897.)*

*A writ of error taking this case to the Supreme Court of the United States was dismissed by that court April 25, 1898.

NOTE.—The validity of an inheritance tax which imposes a higher rate on large sums than small ones is sustained by the Supreme Court of the United States in *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037.

41 L. R. A.

For state decisions as to the constitutionality of succession taxes, see *State, Garth, v. Switzer (Mo.)* 40 L. R. A. 280, and other cases cited in footnote thereto.

A PPEAL by petitioner from a judgment of the Cook County Court dismissing a petition for the appointment of an appraiser to ascertain the tax to be paid by the estate of John B. Drake, deceased. *Reversed.*

The facts are stated in the opinion.

Messrs. Frank L. Shepard and Robert S. Iles, for appellant:

After a person is dead and no longer capable of directing or controlling his wealth, the state, in accordance with one of the fundamental principles of social organization, steps in, continues the ownership, and vests in those to whom the deceased has designated his property. Or, if he should die without a will, the state performs the same office practically, through its statutes of descent and distribution.

This right to take by will or from the intestate is a mere privilege conferred by statutory law, and is not a natural right. And this privilege can be enlarged, restricted, or taken away altogether.

2 Bl. Com. p. 11; *Strode v. Com.* 52 Pa. 182; *Eyre v. Jacob*, 14 Gratt. 430, 78 Am. Dec. 867; *Minot v. Winthrop*, 162 Mass. 119, 26 L. R. A. 259.

A law, such as the one under consideration, cannot be denominated as a property tax, but is an excise, duty, or assessment imposed by the legislature upon the privilege of taking or receiving property left by a decedent.

Scholey v. Rew, 23 Wall. 331, 23 L. ed. 99; *Eyre v. Jacob*, 14 Gratt. 430, 78 Am. Dec. 867; *Mager v. Grima*, 8 How. 490, 12 L. ed. 1163; *State v. Hamlin*, 86 Me. 495, 25 L. R. A. 632; *Minot v. Winthrop*, 162 Mass. 119, 26 L. R. A. 259; *Strode v. Com.* 52 Pa. 182; *Tyson v. State*, 28 Md. 577; *State v. Dalrymple*, 70 Md. 294, 3 L. R. A. 872; *State, Schwartz, v. Ferris*, 58 Ohio St. 814, 30 L. R. A. 218; *Dos Passos*, Inheritance Tax Law, § 8, p. 81.

The inheritance tax, being a duty on a right or privilege of succession, is not a tax on property under the provision of state and Federal Constitutions, and being a mere exercise of the power which every state possesses of regulating the manner and terms upon which property may be transmitted, and imposing a duty thereon, is not in conflict with article 14 of the Constitution of the United States.

Dos Passos, Inheritance Tax Law, § 18; *Mager v. Grima*, 8 How. 490, 12 L. ed. 1168.

The state, in the absence of constitutional prohibition, has unlimited powers in the matter of taxation.

Eurigh v. People, 79 Ill. 214; *Cooley*, Const. Lim. p. 479; *Braun v. Chicago*, 110 Ill. 194.

And the state has the power to tax a privilege, such as the devolution of property, and this right of the state to impose this tax is based upon the broad constitutional power of the state to modify, amend, or annul altogether the laws providing for the transmission of property from decedent to those who take under him.

Dos Passos, Inheritance Tax Law, p. 81; *Eyre v. Jacob*, 14 Gratt. 427, 78 Am. Dec. 867; *Strode v. Com.* 52 Pa. 182; *Du Page County Supers. v. Jenks*, 65 Ill. 277.

Our Constitution only requires that a tax on privileges shall be "uniform as to the class upon which it operates."

Without the limitations imposed by our Constitution upon the general assembly in 41 L. R. A.

matters of taxation, the general assembly would be the sole judges of the manner in which taxes should be imposed and collected, and within those express limitations the general assembly now has that power.

People v. Thurber, 18 Ill. 554; *East St. Louis v. Wehrung*, 46 Ill. 392; *Timm v. Harrison*, 109 Ill. 598; *Dennehy v. Chicago*, 120 Ill. 627.

The so-called exemptions of this act are merely the enumeration of interests not made subject to the tax, and are not exemptions within the meaning of the Constitution.

Re Sherwell, 125 N. Y. 376.

Messrs. Prussing & McCulloch for appellees.

Phillips, J., delivered the opinion of the court:

On November 12, 1895, John B. Drake, a resident of Cook county, Illinois, died, leaving a last will and testament, in and by which Josephine C. Drake, Timothy B. Blackstone, and the Illinois Trust & Savings Bank were appointed his executors and trustees. Under the provisions of the will, property in excess of \$20,000 passed to Josephine C. Drake, widow of John B. Drake; \$5,000 each passed to Fanny D. English, Mrs. Sallie Sausser, and Ella Drake, nieces of the said John B. Drake; \$1,000 each passed to Samuel W. Parker and Henry Morgan, and \$500 each passed to John Gabriel and Bridget Huges, strangers to the blood, and in no wise related to the said John B. Drake; property in excess of \$2,000,000 passed to the said executors, to be held in trust for the use and benefit of the wife and children of the said John B. Drake. A petition was filed by the county treasurer of Cook county in the county court of Cook county, asking for the appointment of an appraiser to appraise said estate, under "An Act to Tax Gifts, Legacies, and Inheritances in Certain Cases, and to Provide for the Collection of the Same," approved June 15, 1895, in force July 1, 1895. To the petition in this case a demurrer was interposed on the part of the executors and trustees, which was sustained by the court, and the petition dismissed, and a judgment entered for costs. The judgment of the court was that the act was unconstitutional.

The question presented by this appeal involves the constitutionality of the act entitled "An Act to Tax Gifts, Legacies, and Inheritances in Certain Cases, and to Provide for the Collection of the Same," approved June 15, 1895.

The existence of the common law within the state of Illinois results from the provisions of chapter 28, Rev. Stat., which declares that the common law of England, and all statutes of a general nature made prior to the fourth year of James I., shall be the rule of decision, and shall be considered as of full force, until repealed by legislative authority. By that authority, chapter 89, Rev. Stat., entitled "An Act in Regard to the Descent of Property," and chapter 148, entitled "An Act in Regard to Wills," were enacted, which in effect repeal the common law in reference to inheritances, and also repeal the statute enacted prior to the fourth year of James I. in reference to devises. There is not in force in this state, under chapter 28, any law providing for the descent or

devise of property. The law of descent, and the right to devise and take under a will within the state of Illinois, owe their existence to the statute law of the state. The right to inherit and the right to devise being dependent on the legislative acts, there is nothing in the Constitution of this state which prohibits a change of those subjects at the discretion of the lawmaking power. The law of descent and devise being the creation of the statute law, the power which creates may regulate and may impose conditions or burdens on a right of succession to the ownership of property to which there has ceased to be an owner because of death, and the ownership of which the state then provides for by the law of descent or devise. The imposition of such a condition or burden is not a tax upon the property itself, but on the right of succession thereto. To deny the right of the state to impose such a burden or condition is to deny the right of the state to regulate the administration of a decedent's estate. When by the act of June 15, 1895, for the taxation of gifts, legacies, and inheritances in certain cases, the legislature prescribed that a certain part of the estate of the deceased person should be paid to the treasurer of the proper county for the use of the state, it was, in effect, an assertion of sovereignty in the estate of deceased persons. Whether to be levied and determined as a tax or penalty, the principle is that, where one owning an estate dies, that estate is to be assessed in accordance with the provisions of the act, and the tax to be paid for the right of inheritance. The amount reserved to the state from the estate of a deceased owner is not a tax on the estate, but on the right of succession. By the Constitution of 1870 it is provided (art. 9):

"Sec. 1. The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property,—such value to be ascertained by some person or persons, to be elected or apportioned in such manner as the general assembly shall direct, and not otherwise; but the general assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, . . . showmen, jugglers, inn-keepers, grocery keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors of patents and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates.

"Sec. 2. The specification of the objects and subjects of taxation shall not deprive the general assembly of the power to require other subjects or objects to be taxed in such manner as may be consistent with the principles of taxation fixed in this Constitution."

Under these provisions of the Constitution, it is insisted that the levy of the succession tax which is required to be made by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property, and that such law shall be uniform as to the class upon which it operates, is defeated by the provisions of the statute above

quoted. That statute provides that certain classes of property which were a part of an estate shall be exempt from taxation under these provisions, and when the legislature provides other classes of property, some of which shall pay \$1 per \$100, others \$2, and others \$3, and others \$4, and still others \$5, and again others \$6 per \$100, six different classes are created, under and by which a tax is levied by valuation on the right of succession to a separate class of property. The class on which a tax is thus levied is general and uniform, and pertains to all species of property included within that class. A tax which affects the property within a specific class is uniform as to that class, and there is no provision of the Constitution which precludes legislative action from assessing a tax on that particular class. By this act of the legislature six classes of property are created heretofore absolutely unknown. It is those classes of property, depending upon the estate owned by one dying possessed thereof which the state may regulate as to its descent and the right to devise. The tax assessed on classes thus created is absolutely uniform on the classes upon which it operates, and, under the provisions of the statute, is to be determined by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property inherited; and it is not inconsistent with the principle of taxation fixed by the Constitution, and is clearly within the sections of the Constitution quoted. No want of uniformity with one living who owns property can be urged as a reason why the statute makes an inconsistent rule. No person inherits property or can take by devise, except by the statute; and the state having power to regulate this question, may create classes and provide for uniformity with reference to classes which were before unknown. Laws of this character have been sustained in Pennsylvania, New York, Maryland, Virginia, North Carolina, and other states. They have been held invalid in New Hampshire and Ohio, and some other states. We are not disposed to enter into an analysis of these cases, and a consideration of the principles on which they have been decided. The broad principle presented is that the legislature may create new classes of property with reference to estates under which they may regulate the right to inherit or devise or take under devise, and, such right existing, such classes may be created, and, as created, may be uniform, and the assessment by valuation, when declared to operate equally on the right of succession to such classes is not a violation of the provisions of the sections of article 9 of the Constitution of the state of Illinois. We hold the act entitled "An Act to Tax Gifts, Legacies and Inheritances in Certain Cases, and to Provide for the Collection of the Same," approved June 15, 1895, to be consistent with the Constitution of the state of Illinois.

The county court erred in sustaining a demurrer to the petition, and its judgment is reversed and the cause remanded, with directions to appoint an appraiser to appraise the estate and assess a tax under that statute.

Craig, J., dissents.

NEW JERSEY COURT OF ERRORS AND APPEALS.

SUPREME COUNCIL OF THE GOLDEN STAR FRATERNITY, *Plff. in Err.*,

v.

Margaret CONKLIN.

(60 N. J. L. 565.)

- *1. The declaration of his age, made by an applicant in his petition for membership in a beneficial society, which has been accepted, and a beneficiary certificate issued, and the required payments made and received for a series of years, will be presumed to be correct, until the presumption is overcome by competent proof.
2. A Bible in which the names and dates of birth of several members of the same family are recorded, without proof of when or by whom written, or of the knowledge the writer had of the facts recorded, or that the persons whose names and dates of birth are written therein ever acknowledged it to be an authentic family record, and when the entries in the book are not shown to have been contemporaneous with the facts stated, is not competent proof of the age of any person whose name may be recorded therein.

(November 17, 1897.)

ERROR to the Circuit Court for Essex County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a benefit certificate. *Affirmed.*

The facts are stated in the opinion.

Mr. Joseph A. Beecher, for plaintiff in error:

The contract between the plaintiff in error and Daniel F. Conklin, deceased, embraces the statute law, the constitution, the by-laws, the rules and regulations, the application for beneficiary membership (which included his signed statement and agreement) and the ben-

*Headnotes by NIXON, J.

NOTE.—*Entries in Family Bible or other religious book as evidence.*

- I. General rule.
- II. Grounds upon which admitted.
- III. Cases in which admitted.
 - a. In general.
 - b. On the testimony of the party making them.
 - c. On the testimony of a party to the action.
 - d. On the testimony of a third party.
- IV. Time of entry material.
- V. Necessity of production of book.
- VI. Necessity of proof of handwriting.
- VII. When declarant is alive.
- VIII. When excluded.
- IX. Right of jury to book on retirement.

For declarations or acts of others as evidence of marriage or pedigree, see *note* to *White v. White* (Cal.) 7 L. R. A. 799; *note* to *Eisenlord v. Clum* (N.Y.) 12 L. R. A. 838; *briefs* in *Re Pickens* (Pa.) 25 L. R. A. 478; and *Re Hulett* (Minn.) 34 L. R. A. 384.

This note is limited to cases falling specifically under its title, and does not include cases wherein family records not specially declared to have been made or contained in the Family Bible, have been adduced in evidence, although, as many cases show, they have been admitted in evidence in cases 41 L. R. A.

efficiary certificate. Together these constitute the contract, and the rights of the defendant in error are to be determined solely by this composite agreement.

Holland v. Supreme Council O. of O. F. 54 N. J. L. 490; *Golden Star Fraternity v. Martin*, 59 N. J. L. 207.

A certificate issued by the fraternity to a person not between eighteen and fifty-five years of age would be invalid; it would not be within the powers of the corporation to issue such a certificate, and the holder would acquire no rights under it.

Metropolitan L. Ins. Co. v. McTague, 49 N. J. L. 587, 60 Am. Rep. 681.

In this case the age of the applicant was of such consequence as to make it as material a condition as the strictest warranty could have been, and his answers should be given the same force and effect.

Vitar v. Supreme Lodge K. of P. 52 N. J. L. 455.

It is not necessary that deceased should have been guilty of an intentional misrepresentation, or that there should have been any intentional fraud on his part, or any false statement made by him, knowing it to be false.

Martin v. Insurance Co. of N. A. 57 N. J. L. 628; *Bennett v. St. Paul F. & M. Ins. Co.* 53 N. J. L. 377.

The "claimant's statement," which formed a part of the proofs of death, put in evidence by the plaintiff, was competent evidence against her and in favor of the insurer, as declarations by her against interest, although not admissible in her favor.

Mutual Ben. L. Ins. Co. v. Higginbotham, 95 U. S. 380, 24 L. ed. 499; *Mutual L. Ins. Co. v. Newton*, 22 Wall. 32, 22 L. ed. 793; *Glutting v. Metropolitan L. Ins. Co.* 50 N. J. L. 287.

An entry by a deceased parent or other relative, made in a Bible, family missal, or any

of pedigree when properly authenticated, upon the same lines as entries in Family Bibles have been held to be evidence in matters of pedigree.

I. General rule.

The general rule is that entries in a Family Bible are only admissible as evidence in matters of pedigree in order to prove relationship and the date and fact of birth, marriage, or death of a party. Such entries must be proved by the best evidence that the nature of the case will admit of, and therefore during the existence of the declarant or party making such entries, the testimony of third persons cannot be received, unless it be shown that such party is not within the reach of process of the court. They are generally regarded as secondary evidence.

Such entries are not allowed to be given in evidence as proof of pedigree, however, when the question of pedigree is merely incidental to the main question involved in the case, and whenever they are admitted as evidence of pedigree they are always held to be subject to the general rule governing hearsay and documentary evidence. They form one of the exceptions to the general rule of law which excludes hearsay evidence.

The general rule would seem to be that hearsay evidence is always admissible to prove pedi-

other book, or in any document or paper, stating the fact and date of the birth, marriage, or death of a child, or other relative, is regarded as a declaration of such parent or relative, in a matter of pedigree.

1 Greenl. Ev. 5th ed. pp. 153, 154.

Mr. J. Franklin Fort, for defendant in error:

The burden of proof of fraud rested on the defendant.

Blackford v. Plainfield Gaslight Co. 43 N. J. L. 438; *Tyng v. Grinnell*, 92 U. S. 467, 23 L. ed. 733.

The burden included proof that such misstatement was made with the intention to deceive.

Cowley v. Smyth, 46 N. J. L. 380; *McVey v. Grand Lodge, A. O. of U. W.* 53 N. J. L. 17.

The answers of Daniel F. Conklin to the question in the application for membership are not to be taken as warranties, the contract sued on not referring to them.

McVey v. Grand Lodge A. O. of U. W. 53 N. J. L. 17.

Nixon, J., delivered the opinion of the court:

The plaintiff in error is a corporation organized pursuant to the act of the legislature of New Jersey entitled "An Act to Incorporate Benevolent and Charitable Associations," approved March 9, 1853 (1 Gen. Stat. p. 149). One of the objects of this fraternity, as declared in its constitution, is to establish a beneficiary fund, from which, on satisfactory evi-

dence of the death of a member in good standing, a sum not exceeding \$2,000 shall be paid as directed in the benefit certificate issued. Daniel F. Conklin, the husband of the defendant in error, became a beneficiary member of this association, having previously complied with all the constitutional rules and requirements, and received from it a benefit certificate for the sum of \$1,000, dated March 11, 1884, and payable, in case of his decease, to Margaret Conklin, his wife. He died on the 9th day of October, 1895, and proof of his death was furnished to the supreme council of the fraternity. Payment of the said sum stipulated in the certificate having been refused, the beneficiary, Margaret Conklin, brought suit, and recovered judgment for that amount, with interest and costs. This writ brings here for review the record, proceedings, and judgment in that trial, which took place before the circuit judge without a jury. The record shows that only two exceptions were taken at the trial, and sealed by the trial judge. The first is to the refusal of the court to nonsuit the plaintiff, and the second to the general finding of the judge against the defendant, which is in the following words: "I find, under the evidence in this case, that the plaintiff has established a right of recovery against the defendant for the amount of this certificate \$1,000, and I direct judgment to be entered accordingly." Other errors are specified in the assignment, but, as no exceptions other than the two above mentioned were taken at the trial, they cannot be considered by this court. If,

agree, and this term embraces, not only questions of descent and relationship, but also the particular facts of birth, marriage, and death, and the times when these events may have happened, and any book, document, or paper containing entries made by a parent or relation as to such facts may be received as the written declarations of the deceased persons who respectively made them,—and such evidence is held admissible, not only from the extreme difficulty of providing any better, but is resorted to on the ground of the interest of the declarants in such matters of family relationship and connection. *Cherry v. State*, 68 Ala. 29, 80.

It has been said that in ancient transactions, where no living witnesses can be had, the declarations, memoranda, or entries, made in writing, with regard to any facts, by persons in a situation to know the truth, and under no bias to misrepresent, will be admitted as evidence of such fact, as it is the best evidence the nature of the case will admit of, and is therefore admissible from necessity. *Chapman v. Chapman*, 2 Conn. 347, 348, 7 Am. Dec. 277.

So, hearsay, or as it is generally termed reputation, is admissible in all questions of pedigree, and the word "pedigree" embraces, not only descent and relationship, but also the facts of birth, marriage, and death, and the times when these events happened; and the entry of a deceased parent or other relative made in a Bible, family missal, or any other book or document or paper, stating the fact and date of the birth, marriage, or death of a child or relative, is regarded as the declaration of such parent or relative in the matter of pedigree. *Kelly v. McGuire*, 15 Ark. 555, 604.

Entries in a Family Bible are hearsay evidence, and subject to the same general rule by which that class of evidence is governed,—that it is admissible only when the fact sought to be established cannot be otherwise shown. *People v. Mayne*, 118 Cal. 516.

Again, entries of the birth and death of an indi-

vidual, being matters of pedigree, may be proved by hearsay evidence and general repute in the family, and an entry thereof made by a deceased parent in the Family Bible is admissible in evidence as a declaration of such parent; but, in order that such entries may be receivable in evidence, it must be proved that they were made by a deceased parent or relative. *Greenleaf v. Dubuque & S. C. R. Co.* 30 Iowa, 301, 308.

So, on questions of marriage, births, deaths, etc., such entries are admissible, even without proof that they have been made by a relative, provided the book is produced from the proper authority. *Jones v. Jones*, 45 Md. 144, 160, 36 Md. 447.

In *Jackson, Ross v. Cooley*, 8 Johns. 123, 131, it is said that an entry in a Family Bible is good evidence to prove pedigree. *People v. Sheppard*, 44 Hun, 565.

It has been stated that such entries are unquestionable evidences for some purposes, particularly in cases of pedigree, and where the acts transpired at such a remote period that no live witness can be supposed to have any knowledge of them. *Leggett v. Boyd*, 3 Wend. 376, 379.

So, the case of *Russell v. Jackson, Schuyler*, 22 Wend. 277, 280, supports the rule that entries in Family Bibles and other religious books, in the handwriting of persons whose writing is unknown, is sometimes resorted to for the purpose of establishing pedigree.

The rule laid down in the *Berkeley Peerage Case*, 4 Campb. 418, *in/r/a*, III. c, under which such entries were held admissible, was commented upon by the court in *People v. Fulton F. Ins. Co.* 25 Wend. 215, although the exact point did not arise in that case, which was one as to the admissibility of declarations made by deceased members of the family.

And in questions of pedigree the verbal declarations of the members of the family are competent evidence, but entries in the Family Bible are much more reliable. *Hunt v. Johnson*, 19 N. Y. 273, 286.

however, there is sufficient evidence to support the finding of the judge, the other errors alleged are in no way material to the disposition of the case.

At the trial below, the plaintiff in error relied entirely on the defense set up in its special plea, that Daniel F. Conklin, in his application for membership in the fraternity, made a false statement as to his age, no one being entitled to beneficiary membership whose age exceeds fifty five years at the time of his application. In the application his age was given at fifty-four years, and the date of his birth, December 13, 1829, which would make him fifty-four years and about two months old; thus bringing him within the eligible period. If this statement was in fact false, and the defendant corporation was thereby led to enter into a contract it otherwise would not have made, it would undoubtedly be a sufficient bar to any recovery upon a certificate such as Conklin held at the time of his death. The proof of false representation, however, rests upon the party alleging it, when the object is to overthrow a contract mutually made and accepted. The suit in this case was based upon the certificate issued to Conklin by the defendant order. The validity of the contract therein expressed will be presumed until overcome by proof, and therefore the issuance of the certificate by the plaintiff in error, duly authenticated, and the good standing of the member at the time of his death, and due notice to the supreme council of the fraternity of the death of the member, if established by the plaintiff,

are sufficient to throw the burden of proving misrepresentation upon the defendant. The above facts were either proved or admitted in the evidence for the plaintiff. But in the proofs of death submitted by the defendant in error the date of Daniel F. Conklin's birth was stated to be December 13, 1823, whereas, in the application for membership it was given by him as December 13, 1829. The former date, if correct, would have made him ineligible to beneficiary membership at the date of his application on February 12, 1884. In the case of *Holland v. Supreme Council, O. of C. F. 54 N. J. L. 490*, it was held that "the contract of the association with its beneficiary members is made up of the application for such membership, the certificate issued, which is an acceptance of the application [for such membership], and the charter, constitution, and by-laws of the society." In his application, as appears by the record before us, Conklin said, among other things: "I agree that any untrue statements, evasion, or fraudulent allegation, or concealment of facts by me, shall forfeit my right to membership in the fraternity, and all the benefits arising therefrom." The applicant, therefore, consented beforehand, as he had a right to do, that any untrue statements made by him should invalidate any claim to benefits. The controlling question is whether the statement made by Conklin as to his age was true or false; and it is not necessary, in this case, to go into a discussion as to whether it was a representation or a guaranty. The evidence relied upon by the plaintiff in error to

So, in the *Slane Peerage Case*, 5 Clark & F. 24, 10 Bligh, 1, it is said that entries in the family misal were admissible as evidence of births, deaths, and marriages of members of the family, just like similar entries in a Family Bible.

And in *Goodright, Stevens, v. Moss*, 3 Cowp. 591, 595, it is said an entry in a father's Family Bible, and inscriptions on a tombstone, and pedigree hung up in the family mansion, are all good evidence of pedigree.

Again, in *Taylor v. Cole*, Westm. sitting after Hil. term, 1799, cited in note to *Doe, Bowerman, v. Sybourn*, 7 T. R. 84, the court recognized the rule allowing evidence of entries in a Family Bible as matters of pedigree.

Yet a qualification as to evidence of tradition, even upon pedigree, shows that it must be from persons having such a connection with the parties that it is natural and likely that, from domestic habits, they are speaking the truth and could not be mistaken, and it is upon this principle that descriptions in wills, monuments, or Bibles are admitted as evidence of pedigree. *Whitelocke v. Baker*, 13 Ves. Jr. 511, 514; *Vowles v. Young*, 13 Ves. Jr. 140.

So, it must be shown that the declarant is dead, and that he was related to the person whose pedigree is sought to be proved by blood or marriage, before the evidence of a third person can be received. *Dupoyster v. Gagan*, 84 Ky. 408, 409.

Yet a register kept in a Family Bible is not in all cases conclusive of the facts stated, but its weight as evidence is subject to be weakened or strengthened by all the proofs in reference to it, and the party by whom the entries were made, when they were made, whether the book has been so kept as to be accessible at all times to all members of the family, are all matters to be considered in determining the probative force of such evidence. *Weaver v. Leitman*, 53 Md. 708, 719.

So, a mutilated Bible without the entries would
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be of little value in proving pedigree, and could be no better evidence than that of a member of a family testifying to family reputation, and declarations made by a deceased member,—especially where such entries appeared to have been made by a party whose authority to make such entries is not proved, and where the evidence does not show whether he was a stranger or relative. *Watson v. Brewster*, 1 Pa. St. 381.

And where the question of pedigree is merely incidental, and the judgment will merely establish a debt or a person's liability on a contract, or his proper settlement as a pauper, and things of that nature, the case is not one of pedigree, although questions of marriage, legitimacy, death, or birth are incidentally inquired into. *People v. Mayne*, 118 Cal. 516.

The California Code does not authorize the admission of a written declaration simply because it is made in the Family Bible, unless it is otherwise admissible as a written declaration, and such entry when admissible is only to be received "as evidence of pedigree;" and a case is not necessarily one of pedigree because it may involve questions of birth, parentage, age, or relationship. *People v. Mayne*, 118 Cal. 516.

II. Grounds upon which admitted.

One of the grounds upon which such entries have been admitted is that a Family Bible, containing entries of the births, marriages, and deaths of a family, is in the nature of a record. *Hubbard v. Lees*, L. R. 1 Exch. 255, 4 Hurlst. & C. 418, 35 L. J. Exch. N. S. 109, 12 Jur. N. S. 435, 14 Week. Rep. 694.

So, it has been admitted as evidence for the reason that such an entry in a Family Bible is entitled to greater weight, by reason of its formality, than would be a similar verbal declaration, although the principles upon which it is received in evidence are the same as govern verbal declarations of the same fact. *People v. Mayne*, 118 Cal. 516.

prove the falsity of Conklin's declaration as to his age was, first, the said notice of his death given to the supreme council of the fraternity. The printed form of notice was furnished by the supreme secretary to a son-in-law of the beneficiary. The blanks were filled by the son of the decedent, and signed by the defendant in error with her mark, she being unable to write her name; and it does not clearly appear that the certificate, when signed, was read to her, or that she knew anything about its contents, except that it was notice of her hus-

band's death about to be sent to the fraternity. Section 4 of article 7 of the Constitution of the order provides that "on the death of a member the secretary of the council shall immediately forward to the supreme secretary an official notice of such death, in accordance with a form furnished by the supreme council." Nothing is said as to what it shall contain further than the notice of death, and no reference is made in the original application for membership, or in the beneficiary certificate, to any special form of notice. The contents

And upon the ground that, as they are made by persons having a connection with the parties, they must be taken to be the statements of those who, from their domestic habits, are speaking the truth, and cannot be mistaken. *Vowles v. Young*, 13 Ves. Jr. 140.

Such evidence is not only admitted owing to the extreme difficulty of producing any better, but on the ground of the interest of the declarant in a matter of family relationship. *Cherry v. State*, 68 Ala. 29, 30.

So, they are admitted for the reason that, as they are there inserted, they must be taken as assented to by those in whose custody the book has been. *People v. Ratz*, 115 Cal. 132, 134.

Again, declarations in the family, descriptions in wills, descriptions upon monuments, descriptions in Bibles and registry books, all are admitted upon the principle that they are the natural effusion of a party who must know the truth and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth. *Pearson v. Pearson*, 46 Cal. 609, 629.

Yet an entry in a Family Bible is a written declaration of a fact made out of court not under the sanction of an oath, or with any opportunity to test its correctness by means of cross-examination, and is but a declaration by the person who made the entry, and is of the same character as any other declaration, whether written or oral. *People v. Mayne*, 118 Cal. 516.

So, an entry by a deceased parent or other relative, made in a Bible, family misal, or other book, or in any document or paper stating the fact and date of the birth, marriage, or death of a child or other relative, is regarded as a declaration of such parent or relative in the matter of pedigree. *Pearce v. Kyzer*, 16 Lea, 521, 57 Am. Rep. 240.

In general such entries are admitted as the declaration of the person by whom they are made. *Campbell v. Wilson*, 23 Tex. 252, 253, 76 Am. Dec. 67; *Sussex Peerage Case*, 11 Clark & F. 85, 98, 8 Jur. 793.

And such an entry, being nothing more than the written declaration of the person who made the entry, is admissible in cases of pedigree as an exception to the general rule upon the subject. *Dobson v. Cothran*, 34 S. C. 518, 529.

A pedigree, whether in the shape of a genealogy tree or map, or contained in a book or mural or monumental inscription, if recognized by a deceased member of the same family, is admissible however early the period from which it purports to have been deduced, because the same act of recognition of the document, and consequent acknowledgment of the relationship, stated in it by a member of the family, is some evidence of that relationship from whatever source his information may have been derived, and because he was likely from his situation both to inquire into the truth of such matters, and from his means of knowledge to ascertain it. *Davies v. Lowndes*, 6 Mann. & G. 525, 7 Scott, N. R. 213.

So, a Family Bible is relied upon in matters of pedigree in respect to its publicity because such publicity supplies a defect there existing, and also 41 L. R. A.

upon the ground that the Family Bible is open to the family. *Monkton v. Atty. Gen.* 2 Russ. & M. 147, 162.

Such entries stand on the ground of family acknowledgments, and are admissible on account of their publicity without proof that the entries were made by a member of the family, but, when better evidence is shown to be accessible, they are excluded by the rule that excludes the secondary when primary evidence can be obtained. *Campbell v. Wilson*, 23 Tex. 252, 253, 76 Am. Dec. 67.

III. Cases in which admitted.

a. In general.

Entries made in the Family Bible of the death of members of the family were allowed to be given in evidence in an action for the recovery of land in Kentucky, brought in the courts of Pennsylvania, to prove the time of the decease of the persons named therein, in *Lewis v. Marshall*, 5 Pet. 470, 476, 8 L. ed. 195, 197.

So, a leaf cut out of a Family Bible, on which were written the names of the children of an ancestor under whom the plaintiff's lessor claimed, with the times of their respective births, which leaf was annexed to a notarial certificate from another state, setting forth that the same was cut out of the Bible in his, the notary's presence, and that the same was sworn before him to be the property and Family Bible of such ancestor, was allowed to be given in evidence in *Douglass v. Sanderson*, 3 Dall. 116, 1 L. ed. 312.

And in a case where it was sought to establish the age of the testator, the Family Bible of the father of the testator's mother was held incompetent, for the reason that so much of the entries attempted to fix the dates of the births of certain children of the decedent's father was not a part of the family record of the grandfather or that of testator's immediate family. *Turner v. King*, 98 Ky. 253, 260. In this case it was sought to prove the age of the testator.

Again, the reading of an entry of the minor's birth, made by the deceased father in the Family Bible as a part of the family record within three months after the child's birth, which record was ever afterward kept in the family, was admitted as evidence on questions of pedigree, and the birth of the children, as the proof was clear and positive. *Beckman v. Nacke*, 56 Mo. 546, 548, 549.

In a case involving the question of the legitimacy of a child for the purposes of descent and distribution, evidence that the father always treated the child as his own, and the Family Bible contained an entry by him of its name and birth, was held admissible to prove that the child was legitimate. *Scott v. Hillenberg*, 56 Va. 245.

So, in a claim of peerage, where the question was whether the deceased peer, the father of the claimant, had been married or not, a prayer book found after the death of the claimant's mother among her papers was received, and an entry made in her handwriting declaring the fact of the marriage read from it, not as conclusively proving that fact, but as a declaration of it made by one of the

of the notice in this case were not in any way an element of the original contract between the fraternity and Conklin. It is only a matter of detail, provided by the constitution to be observed after the death of the beneficiary member. The statement as to age in the notice was written by a stranger to the contract, and the beneficiary only signed it with her mark when presented to her for that purpose. Of itself, therefore, it could have but little probative effect upon the question of Conklin's age, and only serve to stimulate investigation on

that subject. George W. Conklin, the son, being asked where he got the date and place of birth which he put in the notice, said: "I got that information from an old Bible that was in the house. I have got it here now." He further said he did not know in whose handwriting the entry was made, and that he had never seen it before it was brought to him by his sister, when the notice was made out. The Bible was offered in evidence, and the plaintiff rested, and the motion to nonsuit was then made. There was no error in the refusal

parties at the time. *Sussex Peerage Case*, 11 Clark & F. 85, 98, 8 Jur. 793.

b. On the testimony of the party making them.

As documentary evidence the testimony of the party making the entry in the Family Bible that he made the entry and that it is in his handwriting is the best evidence of the entry that can be obtained, and for this reason the testimony of the party making the entry is admissible to prove the fact.

A Family Bible is properly admitted in evidence, in a prosecution instituted by a father for the taking of a child under the age of eighteen without the consent of the father for the purposes of prostitution, in order to prove the age of the child, although positive evidence by the father and mother as to the child's age is also given by them. *People v. Slater*, 119 Cal. 620.

So, the entry in a Family Bible, made by a parent of the birth of his son, and proved by the oath of the plaintiff, is good evidence in an action before a justice of the peace by a parent, under the Pennsylvania statute, for the recovery of a penalty for marrying a son under age. *Carakadden v. Poorman*, 10 Watts, 82, 38 Am. Dec. 145.

Yet the positive testimony of a father and mother as to the age of a child in a prosecution for the taking of such child for purposes of prostitution are quite sufficient without the family record contained in the Bible. *People v. Slater*, 119 Cal. 620.

In *Whitcher v. McLaughlin*, 115 Mass. 167, a book entitled "The Life of the Virgin Mary," containing a record of births and deaths in the family of the defendant's father, who testified that he kept a record of the births of his children on the fly leaf of his wife's manual until a certain year, when the above volume was presented to him, and in which he then copied the said original record, and after that time continued to enter the births and deaths therein, was admitted as evidence of such family record, and of the age of the defendant, without the production of the original record, and as secondary evidence thereof.

Where a mother testified that she made the entries of a daughter's birth in the Bible sometime after she was born, but during the same year, and there were appearances on the face of the entry that the date had been changed as by being written over after its original entry, but it did not appear that any other date was originally in the entry, and the mother testified that it had not been changed, it was held that the question whether there had been a material change in the entry was to be determined by the court when it was offered, before it could be presented to the jury, and that, if admitted in the absence of any showing to the contrary, it must be assumed that the court was satisfied that the change was immaterial, and that its ruling in this respect was not open to review unless it was made to appear that the discretion was abused. *People v. Mayne*, 118 Cal. 518.

c. On the testimony of the party to the action.

In *Cherry v. State*, 68 Ala. 29, the testimony of a 41 L. R. A.

party as to his own age, who stated that he knew his age from the fact that his mother told him, and that it was written in a book which his father carried in his pocket in the court-house, was held admissible. It is not specially shown in this case whether or not the book was a Family Bible.

So, under an indictment for selling liquor to a minor without the consent of his parents, as the person to whom the liquor is sold is a competent witness to prove his own age, there is no objection to his stating that he derived his knowledge of the day on which he became of age from an entry of his birth in the Family Bible, or from any other source of information, but his evidence as to that fact is as a matter of course but hearsay. *Edgar v. State*, 37 Ark. 219, 223.

The above case was followed in *Pounders v. State*, 37 Ark. 360, which was also a prosecution for a similar offense.

Although the above cases show that a person may testify as to his own age, and are therefore, strictly speaking, authorities upon that question, yet they are here cited as showing that he may state that he acquired such knowledge from entries made in the Family Bible.

And a defendant in an action upon a promissory note was allowed to introduce as evidence a paper which he said was the family record containing the dates of the births of his brothers and sisters and himself, and was part of the Family Bible, the residue of which had been destroyed during the civil war, but had been in the family as long as he could recollect, and which he had always understood to be the family record, as it was always treated as such in the family, and was preserved by his mother, and handed to him on the morning of the trial by her as the family record. *Pearce v. Kyzer*, 16 Lea, 521, 57 Am. Rep. 240.

In this case it was said that the defendant was a competent witness to prove his own age whether he derived his knowledge from his mother, from the recognized family record, the Bible, or from public repute in or out of the family, and his evidence was not hearsay in the legal sense, but original, and no part of it could be excluded upon the ground that better evidence might be produced, as such evidence would be open to the other side if it existed. *Pearce v. Kyzer*, 16 Lea, 521, 57 Am. Rep. 240.

Again, in *Whalen v. Nisbet*, 95 Ky. 464, 466, the devise of land was allowed to prove his pedigree and relationship to the testator by producing a Family Bible containing records of the births, deaths, and marriages, which Bible his father had declared was kept and received from another ancestor. The evidence was for the purpose of proving the title of his testator to the premises.

In *Hood v. Beauchamp*, 8 Sim. 28, in order to prove that the person under whom the plaintiff claimed was descended from a certain person, the plaintiff produced an old religious book containing the entry "E. J., her book, 15 June, 1680, the gift of H. J. her father," but it did not appear by whom the entry was made, but the book contained in other parts of it entries of the births of other members of the family which were proved to be

of the trial judge to grant the motion. There had been no evidence presented to show that the Bible in question was a Family Bible, or that Daniel F. Conklin had ever seen it, nor when or by whom the family record it purported to contain was written. The evidence of the defense throws but little light upon this subject. Margaret Conklin, being recalled by the defendant, and asked about this Bible, said

in the handwriting of the father, and the book had been preserved by the family. The court admitted the first-mentioned entry as evidence tending to prove the descent of the plaintiff from the said "H. J."

And in an action of ejectment wherein the plaintiff sought to prove that he was a legitimate son of his father who was then dead, after proving by other evidence that the decedent was his reputed father, plaintiff was allowed to give in evidence an entry in a Bible made by his father in his own handwriting and signed by the father himself, that the plaintiff was his eldest son born in lawful wedlock on a given date, and also evidence that his father had declared that he made such entry for the express purpose of establishing the legitimacy and the time of the birth of such son in case the same should be called in question in any case, or in any cause whatsoever by any person after the death of such father, in order to prove the plaintiff's legitimacy, and as evidence of the declaration of his father in the matter of pedigree, although there were strong circumstances of suspicion on account of its particularity. *Berkeley Peerage Case*, 4 Campb. 401.

d. On the testimony of a third party.

The better opinion would seem to be that the declarations of third persons cannot be admitted to prove pedigree by means of entries in Family Bibles, unless it be shown that the persons making the entries are deceased. *Cherry v. State*, 68 Ala. 29, 30.

In *Collins v. Grantham*, 12 Ind. 440, the entries made in a hymn book by the father, and after the father's death by a witness at the request of the mother, were held good evidence to prove the age of a child after the death of its parents, as it furnished a sufficient declaration of the father as to the ages of his children, and was not obnoxious to the objections that they were made *post litem motam*.

So, a mother may testify as to the age of a child, and produce the Family Bible, and her evidence that such book is hers, and that it contains the record of her family, and the name and the date of birth of the child, and that such record is correct, will be received, although she may not be able to read or write the language in which the entry is made. *People v. Ratz*, 115 Cal. 132, 134.

Again, in *Hunt v. Johnson*, 19 N. Y. 279, 286, a Family Bible of a brother of the decedent was produced by one of his descendants, who had known it from his earliest recollections, to prove that the decedent died before the date of a certain conveyance, but so short a time before the execution of the deed in question as probably to account for his name being inserted in the deed.

IV. Time of entry material.

It is generally conceded that the entries must be made at the time the event happens or within some period of time thereafter, so far remote from the purposes of the suit in which they are to be given in evidence as to prove that they are not made for the purposes thereof, or with the particular litigation in view at the time when made.

If a person takes up a Family Bible with the idea that it is subsequently to be produced in evidence, 41 L. R. A.

the stepmother of her husband, who was soon to remove to Connecticut, brought it to her house about ten years ago, and asked if she did not want it as a keepsake, and she took it, and tied it up, and laid it in the bedroom upstairs; and that she did not think her husband ever looked into it; if he did it was done privately. A family group of pictures was offered in evidence, and the date of Daniel F. Conklin's

and then writes down, at once, the births, and deaths of his children, such Bible is not admissible in evidence, as it must appear that such declarations are made under such circumstances that the relation may be supposed to be without an interest and without a bias. *Chapman v. Chapman*, 3 Conn. 347, 349, 7 Am. Dec. 277.

So, where the entries made in a Bible are years after the events recorded, and the Bible comes from the possession of an aunt without evidence to show when or by whom, or under what circumstances the entries are made, they are entitled to little or no weight as evidence on the question of age. *Amey v. Cookey*, 73 Md. 297, 302.

And where a Family Bible produced, instead of being kept as a record of events at the time of their occurrence, appears to contain several entries made with the same pen and ink, and apparently at the same time, and a blank is left for the date of the birth of a party to the original proceedings who was then a minor, and the witnesses testify of general recollections after a lapse of fifty-one years, and not one of them refers to any distinct, positive fact occurring at the time by which the date of his birth can be satisfactorily fixed, such evidence is inadmissible in an action to set aside the judgment instituted by his heirs, especially when such proceedings are acquiesced in for thirty years by the minor. *Greenwood v. New Orleans*, 12 La. Ann. 426, 440.

V. Necessity of production of book.

The family record itself must be offered in evidence, and where a witness gives in his deposition a copy thereof, or rather recites in his deposition the contents of the record, his evidence is not admissible for the reason that the Family Bible is not such a record that it may be proved by an examined copy, but it must be proved by its production in the same manner as all private writings. If, however, its absence be properly accounted for, secondary evidence, as a copy or proof of its contents, is admissible. *Greenleaf v. Dubuque & S. C. R. Co.* 30 Iowa, 301, 303.

So, a witness, seeking to prove that the defendant in an action was an infant at a given date, who produces a paper which she says contained a copy of an entry of birth made in the Family Bible must produce the Bible itself, otherwise her evidence is inadmissible, even though the copy produced is sworn to by her as having been made by her daughter in her presence, and compared and found correct by herself with the entries made in the Bible. *Ryerson v. Grover*, 1 N. J. L. 458.

And the introduction of a witness, to prove the infancy of a defendant, who stated that he had acquired his knowledge from a family register or memorandum in the Family Bible, is not of itself sufficient evidence to prove the age, for the reason that the private memorandum of an individual is of itself no evidence, and when produced must be supported by an oath. *Taylor v. Hawkins*, 1 McCord, L. 164.

Again, in *Kreits v. Behrensmeyer*, 125 Ill. 141, 185, a contest election case, a voter was not allowed to be examined as to the showing of the family record or Bible with respect to his age, without producing the same.

birth written thereon, as December 13, 1838. This was prepared about fifteen years before, by a daughter since deceased, and it does not appear that Conklin ever authorized his birth to be so written, or that his attention was ever called to it in any way. A letter to the supreme secretary from the defendant in error, in reply to one from him, stating that the date of birth in the notice of the death of her hus-

band had been obtained from the Family Bible, was also offered. The evidence for the defense also brought out the additional fact that at the time of the marriage of Margaret Conklin, the beneficiary, with Daniel F. Conklin, in June, 1848, she was not eighteen years old, and her husband was not nineteen, to the best of her knowledge. If she is correct in her knowledge of the age of her husband at the

But the evidence of a father and mother in an action to recover damages for the abduction of their daughter is competent to prove her age, and there is no error in the court's refusing to require the production of the entry in the Family Bible. *Dobson v. Cothran*, 34 S. C. 518, 529.

So, in an action upon two promissory notes, the evidence of a husband as the administrator of his wife's estate, that he knew his wife's age from the entry in the Family Bible in the possession of another member of the family in another country, and also that his wife had told him the date of her birth, and that he had also seen the entry in the Family Bible, is admissible as a matter of pedigree without the production of such Bible. *Swink v. French*, 11 Lea, 73, 80, 47 Am. Rep. 277.

And in *Berry v. Warring*, 2 Harr. & G. 103, the court admitted the evidence of an uncle, a witness, who stated his recollections of the time of the plaintiff's birth, although he testified that he had once seen an entry in the Family Bible of the plaintiff's father in his, the father's, handwriting, of the birth of the plaintiff, and that the father was dead, and he had never seen the Bible since the death of the plaintiff's mother, in whose possession it was when he last saw it, and that he did not know in whose possession it passed when she died, and that he did not know whether the Bible was then in existence or not, and that he had made no inquiry about it or any search for it.

And the declaration of a witness was admitted as evidence in *Clements v. Hunt*, 46 N. C. (1 Jones, L.) 400, although he stated that there was a family register of births in existence, the court looking upon his evidence as equal in degree with that of the entry in the Bible.

Vl. Necessity of proof of handwriting.

Entries of pedigree in a Family Bible or Testament produced from the proper custody are admissible as evidence of pedigree without proof of their handwriting or authorship. *Hubbard v. Lees*, L. R. 1 Exch. 255, 4 Hurlst. & C. 418, 35 L. J. Exch. N. S. 100, 12 Jur. N. S. 435, 14 Week. Rep. 604.

Such entries are admissible to prove marriage, birth, or death without proof that a relation made them, if the book is itself produced from the proper authority. *Jones v. Jones*, 45 Md. 144, 160, 36 Md. 447.

To require evidence of the handwriting or authorship of the entries in a Family Bible is to mistake the distinctive character of the evidence, for it derives its weight, not from the fact that the entries are made by any particular person, but that being in that place as a family register they are to be taken as assented to by those in whose custody the book has been kept. *People v. Ratz*, 115 Cal. 132, 134; *Jones v. Jones*, 45 Md. 144, 160, 36 Md. 447.

And the admissibility of the Bible as evidence of age does not depend upon proof of handwriting or authorship of the entries, but upon proof of the fact that it is the Family Bible. *People v. Ratz*, 115 Cal. 132, 134.

And such is especially the case when the book is shown to have been the Family Bible or Testament. *Jones v. Jones*, 45 Md. 144, 160, 36 Md. 447.

In *Southern L. Ins. Co. v. Wilkinson*, 53 Ga. 535, 547, the court allowed a Bible to be produced in evidence although the witness subpoenaed to pro-

duce it swore that there was no Family Bible of his father, but that there was a Bible purporting to be such a record, which was in his mother's possession up to her death, and then went to a sister from whom he, the witness, got it, but that they did not recognize it as containing a correct record of the births of the family, and the record was neither in the handwriting of his father nor of his mother, but he believed in the handwriting of a deceased half-sister.

The ground upon which the book was allowed as evidence in the above case was that it was not requisite to prove that the genealogy inscriptions, family trees, or similar evidence should be actually written by the father or the mother, and that if the register was recognized by either as such, and was kept by them and after their decease went into the possession of a child, and was in the handwriting of another who was deceased, and was still preserved in the family, it fell within the terms "similar evidence" as contained in § 3772 of the Georgia Code, and was equivalent to declarations of a deceased person related by blood or marriage.

Yet, in order that entries in a Family Bible may be admissible as evidence as a parent's declaration, it must be proved that they were made by a deceased parent or relative. *Greenleaf v. Dubuque & S. C. R. Co.*, 30 Iowa, 301, 303.

VII. When declarant is alive, etc.

The declarations of a father, made to a third party or contained in a family register of births and deaths, are not admissible to prove the birth of a child where such father is alive and can be produced as a witness, as such entries stand on no higher footing than other declarations, and are entitled to no higher consideration, except that if made at the time the fact occurred they are more reliable. *Robinson v. Blakely*, 4 Rich. L. 538, 539, 55 Am. Dec. 703.

Entries in a Family Bible are generally admitted as the declarations of the person by whom they were made, and cannot be received when the father or mother, or other declarant, is present in court or within reach of process. *Smith v. Geer*, 10 Tex. Civ. App. 252; *Campbell v. Wilson*, 23 Tex. 252, 253, 76 Am. Dec. 67.

Where the mother of a child is present in court, and has testified as to the date of the child's birth, it is not competent for the prosecution, on a charge of rape, to introduce the entries in a Family Bible made by her several years previously. *People v. Mayne*, 118 Cal. 516.

Where the entries in a Family Bible are comparatively recent, and the person by whom they are made is in court but is excluded by reason of his being special bail in the case, the evidence of a brother of the defendant as to the entries in the Family Bible, made by his mother, the wife of such special bail, will be refused. *Leggett v. Boyd*, 3 Wend. 376, 379.

So, in a prosecution for the felonious taking of a female under sixteen years of age for immoral purposes, an entry in the Family Bible as to the time of the birth of such female is not admissible in evidence where the father is alive, and the record does not disclose any effort on the part of any person connected with the prosecution to discover

time of their marriage,—and it is only reasonable to suppose that a wife would be informed on that point,—then Conklin's age was correctly stated by him in his application. This evidence was elicited by the defense. No further proofs were offered on either side.

It will be perceived that the only evidence to impeach the correctness of the statement as to age made by Conklin in his application had its origin from the record made in the Bible. This book, judging by the proofs alone, does not possess the necessary characteristics to war-

rant its acceptance as an authentic family record. It falls far short of what is required to give it such a character. But the learned trial judge in the court below had the opportunity to personally inspect the book itself when offered, and, in the reasoning which led up to the ultimate finding to which the second exception under consideration applies, he uses the following language: "The Bible bears the appearance of age. Perhaps that is hardly correct. It is mutilated and shows evidence of use for a long time; but the binding is not

the *locus in quo* of the father. *People v. Sheppard*, 44 Hun, 565.

And under the California Code of Civil Procedure monuments and inscriptions in public places are receivable as evidence of common reputation, and entries in Family Bibles or other family books or charts, engravings on rings, family portraits, and the like are receivable as evidence of pedigree, as the declaration of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person, and therefore they cannot be received in evidence where the person is living without his testimony, and so the declaration of another living person is not to be received. *People v. Mayne*, 118 Cal. 516.

The evidence of a father and mother, cognizant of their child's birth, is *prima facie* evidence of its date or the age of the child, although there is a written record thereof in the Family Bible. *State v. Woods*, 49 Kan. 287.

VIII. When excluded.

Entries made in a Family Bible cannot be received in evidence over the declaration of the father or mother as to the birth of the child. *Smith v. Geer*, 10 Tex. Civ. App. 252.

And they are excluded when better evidence is shown to be accessible, by the rule, that excludes secondary evidence when primary evidence can be obtained. *Smith v. Geer*, 10 Tex. Civ. App. 252; *Campbell v. Wilson*, 23 Tex. 252, 253, 76 Am. Dec. 67.

This is so for the reason that an entry in a Family Bible is not the best evidence of the age of a person, the date of whose birth is there entered, but is only secondary evidence, and is only permissible when better evidence cannot be obtained. *Dobson v. Cothran*, 34 S. C. 518, 529.

In *Curtis v. Patton*, 8 Serg. & R. 135, the entry of the age of a child in a Family Bible, made by a brother of such child, and sworn to by him as made, by the direction of his deceased father along with other entries respecting the ages of the family, from another book in which the original entry was made by his father, is not evidence where the nonproduction of such original book is not accounted for. See *Whitober v. McLaughlin*, 115 Mass. 167, *supra*, III. b.

So, in a case where a claim to a peerage depended upon the genuineness of entries made in an old prayer book, dated 1728, 1729, the evidence of several witnesses, whose occupation for a long time had made them so conversant with manuscripts of different ages that they could take upon themselves to name the period in which any manuscript previous to the year 1700 was written, that the entries were written in the early part and before the middle of the last century, and at or about the period of these dates, was said to be but small testimony, and hardly entitled to any weight,—especially as the book containing the entries was not satisfactorily identified. *Tracy Peerage Case*, 10 Clark & F. 154.

And, in *Union v. Plainfield*, 39 Conn. 563, upon the question of a pauper's settlement by birth the 41 L. R. A.

declarations of the father and also an entry in the family record contained in the Bible formerly belonging to and kept by the father showing that the pauper was born in the defendant town, were rejected upon the ground that it was not a question of pedigree, as there was no doubt as to the parentage, and was a mere question of locality, and that such record could not therefore be received in evidence to prove the locality of the birth, as the rule of law is that the place of a person's birth cannot be proved by mere hearsay.

Again, in a case where there was an inaccuracy in the entries of the Family Bible, and the fact was demonstrated by the baptismal certificate, and the entry in the church register by the clergyman, and the memory of the mother was defective as to the entries made in the Family Bible, the court rejected such entries and relied upon the proof afforded by the baptismal and marriage certificates in connection with the testimony of the mother as to facts about which she could not well have been mistaken. *Weaver v. Leiman*, 52 Md. 708, 719.

The case of *Buason v. Forsyth*, 32 N. J. Eq. 277, involved the question as to the right of the plaintiff to a distributive share of the estate of her grandfather. The fact that her mother was always treated by the decedent as his lawful child, and that by an entry of her mother's birth in his Family Bible he declared her to be such, was held to be of no value as an admission or declaration, in view of proof that she was illegitimate. In this case the court commented upon the fact that the Bible contained no entry of the marriage of the grandfather and grandmother as further tending to prove the fact.

And in an action upon a promissory note the defendant's infancy cannot be established by the production of the family record of births and deaths of the members of his father's family contained in a Bible, which is identified by his brother as that which had been recognized as such, and as containing the family record since his first recollection, and by his further testifying that his father is dead, and that he did not know by whom the entries were made, but that the mother was alive and in another county, as there is better evidence accessible, namely, that of the mother, within reach of the process of the court. *Campbell v. Wilson*, 23 Tex. 252, 253, 76 Am. Dec. 67.

IX. Right of jury to take book on retirement.

It is not permissible to allow the jury to take with them, on their retirement, a leaf from a Family Bible which has been detached from the depositions of a witness, and which contains a record of the births and deaths of the family, and also memoranda opposite the names of some of the family showing that they died in infancy,—especially where there is evidence showing and identifying a party to the action as one of the family, as the possession of such record leaf from the Bible, unaccompanied by the deposition, would be injurious to the party in the cause. *Chamberlain v. Pybas*, 51 Tex. 511, 516.

E. W.

of a character one would expect to find in a very ancient volume. The title page being lost, it is impossible to ascertain the date of printing. The entries are certainly not contemporaneous with the facts stated. The names are written in one handwriting, and apparently at one time; the same pen and ink, apparently, having been used. It is also apparent that the dates of the birth of the children were written at the same time, but in a different handwriting from the names, and with a different pen and ink. From the appearance of the ink and the writing, I think that the dates were appended long after the names were written. A correction has been made in one of the dates. . . . The question is, Can this book, under the evidence, be regarded as a family record? I do not think there is proof in the case warranting me to so regard it. There is no evidence showing when the dates were placed in the book, or by whose authority, or what information the person making the entries had. That they were not made contemporaneous with the births of the children named is apparent."

We find no error in the record, and *the judgment should be affirmed.*

(Supreme Court.)

GLOUCESTER & SALEM TURNPIKE COMPANY

v.

John H. LEPPEE.

(.....N. J.....)

***A turnpike company, by its charter, was empowered to collect toll for every carriage drawn by one or more beasts which traveled over its road, and to stop any person driving any carriage of burden or pleasure who attempts to pass its gates without having paid the specified toll. Held, that this charter provision did not authorize the exaction of toll from a bicycle rider traveling along the company's turnpike upon his wheel.**

(June 23, 1896.)

ON DEMURRER to the complaint in an action brought to recover the penalty for forcibly passing a toll gate without paying toll. *Demurrer sustained.*

The facts are stated in the opinion.

Mr. Herbert W. Knight, for defendant, in support of demurrer:

The statute being penal must, by the established rule of construction, be strictly construed, and not be extended beyond its words,—especially when they have a well-settled meaning.

Allen v. Stevens, 29 N. J. L. 509; *Lair v. Killmer*, 25 N. J. L. 522.

Where there is no ambiguity in the words there is no room for construction. The case must be a strong one, indeed, which would

*Headnote by GUMMERE, J.

NOTE.—As to tolls for use of road by bicycle, see also *Geiger v. Perkiomen & R. Turnp. Road* (Pa.) 28 L. R. A. 458, and *Murfin v. Detroit & E. Pl. Road Co.* (Mich.) 88 L. R. A. 198.

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justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest.

United States v. Smith, 5 Wheat. 176, 5 L. ed. 61.

Bicycles were unknown at the time the act was passed, and therefore the charging of a toll for riding a bicycle could not possibly have been intended or in contemplation by the framers of the act.

Wells v. Porter, 8 Scott, 141; *Elsworth v. Cole*, 2 Mees. & W. 81; *Com., Directors of the Poor, v. Wells*, 110 Pa. 463.

Public grants are to be strictly construed, and whatever is not plainly granted must be understood to have been withheld.

Jersey City Gas Light Co. v. Consumers' Gas Co. 40 N. J. Eq. 427; *State, Elizabeth Library Assn., v. Lester*, 28 N. J. L. 108; *Stockton v. Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 97.

Mr. David O. Watkins, for plaintiff, *contra*:

The bicycle is to be regarded as a carriage or vehicle. Particularly in relation to its use on the highways, the bicycle is entitled to the same privileges and subject to the same burdens as other vehicles and carriages.

Taylor v. Goodwin, L. R. 4 Q. B. Div. 229; *Reg. v. Justin*, 24 Ont. Rep. 327; *Holland v. Barch*, 120 Ind. 46; *Mercer v. Corbin*, 117 Ind. 450, 8 L. R. A. 221; *Swift v. Topeka*, 43 Kan. 671, 8 L. R. A. 772; Acts 1890, No. 13, p. 10; *Myers v. Hinds*, 110 Mich. 800, 38 L. R. A. 356; *Thompson v. Dodge*, 58 Minn. 555, 28 L. R. A. 608; Laws 1887, chap. 705; Act of 1889, P. L. 44; *Geiger v. Perkiomen & R. Turnp. Road*, 167 Pa. 582, 28 L. R. A. 458; *Lacy v. Winn*, 4 Pa. Dist. R. 409.

And in our own state the bicycle is declared to be a carriage within the meaning of that term, as used in § 91 of the act entitled, "An Act Concerning Roads."

The word "carriage" is large enough to include a machine such as a bicycle which carries the person who gets upon it. He guides as well as propels it, and may be said to drive it as an engine driver is said to drive an engine.

4 Am. & Eng. Enc. Law, 2d ed. p. 16; *Mercer v. Corbin*, 117 Ind. 451, 8 L. R. A. 221; *Myers v. Hinds*, 110 Mich. 800, 38 L. R. A. 356; *Geiger v. Perkiomen & R. Turnp. Road*, 167 Pa. 582, 28 L. R. A. 458; *State v. Collins*, 16 R. I. 871, 8 L. R. A. 394; *Reg. v. Justin*, 24 Ont. Rep. 327; 4 Am. & Eng. Enc. Law, 2d ed. p. 17.

The method of computing by horses, etc., is not the power to collect toll,—merely a limitation upon the power,—and it is a matter of no moment, nor a material point, as to whether the bicycle in this case was used for pleasure or burden, for, if either, the plaintiff was authorized to collect toll.

Geiger v. Perkiomen & R. Turnp. Road, 167 Pa. 582, 28 L. R. A. 458; *Nicholson v. Williamstown & G. I. Turnp. Co.* 28 N. J. L. 143.

The act of the legislature incorporating the plaintiff is not to be restricted by a literal interpretation within narrower limits than is required by the obvious intent and reason of the act.

Hearsey v. Pruyn, 7 Johns. 179; *Hearsey v. Boyd*, 7 Johns. 183; *Chestney v. Coon*, 8 Johns.

150; *Stratton v. Herrick*, 9 Johns. 856; *Stratton v. Hubbel*, 9 Johns. 857; *Wooster v. Van Vechten*, 10 Johns. 468; *Medford Turnp. Corp. v. Torrey*, 2 Pick. 538; *Kent v. Newburyport Turnp. Corp.* 4 Pick. 388.

The gate was passed by defendant after he had been refused permission to pass without payment of toll, without the consent and against the will of the keeper. It is not necessary, to bring the case within the provision of the statute, that plaintiff should have been resisted by force, or that violence should have been offered.

Nichols v. Bertram, 8 Pick. 843; *Proprietors of Second Road v. Taylor*, 6 N. H. 499; *Camden, E. & M. Turnp. Co. v. Fowler*, 24 N. L. L. 205.

Gummere, J., delivered the opinion of the court:

This is an action brought to recover a penalty alleged to have been incurred by the defendant in refusing to pay a toll of five mills per mile for riding a bicycle along the turnpike road of the plaintiff company in Gloucester county. The statute under which the action is brought is "An Act to Incorporate the Gloucester & Salem Turnpike Company" (Pamph. Laws 1851, p. 177.) The 8th section of this statute empowers the company to erect gates across its turnpike, "and to demand and receive toll for traveling each mile of the said road not exceeding the following rates, to wit: For every carriage, sleigh, or sled drawn by one beast, one cent, for every additional beast one cent. For every horse and rider or led horse or mule, five mills. For every dozen of calves, sheep, or hogs, five mills. For every dozen of horses, mules, or cattle, two cents." It further enacted that "it shall and may be lawful for the toll-gatherers to stop persons riding, leading, or driving any horses, cattle, mules, calves, sheep, or hogs or carriages of burden or pleasure from passing through the said gates or turnpike until they shall have paid the toll as above specified." The 10th section of the act provides that, "if any person shall . . . forcibly pass such gates without having paid the legal toll at such gates or turnpikes, such person shall forfeit and pay the sum of \$20,

besides being subject to an action of damages for the same to be recovered by said company, by action of debt, or other proper action, in any court of competent jurisdiction, with costs of suit." The sole question presented by this demurrer is whether the plaintiff was entitled, under the charter provision above set out, to collect toll from the defendant for riding his bicycle upon its turnpike. The plaintiff insists that a bicycle is a carriage by legislative enactment (3 Gen. Stat. p. 2940, § 570), that it is "a carriage of pleasure," and that, as the latter clause of the 8th section of plaintiff's charter authorized its toll gatherers "to stop persons drawing carriages of burden or pleasure until they have paid the toll," etc., the defendant incurred the penalty prescribed by the 10th section of the charter, by forcibly passing through the toll gate on his bicycle without having paid toll. It is true that in this state bicycles are carriages, and that persons riding or propelling them upon turnpikes or public roads are to observe the law of the road when passing or being passed by another vehicle; but this does not necessarily make it tollable. The plaintiff company is not entitled to collect toll from every person traveling upon its turnpike. Its right to do so is dependent wholly upon the authority conferred by its charter, and its toll gatherers are empowered to stop persons passing through its gates only in those cases in which the company has a right to exact a toll by the specific provisions of that instrument. A glance at the schedule contained therein discloses that carriages *per se* are not subject to toll, and that they only become so when "drawn by one or more beasts." A bicycle ridden by a human being no more comes within this description than a wheelbarrow drawn by a man, or a perambulator pushed by a nurse maid.

Bearing in mind the fundamental rule that grants by the state to corporations of franchises of this character are to be strictly construed, and that nothing passes thereby except what is plainly granted, it is manifest that the plaintiff's charter did not authorize it to collect the toll demanded from the defendant, and that there must be *judgment on the demurrer*. The defendant is entitled to costs.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

CENTRAL TRUST COMPANY, *Appt.*,
v.

RICHMOND, NICHOLASVILLE, IRVINE,
& BEATTYVILLE RAILROAD COM-
PANY *et al.*

(31 U. S. App. 675, 68 Fed. Rep. 90, 15 C. C. A. 273.)

1. An agreement by a contractor for payment in securities which when accepted would waive a lien does not before payment prevent an inchoate lien under the Kentucky act of 1888 creating mechanics' liens,

NOTE.—For payment to contractor or subcontractor as affecting the lien of a subordinate claimant, see note to *French v. Bauer* (N. Y.) 20 L. R. A. 560.

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but providing that they shall not attach unless a statement is furnished for filing within a time specified.

2. The waiver of a lien by a contractor will not affect subcontractors' liens under the Kentucky act of 1888, which gives liens to "all persons who perform labor or furnish labor or materials . . . by contract . . . or by subcontract thereunder," independent of that of the main contractor.

3. The time when the last labor was performed by the claimant, and not by other lienors, is that from which to compute the time for filing his claim under Kentucky lien act 1888, § 4, requiring a statement "within sixty days after the last day of the last month in which any labor was performed."

4. A provision for payment to a con

tractor in instalments is not binding on subcontractors so as to affect their rights to a lien under a statute giving them liens independent of that of the main contractor.

5. **Payments made according to stipulation of 90 per cent of the estimates,** which are subject to correction, of the amount due under a contract to a subcontractor, do not absolutely discharge 90 per cent of the liability for work done up to that time so as to prevent a subcontractor's lien therefor, but are to be applied merely as partial payments on what is due the subcontractor.
6. **Partial payments to a subcontractor** by the principal contractor should be applied on that portion of the claim which may not be covered by the subcontractor's lien, for the purpose of fixing the amount of the lien.
7. **Claims having a common security take pro rata** on their full amount without deduction for payments made by the debtor on account of his personal liability.
8. **The distribution among subcontractors of the original contract price, which is the limit of aggregate liens,** should be made upon the basis of the entire lienable claim of each subcontractor, and payments by the owner to each of them must be applied thereon up to the amount of his share when made in the progress of the work, although no lien therefor had been perfected.
9. **The money value of a contract for railroad construction** calling for payment in bonds and stock is, for the purpose of fixing the limit of subcontractors' liens, the market value of the bonds and shares when actually delivered in pursuance of the contract.
10. **The price for which railroad bonds were sold by a contractor when indorsed by another railroad company** in consideration of the stock of the company which issued them is, for the purpose of determining the extent of subcontractors' liens, to be deemed their value to the contractor, where he took the stock and bonds in payment, although the indorsement was afterwards adjudged to be invalid and the stock had no market value.

(May 7, 1895.)*

APPEAL by complainant from a decree of the Circuit Court of the United States for the District of Kentucky settling the priority of liens upon a partially constructed railroad to foreclose a mortgage on which the suit was brought. *Affirmed.*

Before *Taft* and *Lurton*, Circuit Judges, and *Severens*, District Judge.

Statement by Lurton, Circuit Judge:

The questions for determination arise between creditors of the defendant railroad company claiming mechanics' liens for the construction of its road, and the holders of its first mortgage bonds, issued shortly after its construction was begun. The Richmond, Nicholasville, Irvine, & Beattyville Railroad Company, hereafter designated and described as the "Railroad Company," was chartered by special act of the Kentucky legislature, and authorized to construct and operate a railroad

from Versailles, in Woodford county, to Beattyville, in Lea county, Kentucky. The charter provided that the company might pay for the construction of its railroad with its own capital stock and bonds. On the 1st day of July, 1889, the railroad company executed its first mortgage to the Central Trust Company of New York, as trustee, which mortgage recited that it had executed, and made ready for delivery, 2,375 bonds, of the denomination of \$1,000 each, bearing interest at the rate of 6 per cent per annum, payable semi-annually, evidenced by coupons attached, the principal being payable thirty years after date. It was also provided that upon default in the payment of interest for more than six months the principal sum mentioned in each of the said bonds should, at the option of the holders of a majority of the bonds, become due and payable. There was a default in the payment of interest for more than six months, whereupon, at the request of a majority of the holders of the bonds, the trust company declared the maturity of the principal thereof; and this bill was thereupon filed December 2, 1891, in the circuit court of the United States for the district of Kentucky, for the purpose of obtaining a foreclosure thereof. Various persons and corporations, claiming to be creditors of the said railroad company, and claiming to be entitled to priority over the mortgage aforesaid, were made defendants thereto, and some of them have filed cross bills setting up their several claims. From the final decree of foreclosure, settling the priorities as between the various creditors, appeals have been prosecuted by the Central Trust Company, and by a large number of other creditors, claiming mechanics' liens.

On the 11th day of October, 1888, and prior to the execution of the mortgage aforesaid, the railroad company entered into a contract for the construction of its entire line of railway with the Ohio Valley Improvement & Contract Company. That company was a Kentucky corporation, authorized by its charter to construct railroads, and to receive in payment the stocks and bonds of such railroads. By the contract mentioned, the Ohio Valley Improvement & Contract Company, hereafter designated the "Contract Company," agreed to procure all necessary rights of way, to make all surveys, to furnish all the materials, and to build the entire line of said railroad, from Versailles to a point within $\frac{1}{4}$ of a mile of Beattyville. It also undertook to pay to the railroad company, until the road was completed, such sums as might be necessary to pay the salaries of the railroad company's officers, not exceeding \$10,000 per annum. It also agreed to assume and pay the debts of the railroad company not exceeding \$25,000, and to assume and pay the interest coupons on the mortgage bonds of the railroad company during the construction of the road, and two semi-annual instalments of interest thereafter maturing. In payment for all this the railroad company agreed to assign to the contract company bonds of five counties amounting to \$550,000, to be delivered to the contract company whenever the railroad company was entitled to receive the same from the counties for construction of the road in accordance with their

*Petition for certiorari to take the case to the Supreme Court of the United States denied October 23, 1895.

several subscriptions. The counties had subscribed, in all, for \$550,000 of stock of the railroad company, payable in bonds of the respective counties, in instalments, depending upon the completion of the road to designated points. The railroad company further agreed to assign and deliver to the contract company, for each lineal mile of road, \$25,000 of its own negotiable 6 per cent coupon bonds, secured by a mortgage constituting a first lien upon the entire line of road and its equipments; also to assign to the contract company the subscriptions made by individuals to the capital stock of the railroad company; also to issue to the contract company, for each lineal mile of road, \$25,000 of the paid-up capital stock of the company, after deducting the stock subscribed for by individuals and counties. It was provided in the contract that the aforesaid bonds and shares of stock should be issued in advance, and placed in the custody of the Louisville Safety Vault & Trust Company, to be paid over to the contract company as the work progressed. The entire line of road thus contracted for was 97 miles in length. Of this, 63 miles were completed. Considerable proportion of the remainder was graded, but before completion the contract company became insolvent and abandoned the work, whereupon this litigation began. Of the \$550,000 in county bonds mentioned in the contract, only \$200,000 were earned. The remainder were lost on account of the failure of the contract company to finish the road to designated points by the times stipulated in the various contracts with the counties. During the time of construction the railroad company delivered to the contract company the \$200,000 of county bonds earned as aforesaid, and its first mortgage bonds to the amount of \$2,875,000. It also delivered a corresponding amount of its railroad shares to said contract company. The contract company is one of the defendants to this litigation, but it has not appealed from the decree of the circuit court.

All these payments were made to the contract company on monthly estimates by the chief engineer of the railroad company, which estimates included the work done and materials furnished by the contract company directly or through its various subcontractors; the contract providing for payment by instalments, on estimates thus made, as the work progressed. A large part of the work done and materials furnished was done or furnished directly by the contract company, but a still larger proportion was done or furnished through the medium of subcontractors employed by the principal contractor. These subcontractors were to be paid directly by the contract company in money, on monthly estimates furnished by the railroad company's chief engineer, who was to give vouchers for 90 per cent of such estimates, to be paid in cash by the contract company. The railroad company seems to have fully complied with the terms of its agreement, and to have made all payments, as the work progressed, which it was obligated to do. The capital of the contract company was insufficient to carry on and complete its undertaking. It was therefore driven to make ruinous sales of the securities it from time to time received under its con-

tract, at prices affected by the fact that they were the securities of an unfinished railroad,—subordinate, by the express terms of the Kentucky statute giving a lien to contractors and subcontractors constructing a railroad, to the claims of all engaged in the work of construction. The railroad company took no steps to protect itself against the liens of subcontractors, and made no payments directly to them. It seems to have willingly met its obligations to the contract company, and to have trusted to its ability to relieve its road from any liens which might exist in favor of subcontractors. The contract company had an independent capital of about \$500,000. It added to this the proceeds arising from the sale of the railroad company's securities, and applied all in the payment of its obligations. Its resources proved insufficient. It was compelled to abandon its contract before completion, leaving several hundred thousand dollars of debts to subcontractors unpaid. The unpaid subcontractors were either made defendants to the foreclosure bill, or they have become parties by intervention, and have asserted liens, under the Kentucky lien law, as against the property of the railroad company. These claims, if successfully asserted, constitute liens prior to that of the bondholders. The property of the railroad company is confessedly inadequate to meet both classes of liens. This state of facts has given rise to a much complicated and hotly-contested series of litigations, culminating in twelve distinct appeals from the decree of the circuit court. Many of the appeals present questions common to all the cases. These appeals were argued together. So many of the questions as are common to all the appeals, and as are presented on the appeal of the Central Trust Company, will be disposed of in this opinion, leaving such questions as arise upon cross-appeals of mechanics' lien creditors to be disposed of in another opinion. The existence and priority of the several liens claimed in opposition to the bondholders depend upon a construction of the Kentucky lien act passed in 1888, entitled "An Act to Create a Lien on Canals, Railroads, and Other Public Improvements, in Favor of Persons Furnishing Labor or Materials for the Construction or Improvement Thereon." 1 Ky. Gen. Laws 1887-88, p. 99, chap. 1291, being §§. 2492-2495, Ky. Stat. 1894, revised by Barbour and Carroll. These sections are as follows:

"Sec. 1. That all persons who perform labor or who furnish labor, materials, or teams for the construction or improvement of any canal, railroad, turnpike, or other public improvement in this commonwealth, by contract express or implied, with the owner or owners thereof, or by subcontract thereunder, shall have a lien thereon and upon all the property and franchises of the owner or owners thereof for the full contract price of such labor, material, and teams so furnished or performed, which said lien shall be prior and superior to all other liens theretofore or thereafter created thereon.

"Sec. 2. The liens provided for in the foregoing section shall in no case be for a greater amount in the aggregate than the contract price of the original contractor, and should the aggregate amount of liens exceed the price

agreed upon between the original contractor and the owner or owners of the canal, railroad, turnpike, or other improvement, then there shall be a *pro rata* distribution of the original contract price among said lienholders.

"Sec. 3. No lien provided for in this act shall attach unless the person who performs the labor or furnishes the labor, material, or teams, shall within sixty days after the last day of the last month in which any labor was performed, or materials or teams were furnished, file in the county clerk's office of each county in which the labor was performed or materials or teams were furnished, a statement in writing, verified by affidavit, setting forth the amount due therefor, and for which the lien is claimed, and the name of the canal, railroad, turnpike, or other public improvement upon which it is claimed. Said claim shall be filed and indorsed by the clerk of the court, giving the date of its filing. The clerk shall also make an abstract and entry thereof, as now provided by law in case of mechanics' liens, and in the same book used for that purpose, and shall make proper index thereof. For his services the clerk shall be paid \$1 by the party filing the claim, which may be recovered by the latter from the owner or owners of the canal, railroad, or other improvements as costs.

"Sec. 4. Liens acquired under this act shall be enforced by proper proceedings in equity, to which other lienholders shall be made parties; but such proceedings must be begun within one year from the filing of the claim in the county clerk's office, as required by the 8d section of this act."

Messrs. A. E. Richards, J. B. Baskin, and Butler, Stillman, & Hubbard for Central Trust Co.

Messrs. W. A. Sudduth and H. L. Stone for Richmond & Irvine Const. Co.

Mr. Ernest Macpherson, [with **Messrs. Bryan, Bacon, and G. G. Gilbert**, for John Mitchell & Co.

Mr. St. John Boyle for Louisville Trust Co.

Mr. Matthew O'Doherty for D. Shanahan & Co.

Mr. Alexander P. Humphrey for D. Shanahan & Co., J. W. Walker, and the Shiffler Bridge Co.

Messrs. Pirtle & Trabue, for John MacLeod, Dickason & Crawford, M. A. Sullivan, et al.

Lurton, Circuit Judge, delivered the opinion of the court:

The first question presented upon the appeal of the Central Trust Company involves the existence of a mechanic's lien in favor of any of the subcontractors. The contention of the trust company is that the contract company agreed to accept for its work bonds constituting a first lien upon the same property, and maturing thirty years from their date, and thereby waived any mechanic's lien in its favor, and that subcontractors are bound by the waiver, and cannot assert any lien in consequence. It may be admitted that lien laws do not, in general, create a lien in favor of one who accepts in full a different security at the time the contract or agreement is made, or who has en-

tered into any other agreement which manifestly indicates a clear purpose and intention to waive the benefit of the statutory lien. A contract for a security which is inconsistent with the intention that a mechanic's lien should exist will be held, generally, as a waiver of the statutory lien; but it is clearly well settled that though the owner obligate himself to give a security inconsistent with the intention that a mechanic's lien should exist, or where the contract is to pay in land, or other specific article of property, yet if the owner fail to fulfil the agreement for such mode of payment, or for different security, it will not be taken as an agreement to waive the mechanic's lien in case payment is not made in the manner provided for, or the security is not given according to the obligation of the owner. *Grant v. Strong*, 18 Wall. 923, 21 L. ed. 859; *Railey v. Ward*, 4 G. Greene, 22; *McMurray v. Brown*, 91 U. S. 257, 23 L. ed. 321. "If the labor has been performed, or the materials furnished, no matter in what the owner agreed to pay, if he has not paid in any way, the laborer or mechanic has a right to resort to the security provided by law, unless the rights of third persons intervene before he gives the required notice. . . . Liens of the kind, except where the statute otherwise provides, arise by operation of law, independent of the express terms of the contract, in case the stipulated labor is performed, or the promised materials are furnished; the principle being, that the parties are supposed to contract on the basis that if the stipulated labor is performed, or the promised materials are furnished, the laborer or materialman is entitled to the lien which the law affords, provided he gives the required notice within the specified time." *McMurray v. Brown*, 91 U. S. 266, 23 L. ed. 324; *Chicago & A. R. Co. v. Union R.R. Mill Co.* 109 U. S. 702, 721, 722; 27 L. ed. 1081, 1088; *Van Stone v. Stillwell & B. Mfg. Co.* 142 U. S. 136, 35 L. ed. 964. It may be admitted that the agreement of the contract company to accept, in payment for work and materials, the bonds of the company, secured by a first mortgage, and payable in thirty years, and the shares of the capital stock of the company, was an agreement to take a security, which, when actually accepted, would be inconsistent with the retention of a mechanic's lien. And it may be conceded that, to the extent that payment was made and accepted in bonds and shares, the debt for work and materials was satisfied, and the mechanic's lien waived. It is very clear, however, that under the Kentucky statute a lien is originated with the beginning of the work, or the delivery of the materials. The provision in the 8d section of the act that no lien "shall attach unless the person who performs the labor or furnishes the labor, material, or teams, shall within sixty days after the last day of the last month in which any labor was performed, or materials or teams were furnished," furnish a statement in writing, etc., and file the same with the clerk of the county court,—is not in conflict with this view. This filing of the claim is necessary to the continuance and perfection of the lien. If this is not the meaning, and the lien has its inception when the work has been completed and the claim filed, then the con-

tractor would have no protection against a bona fide purchaser who bought or fixed a lien before the statutory registration. The lien, under such statutes, has been uniformly held to begin with the delivery of materials, or the beginning of the work. It is not a lien originating in a contract for a lien, but arises out of the statute, independent of any agreement for a lien, and is based upon the equity of paying for work done or materials delivered. It is an incipient or inchoate lien until it is completed or perfected by compliance with the statute, and is lost utterly if those acts required for its completion be not done within the time and in the manner required by the statute. Thus, although the contract company had a contract for payment in such securities, which, when accepted, would be inconsistent with the retention of a statutory lien, yet it had an inchoate lien from the time it began work or the delivery of material, which inchoate lien was only waived when the railroad company complied with its agreement, and gave the security or made the payment contracted for. But, independently of the existence of an incipient or perfected lien in favor of the contract company, we are quite agreed that a subcontractor in the first degree is given a direct lien under this statute. It is difficult as observed by counsel, to add anything by way of argument which will make this contention any more obvious than is apparent from the plain language of the statute. The 1st section of the act gives the lien to "all persons who perform or who furnish labor, materials, or teams, . . . by contract, express or implied, with the owner . . . or by subcontract thereunder." The clear purpose of the Kentucky statute was to make the liens of the contractor and subcontractor independent direct liens, the latter limited only by the amount of the original contract price. The lien of the subcontractor does not spring out of the lien of the contractor; is not derived therefrom, or subordinate thereto. The aggregate of all the liens is not to exceed the contract price agreed to be paid by the owner, but this limitation concerns, not the fact of a lien, but the extent thereof. Being a direct lien, its existence does not depend upon the existence or nonexistence of a contractor's lien, and the waiver of a lien by a contractor will not affect the subcontractor's lien.

Opinions of other courts, construing other statutes, are of little importance, without a careful comparison of the statute in question with that construed. But upon this question, as to whether a subcontractor has a direct lien, the case of *Green v. Williams*, reported in 92 Tenn. 220, 19 L. R. A. 478, is in point, for the reason that the Tennessee statute gives a lien to the contractor, and every person "employed" by the contractor, to work on the building or to "furnish . . . materials." Laws 1845-6, p. 185, chap. 118, § 2, the Tennessee supreme court, in the case cited, said that "the lien of a furnisher of materials is distinct, and independent of that of the original contractor. The statute gives the lien to several classes of persons, and the lien of each depends upon the statute, and is not derived from the right, or dependent upon the existence or nonexistence of the lien, of any other. The contractor may,

by contract or conduct, waive or estop himself. But his subcontractor may nevertheless bring himself within the protection of the statute, and independently assert a lien for his work or materials."

The language of the Kentucky act is that "all persons who perform labor or who furnish . . . materials, . . . by contract express or implied with the owner or owners thereof, or by subcontract thereunder, shall have a lien thereon." As to what is meant by "subcontract thereunder," the learned district judge very aptly observed: "The words 'by subcontract thereunder' could not be intended to make the lien of subcontractor a subrogated one, taking simply the place of the contractor, since, if such was the intention and meaning, the limitation of the liens to the original contract price would be without meaning, as, without this limitation, neither the original contractor, nor those subrogated to his lien, could claim a lien for labor and material furnished under a contract, beyond the contract price of that contract. I have heretofore construed those words as limiting the person who could obtain a subcontractor's lien."

2. The contention that the lien claims registered in the county clerk's office before the final completion or abandonment of the work by the contractor or subcontractor last engaged upon the work were prematurely filed, and that, therefore, no lien has been perfected, is not based upon a reasonable construction of the statute. The act requires that a lienor "shall within sixty days after the last day of the last month in which any labor was performed, or materials or teams were furnished, file a statement in writing, verified by affidavit, setting forth the amount due therefor, and for which the lien is claimed: . . . Said claim shall be filed and indorsed by the clerk of the court, giving the date of its filing." By § 4 it is required that the lien thus asserted shall be enforced by a suit in equity, to which other lienors are parties, by proceedings begun within one year from the filing of the claim in the county clerk's office. In view of the limitation upon the aggregate amount of liens enforceable against an owner who has a contract for the whole work, and of the provision that if the liens exceed the contract price the original contract price shall be distributed *pro rata* among such lienors, it is evident that all lienors should be parties to any suit of the kind, where, by reason of the excess of liens over the contract price, a *pro rata* distribution must be made. Indeed, the statute expressly requires only what a court of equity, under such circumstances, would order. But this does not, in itself, conflict with the other provision, which seems to contemplate that the person doing or furnishing the labor, materials, or teams is required to file his claim within sixty days after he has completed his work or furnished his materials. The language, "due therefor, and for which the lien is claimed," refers to the statement of the labor that was performed or materials or teams that were furnished, which was the subject-matter of the statement to be filed in the county clerk's office of each county in which the labor was so performed or the materials so furnished. The word "therefor" cannot refer to the last labor

that was performed, or the last materials that were furnished, by some other person. The construction placed upon the statute by the district judge, by which each claimant is required to file his claim within sixty days after the last day of the last month in which he performed any labor, or furnished any materials, meets with our approval. The inconvenience of having the final decree postponed until all lienors can be brought before the court who had subcontracts under the original contractor, is not so great as to leave purchasers and creditors indefinitely unduly advised as to the existence of liens for work done and materials furnished until the last work had been done or the last materials furnished under a contract for the construction of an entire railroad. The object of filing the claim is to give notice, not only to the owner, but to others interested; and it seems very unreasonable to construe the statute so as to authorize the filing of such notice only after completion of the entire work, or a final abandonment of the contractor's obligation.

3. As we have before stated, the contract between the contract company and the railroad company obligated the latter to pay the former, as the work progressed, on monthly estimates embracing all work done or materials furnished under the contract. The railroad company did make payments accordingly, on estimates which embraced all work done and materials furnished, whether by the contract company directly, or through its subcontractors. The insistence of the appellant is that the subcontractors must be taken to have entered upon their several subcontracts with reference to the obligation of the railroad company to pay on monthly estimates, as the work progressed, and therefore to be bound by all payments thus made under the contract. This might be so, if the subcontractors' lien was a derivative one, and subordinate to the lien of the principal contractor. When the railroad company made the contract for the construction of its entire road, it did so in the face of the fact that the contractor might sublet the work, and that, if it did so, each subcontractor would be entitled, under the law, to a lien which could only be discharged by the payment to such subcontractors of an equitable proportion of the original contract price. This statute was as much a part of the original contract as if it had been written therein. Under the plain and explicit provision of the statute, there was no way for the railroad company to protect itself against the liens of subcontractors but by so distributing the contract price between all who should contribute to the work of construction as that each incipient lienor should receive from it his *pro rata* of the contract price. An agreement to pay to the contractor this contract price in instalments, as the work progressed, was an agreement inconsistent with self-protection. If an owner, in the face of such a statute, obligates himself to make payments in advance, or in instalments, as the work progresses, he cannot complain if the effect of his own agreement is to leave him unprotected against the possible defaults of the contractor in paying subcontractors. We do not think that the effect of the statute is to suspend the owner's contract, as to the time and mode of paying the original contractor.

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If he has made a foolish contract, it is nevertheless a valid one; and if he cannot get relief through an equitable injunction, in case subcontracts are made, but is forced to carry out his agreement, he has no one to blame for his folly in making a contract prejudicial to his own interests, in case subcontracts are left unpaid. From this it must follow that the fact that payments had been made to the contract company, in excess of its *pro rata* proportion, for work and labor done or materials furnished by it, is no answer to the independent liens of subcontractors whose obligations have not been discharged by the contract company. 2 Jones, Liens, 2d ed. §§ 1304, 1305. What the effect would be if the principal contractor had made payments to his subcontractors through orders made on the owner, it is unnecessary for us to say, for no such question arises in this case. Payments made by the owner direct to a subcontractor in discharge of the subcontractor's claim and lien would, of course, operate as intended by the parties, and reduce to that extent the liability of the property for mechanics' liens, provided such payments were not in excess of the *pro rata* part of the contract price due to such subcontractor. So, also, it may be conceded that if the subcontractor expressly or impliedly agreed that the contract price might be paid to the principal contractor, and undertook, expressly or impliedly, to look to the principal contractor alone, such conduct would operate as an estoppel, and prevent the enforcement of any lien by the subcontractor. This case is, however, free from all circumstances indicating any agreement, express or implied, that the contract price might be paid to the principal contractor, and that such payment should operate as a discharge, *pro tanto*, of the subcontractor's lien. There is nothing to indicate that in any way the principal contractor received any part of the contract price as the agent of the subcontractors. The subcontractors were in the situation of a creditor having two securities. The principal contractor was primarily liable for the whole amount of their claims. And, in addition, they had a lien upon the owner's property for a proportionate part of each claim against the contractor. Payments made by the principal contractor to a subcontractor would primarily be payments in discharge of the personal obligation of the principal contractor, and therefore applicable to that part of the subcontractor's claim in excess of his lien against the owner. This was the rule of distribution and application of payment adopted by the district judge who heard this case in the circuit court. We have given additional consideration to the argument presented here by the Central Trust Company, that partial payments made from time to time by the principal contractor upon monthly estimates of work or materials done or furnished by the subcontractors should operate as an absolute discharge of so much of the claims of the subcontractors as was embraced within the estimate paid, in full or in part. This question arises upon evidence that monthly estimates were made by the railroad company's chief engineer of work done or materials furnished by subcontractors, and that the contractor, in very many instances, paid on such estimates 90 per cent of the amount thus esti-

mated. Upon these facts, counsel contend that the payments thus made by the contractor operated to absolutely discharge 90 per cent of the entire work done and materials furnished during the given month. This overlooks the fact that the subcontractor's contracts were entire contracts. They were contracts to do so much work and furnish so much material for a given sum of money, and that these monthly payments as the work progressed were upon estimates subject to correction. The learned district judge was right in holding that payments made upon such estimates were, in the last analysis, but partial payments upon sums due or to become due upon the subcontractor's entire contracts, and that as a partial payment made by the contractor, who was personally obligated to pay the whole of the sum, it should be properly treated as a payment upon that proportion of the subcontractors' claims in excess of that secured by the lien. The same result will be brought about upon another theory, which is that, where the aggregate of the liens is for a sum in excess of the original contract price, each lienor is entitled, under the statute, to only a proportionate part of the contract price, and to a *pro rata* interest in the common security, and that he would be entitled, when he came to assert his claim against the common security, to obtain that *pro rata* upon the basis of his entire claim, and not upon the basis of the balance due after crediting his claim with payments made by the principal contractor on account of his personal liability. *Chemical Nat. Bank v. Armstrong*, 16 U. S. App. 465, 59 Fed. Rep. 379, 8 C. C. A. 155, 28 L. R. A. 281. Thus construed, it must follow that the distribution of the original contract price should be made upon the basis of the entire lienable claim of each subcontractor to the work of construction. If the railroad company pays out the contract price before the work is completed or finally abandoned, then its liability to contractors or subcontractors left with unpaid claims will be ascertained by an appraisal of the entire original contract price among the several persons who did work or furnished materials on the basis of the cost of the work. To limit this distribution to those claims which were perfected by the statutory notice would be unjust to the owner, who had a right to distribute the contract price during the progress of the work. If, by premature distribution, one incipient lienor is paid more than his proportion, the owner will suffer the loss, and be remitted to his remedy against the original contractor. To require the contract price to be distributed alone among those who finally perfected their claims, and upon the basis of the amount of the claims shown by the completed liens, would do great injustice, and deprive the owner of the right to distribute the contract price among contributors to the work as it progressed. The fact that some of the subcontractors have been paid a larger per cent of their claims by the principal contractor than others is an advantage of which they should not be deprived. If any part of their claims remains unpaid, they will be entitled to share in the common security ratably. That some of the subcontractors received some of the bonds paid by the railroad company

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to the principal contractor, and that others received the proceeds derived from sales of such bonds by the contractor, cannot affect the rule of distribution. The bonds were paid to the contract company as an absolute payment, and became the property of that company, to do with as it saw fit. The contract company was absolutely liable to each subcontractor for the full amount of the price agreed to be paid under the subcontracts. The aggregate sums thus due to subcontractors very much exceeded the original contract price. Payments made by the contract company were most often made from a common fund, arising in part from the capital of that company, and in part from proceeds of sales of bonds received from the railroad company; other payments were made on the check of the company against a fund traceable wholly to proceeds of sales of such bonds; and, in still other cases, partial payments were made in such bonds at an agreed cash valuation. But all these payments were made, without regard to the source from which the fund or property came, upon the direct, personal, pecuniary obligation of that company to its subcontractors, and in reduction of that acknowledged liability between debtor and creditor. The first effect of these payments was to reduce the personal and primary liability of the payor. The second and indirect effect was to relieve the property of the railroad company, in so far as such payments, on proper application, might discharge the independent liens of the subcontractors. If the subcontractors took pay in bonds at an agreed value, instead of money, it ought not to operate as a discharge of their liens to any greater extent than a like payment in money. If we are right in holding that a partial payment in money by the contract company, upon its own absolute obligation, would not operate to defeat or release the direct liens of the subcontractors to a ratable proportion of the common security for any balance left unpaid, then it must follow, in the absence of an agreement to the contrary, that it is immaterial whether such payment was made in bonds or money, and immaterial to inquire as to the origin of the contract company's title. The decree declaring the liability of the railroad company proceeded upon the basis we have indicated, and meets our approval.

4. The next objection to the decree presented by the Central Trust Company is as to the method adopted for the ascertainment of the contract price agreed to be paid by the railroad company to the contract company. Appellant insists that it was the duty of the railroad company to withhold the payment of any part of the contract price until all the work contracted for by the principal contractor or by subcontractors had been finished, and all liens ascertained and perfected; that at that time only the contract price should have been ascertained, and distributed among all the persons entitled to share therein. This suggestion is based upon the peculiar facts of this case. The contract price was payable in bonds and shares of stock, and not in money. As between the principal contractor and the railroad company, the latter was obliged to pay this contract price only in bonds and

stock. It was also obligated to make these payments on estimates, as the work progressed. This the railroad company did, and paid to the contract company, from time to time, as the work progressed, every dollar that it was obligated to pay. These bonds were converted into money by the contract company, as received, and the proceeds of such sales were the principal source from which the contract company made its partial payments to its subcontractors. The price of these bonds varied. Those first delivered are shown to have sold as high as 90 cents on the dollar, but from that time they declined in market value. Some were sold for 60 cents, some for 40 cents, some for 80 cents; and after a receiver was appointed in this case, and these mechanics' liens were asserted, the market value of the bonds had declined to from 12 to 17 cents on the dollar. Now the contention of the trust company is that the money value of the price to be paid by the railroad company should have been ascertained when the work was finally completed or abandoned. This contention would operate to reduce the money value of its contract to a comparatively insignificant sum. The position is inequitable, unjust, and legally unsound. The railroad company had placed itself in a position where it was obligated to pay out these securities to the contract company from time to time. The statute, as we have before said, placed it under the obligation to see that the contract price was ratably distributed among all persons who contributed to the building of the railroad or the furnishing of materials. If its own contract was inconsistent with its protection against the independent liens of subcontractors, undischarged by a proper application of the contract price by the contractor in discharge of subcontractors' claims, it did not operate to destroy the contract, or to suspend its liability thereunder. It is perhaps true that it might have resorted to a court of equity, and have brought the contractor and subcontractors before the court, and compelled a distribution of the contract price ratably among all the lienholders, or have obtained other equitable interference, by way of an injunction prohibiting the contract company from subletting any of its work unless it should give a bond for the protection of the owner against subcontractors and their liens. If the railroad company chose not to avail itself of possible equitable assistance, it had the right to go ahead and pay the contract price into the hands of the contractor, as it had agreed to do, and take the risk of liability to subcontractors whose claims should be left unpaid. Now, this is exactly what the railroad company did. If the contract price had been payable in money, instead of bonds and stocks, no such question as this would have been material, but inasmuch as the subcontractors' liens are independent, and inasmuch as their contracts with the principal contractor were for money, it follows that the subcontractors' liens operated as a security for the payment of the money; and it is no answer for the railroad company to say that it contracted to pay for the building of its road in land or bonds or shares, and that therefore their liens are dischargeable by lands or bonds or shares. That would be so if the subcontractors' liens were

by way of subrogation. It would be so if the subcontractors were limited to the amount due by the owner to the contractor at the time their liens were acquired. But the lien of the subcontractor, being an independent, direct lien, is a lien for the security of the money due on his contract with the principal contractor. It therefore becomes essential that the money value of the contract price to be paid by the owner shall be ascertained. The subcontractor is bound by that contract price, for the statute provides that the aggregate amount of the liens shall not exceed the original contract price. The method adopted by the circuit court was to ascertain the market value of the bonds and shares at the time they were actually delivered by the railroad company to the contract company in pursuance of the contract between them. That method, we think, was the proper one, and did no injustice to any of the parties concerned.

The insistence of the appellees below, and again presented by their several cross appeals, was, that the contract price was \$50,000 per lineal mile, plus the various county aid bonds. This contention rests upon the assumption that for the construction of the railroad, and for the other expenditures to be made by the contract company, it agreed to pay \$50,000 per lineal mile, in money, or at its election, in its bonds and shares. This assumption is radically erroneous. The contract fixed no money value whatever. It provided that "in payment for this work thus to be done, and the expenditures to be made, the railroad company agrees to sign and deliver to the contract company the following named securities, to wit." This is followed by a detailed statement of the securities to be delivered in payment. By the third paragraph it was provided that payment should be made in monthly instalments, as the work progressed. By the fourth paragraph the railroad company agreed to deposit these securities as soon as practicable, with the Louisville Safety-Vault & Trust Company, as trustee under this agreement. The fifth paragraph provides the method of ascertaining, from time to time, the payments due to the contract company, by prescribing that the chief engineer shall from month to month certify in writing "what proportion the work done, and material furnished . . . bear to the total expenditures and cost of the railroad and equipments, when completed according to this contract, as same may be estimated by said engineer, and the amount payable on account thereof to said contract company, and thereupon the amount so certified shall become immediately payable by the railroad company to the contract company." The sixth paragraph, which gave to the company an option to pay in money, was in these words:

"Par. 6. As the several instalments of money shall become due to the contract company under this agreement as above provided, it shall be the duty of the railroad company to pay the same in money, or to give to the trustee an order for a delivery to the contract company, or its order, of the securities deposited with it as above provided, equal in amount, at their par value, to the amount of such instalment, as fixed by the certificate of the engineer. If the railroad company should pay any such

instalments in money, it may, upon depositing with the trustee the receipt of the contract company therefor, withdraw from the hands of the trustee an equal amount, at par, of the bonds and capital stock of the railroad company, such withdrawal to be in equal proportion of each. If payment be made in securities, instead of money, the contract company shall be entitled to receive *pro rata* payments in the stocks and bonds of the railroad company, after deducting the amounts paid in county bonds, as provided in clause 1, ¶ 2, of this contract."

It is difficult to draw an inference that the company was to pay at the rate of \$50,000 per mile in the event it elected to pay in money in place of securities. The estimates of the engineer were to be based on the proportion of the work done to the whole amount to be done. Thus, if the estimates showed that 10 per cent of the whole work had been done and materials furnished, then 10 per cent of the securities had been earned, and were deliverable. It is not within the bounds of reason that these securities were estimated at their par value, or that, if, for any reason, the company had refused to deliver them, a money judgment equal to the par of the stocks and bonds would have been recoverable. But, however this may be, the railroad company did deliver these stocks and bonds as they were earned; and this, as we have already seen, it had a right to do. The legal proposition that where a promise is in the alternative, to pay in money or in property, the promisor has an election either to pay in money or the equivalent, and that, if he fail to pay in property on the day of payment, the right of election is gone, and the promisee entitled to payment in money, is not applicable, upon the facts of this case. To be applicable, there must be a promise to pay a definite sum of money, or its equivalent in property, and there must be a failure to pay according to the contract. Neither essential is found here. No contractual relation existed between the railroad company and the subcontractors. It was under no promise to pay them anything. It is true that they had a direct, statutory lien to secure them in the payment by the contractor of the sums due under their several subcontracts, and it is also true that they have been allowed money decrees against an owner who had a contract to pay only in property. But this is because the property has been paid over to the principal contractor, thus entitling them to a decree for a proportionate part of the value of the property. That value was properly ascertained when the master reported its cash value when paid and delivered to the contract company. The amount to be paid in bonds and stocks for each lineal mile was manifestly not intended as the measure of a money price to be paid, or of a money indebtedness in case of a default in the delivery of the securities. The price to be paid for the work was fixed with reference to the speculative value of the securities in which it was to be paid, and it would be gross injustice to hold that a price so payable furnished the measure of a money indebtedness. In *Cleveland & P. R. Co. v. Kelley*, 5 Ohio St. 180, the agreement was that 75 per cent of the price of construction should be paid in money, 41 L. R. A.

and 25 per cent in the stock of the company. The railroad company made default in delivery of the stock, and was held to have lost the right to pay in stock. But upon a full consideration of the contract the Ohio court held that the price was a stock price, and not a money price, and the price, as payable in stock, was not, in the contemplation of the parties, a money indebtedness, and that it would be a manifest injustice to give the contractors, in cash, what was measured by payment in speculative stock. The court thereupon held that the market value of the stock was the measure of recovery. The cases of *Moore v. Hudson River R. Co.* 13 Barb. 156, and *Parks v. Marshall*, 10 Ind. 21, are to the same effect.

5. Appellant's tenth assignment of error is based upon the action of the court in overruling its twenty ninth exception to the report of Special Master Du Reille. That exception was in these words:

"Because the master valued \$652,000 of bonds issued by the Richmond, Nicholasville, Irvine, & Beattyville Railroad Company, and afterwards indorsed by the Louisville, New Albany, & Chicago Railway Co. at 90 cents on the dollar, being the amount at which they sold after such indorsement, instead of valuing the said bonds at the sum they were worth at the time they were received by the Ohio Valley Improvement & Contract Company without said indorsement."

The contract company entered into an agreement with the Louisville, New Albany, & Chicago Railway Company, a corporation of Indiana, by which the latter, in consideration of the transfer to it of a controlling interest in the stock of the Richmond, Nicholasville, Irvine, & Beattyville Railroad Company, agreed to indorse the bonds of the latter company, when delivered to the contract company. The last-named railroad company is not shown to have had anything to do with this arrangement, the consideration for the indorsement proceeding wholly from the contract company. Bonds to the amount of several hundred thousand dollars were accordingly indorsed and sold before any question was made as to the validity of the indorsement. The master, in ascertaining the value of the contract price to be paid for construction, attached no value to the stock of the railroad company, except in so far as that stock had been used to enhance the value of the bonds, as furnishing a consideration inducing the Indiana Railroad Company to indorse the bonds of the Kentucky Railroad Company. We are unable to see any injustice in this. While the stock had no definite market value in money, yet a controlling interest did have value sufficient to procure an indorsement on the bonds in which the remainder of the price of construction was to be paid. If that indorsement enhanced the market value of those bonds, that enhancement furnished a reasonably fair measure of the value of the shares which were part of the contract price. Before all the bonds had been indorsed, and before most of them indorsed had been sold, the act of the Indiana Railroad Company in undertaking to indorse the bonds of another railroad corporation was, in a judicial proceeding instituted by the Indiana Company against the contract company and

other holders of indorsed bonds, declared null and void as *ultra vires*. This decision operated to deprive the contract company of any benefit from such indorsement on unsold bonds, but it did not rob it of the benefit already realized through the enhanced value of such bonds as had been sold theretofore. To the extent of this benefit, it had been able to re-

alize value from the shares of stock, and this enhanced value of the bonds actually sold was a fair measure of the value of that part of the price of construction paid in shares.

Costs of appeal will be paid out of the fund arising from the sale of the railroad.

Affirmed.

CALIFORNIA SUPREME COURT.

Mary I. BERLINER, *Appt.*,

v.

TRAVELERS' INSURANCE COMPANY,
Rept.

(.....Cal.....)

1. "A proviso exempting an accident insurance company from liability for injuries to a person "in or on any such conveyance not provided for the transportation of passengers" does not include injuries received by a passenger while on a locomotive of a passenger train at the invitation of a railroad official.

2. A person insured by an accident policy in a preferred class as a mining expert is not, while riding as a passenger on a railroad locomotive, within a proviso reducing the amount of insurance if he is injured "in any occupation or exposure classed . . . as more hazardous than that here given."

3. A passenger does not, by riding on a railroad engine by invitation of an officer of the road, lose his character as a passenger within the meaning of an accident policy which doubles the amount of insurance in case of injury to a passenger "in any passenger conveyance using steam," etc.

(July 18, 1898.)

APPEAL by plaintiff from a judgment of the Superior Court for the City and County of San Francisco granting a nonsuit in an action brought to enforce payment of the amount alleged to be due under a policy of accident insurance. *Reversed.*

The facts are stated in the Commissioner's opinion.

Mr. Daniel Titus, for appellant:

Whether the insured met his death while riding on the engine was a question of fact for the jury, and not of law for the court.

Anthony v. Mercantile Mut. Acci. Asso. 162 Mass. 354, 26 L. R. A. 406.

Where George Berliner was at the time of the accident, and whether voluntarily exposing himself to "unnecessary danger," and whether "in or on a conveyance using steam as a motive power and not provided for the transportation of passengers," were one and all questions of fact for the jury, and not of law for the court.

Travellers' Ins. Co. v. Seaver, 19 Wall. 544, 22 L. ed. 158; *Lake Shore & M. S. R. Co. v. Brown*, 128 Ill. 162; *Wagner v. Missouri P. R.*

Co. 97 Mo. 522, 8 L. R. A. 156; 1 Am. & Eng. Enc. Law, 2d ed. p. 308.

In the construction of insurance policies all language used in the policy which limits the liability of the company is taken most strongly against the insurer and liberally in favor of the insured.

Manufacturers' Acci. Indemnity Co. v. Dorgan, 16 U. S. App. 290, 58 Fed. Rep. 956, 22 L. R. A. 620, 7 C. C. A. 581; *Rogitable Acci. Ins. Co. v. Osborn*, 90 Ala. 207, 18 L. R. A. 267; *Burkhard v. Travellers' Ins. Co.* 102 Pa. 266, 48 Am. Rep. 205; *McGlinchey v. Fidelity & C. Co.* 80 Me. 251; *Darrov v. Family Fund Soc.* 116 N. Y. 537, 6 L. R. A. 495.

The construction of a policy of insurance must always be in favor of upholding the contract.

McMaster v. Insurance Co. of N. A. 55 N. Y. 232, 14 Am. Rep. 239; *Coyne v. Weaver*, 84 N. Y. 386; *Hoffman v. Aetna F. Ins. Co.* 82 N. Y. 405, 88 Am. Dec. 337; *Healey v. Mutual Acci. Asso.* 133 Ill. 556, 9 L. R. A. 371; *Union Mut. Acci. Asso. v. Frohard*, 33 Ill. App. 183; *Pittton v. Ins. Co.* 17 C. B. N. S. 123; *Accident Ins. Co. v. Crandal*, 120 U. S. 527-533, 80 L. ed. 740-743; *United States Mut. Acci. Asso. v. Newman*, 84 Va. 52; *Healey v. Mutual Acci. Asso.* 133 Ill. 556, 9 L. R. A. 371.

As the train on which Berliner was riding was a passenger conveyance the policy does not exclude him from being in or on any part of it.

Southard v. Railway Pass. Assur. Co. 34 Conn. 574; *Marr v. Travelers' Ins. Co.* 39 Fed. Rep. 321; *Travelers' Ins. Co. v. Mitchell*, 47 U. S. App. 260, 78 Fed. Rep. 766, 24 C. C. A. 305; 2 May, Ins. 2d ed. § 515.

Negligence on the part of the insured is no defense unless made so by the terms of the policy.

Wilson v. Northwestern Mut. Acci. Asso. 53 Minn. 479; *Champlin v. Railway Pass. Assur. Co.* 6 Lans. 72; Niblack, Ben. Soc. § 365; 2 May, Ins. 3d ed. §§ 409, 530.

The engine was a part of the passenger conveyance. The train was a passenger train and no part of it was excepted from the provisions of the policy.

2 May, Ins. 2d ed. §§ 526, 527, 529; *Brown v. Railway Pass. Assur. Co.* 45 Mo. 221.

The question whether there was a voluntary exposure to unnecessary danger is always one of fact for the jury.

Travellers' Ins. Co. v. Seaver, 19 Wall. 544.

NOTE.—For injury while engaged in employment more hazardous than that for which a person is insured, see also *Johnson v. London Guarantee & 41 L. R. A.*

Acci. Co. (Mich.) 40 L. R. A. 440; also *Standard Life & Acci. Ins. Co. v. Carroll* (C. C. App. 2d C.) ante, 194.]

22 L. ed. 158; 1 Am. & Eng. Enc. Law, 2d ed. p. 808; *Manufacturers' Acci. Indemnity Co. v. Dorgan*, 16 U. S. App. 290, 58 Fed. Rep. 945, 22 L. R. A. 620, 7 C. C. A. 588; *Anthony v. Mercantile Mut. Acci. Assn.*, 162 Mass. 354, 26 L. R. A. 406; *Burkhard v. Travelers' Ins. Co.*, 103 Pa. 262, 48 Am. Rep. 207.

Mess's. Olney & Olney, for respondent:

The contract in suit restricts the insured, *ex vi termini*, unless he is a railway employee, from going upon those portions of the train not intended for his accomodation.

Pacific Mut. L. Ins. Co. v. Howell, 13 Ind. App. 519; *Piper v. Mercantile Mut. Acci. Assn.*, 161 Mass. 589; *Travelers' Ins. Co. v. Snowden*, 45 Neb. 249.

The United States circuit court of appeals for the eighth circuit takes exactly the opposite view to that of the learned commissioner in this case.

Atina L. Ins. Co. v. Vandecar, 57 U. S. App. 446, 86 Fed. Rep. 282.

Haynes, C., filed the following opinion:

Action upon a policy insuring George Berliner, the husband of plaintiff, against death caused by accident. At the conclusion of plaintiff's evidence, defendant moved for a nonsuit. The motion was granted, and, from the judgment entered thereon, the plaintiff appeals.

Said policy insured said Berliner against loss of time resulting from bodily injuries effected through external, violent, and accidental means, and classifies the injuries and the compensation for loss of time. It then provides: "(e) Or if death results from such injuries alone within ninety days will pay \$10,000 to Mary I. Berliner, his wife, if surviving; in event of her prior death, to the legal representatives or assigns of insured. (f.) If such injuries are sustained while riding as a passenger in any passenger conveyance using steam, cable, or electricity as a motive power, the amount to be paid shall be double the sum above specified: provided, if insured is injured in any occupation or exposure classed by this company as more hazardous than that here given [that of mining expert], his insurance shall be only for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard." The policy then proceeds to qualify its liability by specifying what is not covered by it, as follows: "This insurance does not cover disappearance . . . nor accident nor death . . . resulting wholly or partly, directly or indirectly, from any of the following causes, or while so engaged or affected: Disease or bodily infirmity; . . . violating law; voluntary exposure to unnecessary danger; . . . entering or trying to enter or leave a moving conveyance using steam as a motive power (except cable and electric street cars), being in or on any such conveyance not provided for transportation of passengers, or on a railway bridge or roadbed (railway employees excepted)." The insured received injuries in a railway accident in Mexico, from which he died four days afterwards. The only evidence as to the circumstances connected with the accident was the testimony of S. W. Ferguson, who accompanied Mr. Berliner to Mexico, and was travelling with him at the time of the ac-

cident. The witness and Mr. Berliner were invited by the superintendent of the railroad to go from the city of Mexico to Pueblo, and return. Mr. Cokefield, superintendent of motive power on that road, an old acquaintance of Mr. Berliner, was with the party. On the return trip the train consisted of a locomotive, a baggage car, and three or four passenger cars, and the superintendent's car, which was at the rear end of the train. While at a station, Mr. Cokefield invited Mr. Berliner to go with him to the engine, that he might better see the country, and they started towards the engine, and the witness returned to the superintendent's car. In going down the grade, the train acquired a great velocity, and leaving the track was wrecked. The engineer, fireman, and conductor were killed, and he thought, about a half a dozen of the passengers. He found Mr. Berliner in the wreck of the engine, near the fire box, and burned by escaping steam, and believed Berliner was on the engine at the time of the accident. On cross examination he testified that he advised Mr. Berliner not to go on the engine, that he would get his clothes dirty, that he could see as well from the car, and that he thought it was not a safe place, but that he might or might not have used the word "safe," that the conversation was jocular, but he desired to detain him. The foregoing is the substance of the testimony relating to the accident.

The ground of the motion for a nonsuit was "that the contract itself did not provide for the death of a party by an accident while riding upon a locomotive, but only in a conveyance intended for passengers." Assuming that Mr. Berliner was upon the engine at the time of the accident, — and we think the court might properly find that he was — defendant's contention is that Mr. Berliner was at the time of the accident on "a conveyance not provided for the transportation of passengers," and that, therefore the defendant is not liable, while appellant contends that the train on which the insured was riding was a regular passenger train composed of a locomotive and cars, and formed a conveyance for the transportation of passengers, and that the policy did not exclude him from any part of it. It is well settled that policies of insurance should be liberally construed in favor of the insured; that, where its terms permit of more than one construction, that will be adopted which supports its validity. In *Equitable Acci. Ins. Co. v. Osborn*, 90 Ala. 201, 207, 13 L. R. A. 267, it was said: "Exceptions of this kind are construed most strongly against the insurer, and liberally in favor of the insured. This is now the settled rule for construing all kinds of insurance policies, rendered necessary, especially in modern times, to circumvent the ingenuity of insurance companies in so framing contracts of this kind as to make the exceptions unfairly devour the whole policy." In *Accident Ins. Co. v. Orandal*, 120 U. S. 527, 30 L. ed. 740, it was held that "a policy of insurance against 'bodily injuries, effected through external, accidental, and violent means,' and occasioning death or complete disability to do business; and providing that 'this insurance shall not extend to death or disability which may have been caused wholly or in part by bodily infir-

injuries, or by suicide, or self inflicted injuries,' covers a death by hanging one's self while insane." It was there said that "the insane suicide no more dies by his own hand than the suicide by mistake or accident," and that the words "bodily infirmities or disease" do not include insanity, and that it is "the fundamental rule of interpretation that policies of insurance are to be construed most strongly against the insurers who frame them." To this we may add that the general rule is that exceptions and conditions are to be construed strictly against the party in whose favor they are made. In a New York case it was said: "It has become a rule of law that if it be left in doubt whether words of the contract were used in an enlarged or a restricted sense, other things being equal, the construction will be adopted which is most beneficial to the promisee." *Darrow v. Family Fund Soc.* 116 N.Y. 537, 6 L. R. A. 495. In *Healey v. Mutual Acci. Assn.* 133 Ill. 556, 9 L. R. A. 371, it was held that a death caused by accidentally taking and drinking poison is a death produced by bodily injuries received through external, violent, and accidental means. Many other cases might be cited illustrating and applying the rule of construction above stated, but the rule is so well settled that we deem it unnecessary.

The policy here in question, though of a preferred class, was not special, covering only accidents to the insured while engaged in a designated employment, pursuit, occupation, or situation, but covered any possible accident which might happen to anyone under any or all circumstances, provided it did not fall within an exception expressed in the policy. The term "conveyance" applies as well to the means of transporting freight as of passengers, and in the clause exempting the insurance company from liability for accidents occurring in "entering or trying to enter or leave a moving conveyance using steam as a motive power" is so applied; while the clause here under consideration distinguishes a "conveyance provided for the transportation of passengers" from those used for the transportation of freight. Neither clause specifies railroad trains, and each includes as clearly vessels propelled by steam. If the insured had met with an accident upon a passenger steamer instead of a railroad train, upon what part of the vessel must he have been at the time of the accident to be within the protection of his policy? Must he be seated in the cabin or occupy a state room? The policy does not say so. It restricts him to no part of the vessel, and therefore, if the insurance company sought to escape liability by showing that at the time of the accident he was not in the cabin or a state room, it must import into the contract a qualification or provision which is not expressed or even implied. That the locomotive is part of the "conveyance" provided for the transportation of passengers upon a railroad is not disputed. If the deceased had been killed in trying to enter or leave the engine of a freight train, the defendant here would hardly concede its liability upon the ground that it was no part of "a moving conveyance," and therefore not within the clause exempting it from liability. Upon the theory that the engine is

not part of the conveyance, it would follow that, if A were killed in attempting to get on a car of a moving passenger train, the insurance company would not be liable, while if B were killed in attempting to get upon the engine of the same train at the same moment the insurer would be liable. If it had been intended to restrict the insured to any particular part of the conveyance, apt words to express such intention could have been readily found and used; as, for example, in *Hull v. Equitable Acci. Assn.* 41 Minn. 232, the policy contained the following provision: "Standing, being, or riding upon the platform of moving railway coaches (other than street cars), or riding in any other place not provided for the transportation of passengers, . . . are hazards not contemplated or covered by this certificate." The same provision is found in the policy considered in *Anthony v. Mercantile Mut. Acci. Assn.* 162 Mass. 354, 26 L. R. A. 406; and a similar provision is found in a policy issued by still another company. See *Sawtelle v. Railway Pass. Assur. Co.* 15 Blatchf. 216. That "a conveyance using steam as a motive power" includes railroad trains cannot be controverted. If, then, we insert "railroad trains" for or instead of "conveyance," the meaning becomes clear. Thus, "entering or trying to enter or leave a moving railroad train (except cable and electric street cars), being in or on any such moving railroad train not provided for transportation of passengers, or on a railroad bridge or road-bed (railway employees excepted)." Thus paraphrased, the only distinction made is in the character of the trains, and not as to different parts of the train. In the first clause in regard to entering or leaving trains, all trains are included; while, under the second clause, passenger trains are distinguished from freight, repair, wrecking, and other trains "not provided for the transportation of passengers." These exceptions, therefore, literally interpreted, have no application or reference to passengers or passenger trains except as to entering or trying to enter or leave, any train, whatever its character, while in motion; and therefore some term or condition not expressed in the policy must be imported into it to work a forfeiture and relieve the defendant from liability, and that is not permissible.

It follows from this conclusion that plaintiff's right to recover under clause (e) or (f) of the policy is clear, unless such right is barred by No. 1 of the provisos. That proviso is as follows: "If insured is injured in any occupation or exposure classed by this company as more hazardous than that here given, his insurance shall be only for such sums as the premiums paid by him will purchase at the rates fixed for such increased hazard." In *Stone v. United States Casualty Co.* 34 N. J. L. 375, a similar provision in an accident policy was considered. It was there said: "The injuries excluded from the compensation of the policy are described as those that are 'received in any employment, or by any exposure either more hazardous in itself, or classified by the company as more hazardous.' These terms, literally rendered, require that the assured, to come within their effect, must, at the time of the injury, be in an employment more dangerous than his own. The language has respect to

employments, and not to individual acts. It is true that a certain degree of ambiguity is introduced by the expression 'other exposure'; but, looking at the body of the policy, we find these terms used in the sense of the risks arising from a business or occupation. By adhering to the literal signification of the terms employed, these indorsements prefixed to the several classes of employments lose all force as independent stipulations, and serve the simple purpose of graduating such employments for the service of that provision of that policy which prohibits the assured from passing, at his own option, from one business to another. Understood in this view, they are properly a part of the classifications; but, if they are to be received as containing new terms of the contract, they are entirely out of place. If the company intended to say to the assured that if he did any act which did not strictly belong to his own occupation, but was embraced more properly in some other business, and if thereby any harm to him accidentally resulted, that in such event he could claim nothing under his policy, it was easy for them to do so in plain language. . . . A qualification . . . so restrictive of the rights of the party insured ought not to be admitted unless the terms of this indorsement will bear no other rational interpretation." In that case the occupation of the insured was stated to be that of a teacher. While unemployed, he was superintending the erection of a building for himself, and fell from the building by the breaking of a joist, and was killed, and the judgment against the company was affirmed. In the case at bar the policy did not provide that it covered only those accidents which might occur to the insured while actually engaged in the direct duties of a mining expert, but covered all accidents not excluded by the terms of the policy, the occupation being inserted only to show that it was within a specified class of risks. See, upon this point, and supporting the case last above cited, *Provident L. Ins. Co. v. Fennell*, 49 Ill. 180, and *North American Life & Acci. Ins. Co. v. Burroughs*, 69 Pa. 43, 8 Am. Rep. 212.

Under the evidence contained in the record, I think it perfectly clear that the plaintiff was

at least entitled to judgment for \$10,000 under clause (e) of the policy, and the only remaining question is whether she was entitled to judgment for \$20,000 under clause (f), which provides: "If such injuries are sustained while riding as a passenger in any passenger conveyance using steam, cable, or electricity as a motive power, the amount shall be double the amount above specified." If Mr. Berliner had been riding on the train in any other capacity than that of a passenger,—that is, as an employee of the railroad company, or an express or mail agent, or a tramp stealing a ride upon a brakebeam,—the defendant would not be liable under clause (f). But he occupied no such relation to the railroad company or the train. Though upon the engine, he was a passenger. That he did not lose his character as a passenger by going upon the engine at the request of an officer of the road, see *Lake Shore & M. S. R. Co. v. Brown*, 123 Ill. 186; *McGee v. Missouri P. R. Co.* 92 Mo. 216, and *Nashville & C. R. Co. v. Erwin* (Tenn.) 8 Am. & Eng. R. Cas. 465. These were cases that involved the liability of the railroad company for injury to its passengers while rightfully upon the engine, and were not cases of accident insurance; but the word "passenger," as here used, is evidently intended to designate the character or relation the insured sustained to the proprietor of the conveyance, and are therefore in point. That the defendant cannot import into this clause of the policy conditions as to the part of the conveyance in which the insured must be, and thus, by construction, work a forfeiture, need not be further discussed. All that is required is that the insured shall be "riding as a passenger" in any passenger conveyance using steam, cable, or electricity as a motive power. That portion of the judgment from which the present appeal is taken should be reversed.

We concur: **Britt, C.; Chipman, C.**

Per Curiam:

For the reasons given in the foregoing opinion, that portion of the judgment from which the present appeal is taken is reversed.

Rehearing in banc denied.

GEORGIA SUPREME COURT.

**COLEMAN, BURDEN, & WARTHEN
COMPANY, *Plff in Err.*,**

v.

DANNENBERG COMPANY.

(.....Ga.....)

***Equity recognizes no property right in a trademark** which is calculated to mislead and deceive the public as to the place where the goods sold under such trademark are manu-

factured. It follows that the words "Old Colony Shoe Company, Rockland, Mass." used as a trademark by the seller of shoes not manufactured at the place named, which was at the time the trademark was adopted a place having a reputation for the manufacture of fine shoes, were not such a trademark as would be protected by a court of equity. The prior use by the originator would authorize such court neither to enjoin the use of the same deceptive trademark by another dealer in the same character of goods, nor to award damages against him for such use.

*Headnote by SIMMONS, Ch. J.

(March 26, 1906.)

NOTE.—For the effect of deception to preclude protection of a trademark, see note to *Joseph v. McCowsky* (Cal.) 19 L. R. A. 58; also *California Fig* 41 L. R. A.

Syrup Co. v. Frederick Stearns & Co. (C. C. App. 8th C.) 88 L. R. A. 56

ERROR to the Superior Court for Bibb County to review a judgment in favor of defendant in an action brought to enjoin the alleged infringement of a trademark. *Affirmed.*

The facts are stated in the opinion.

Messrs. Steed & Wimberly for plaintiff in error.

Messrs. Hardeman, Davis, & Turner, for defendant in error:

The plaintiff's proof showed that the trademark was a deception upon the public in leading the public to believe said shoes were manufactured at Rockland, Massachusetts, when they were not; that the shoes which it now claimed the right to sell under said trademark were manufactured by a different manufacturer than the shoes originally sold under said trademark, though the public was not put upon notice of this fact.

The court was right in sustaining the demurrer and dismissing the plaintiff's action.

Manhattan Medicine Co. v. Wood, 108 U. S. 218, 27 L. ed. 706; *Palmer v. Harris*, 60 Pa. 156, 100 Am. Dec. 557; 26 Am. & Eng. Enc. Law, p. 881.

An assignee should always accompany the trademark, when used by him, by words appropriate to convey to the public the knowledge that the trademark is employed to indicate that the goods on which it appears are of the same kind and quality as were formerly made by the adopter of the trademark, but are now made and sold by his assignee.

26 Am. & Eng. Enc. Law, p. 885.

Simmons, Ch. J., delivered the opinion of the court:

It appears from the record that in the year 1889 the S. T. Coleman & Burden Company, of Macon, Georgia, a corporation dealing in shoes, adopted as a trademark for its shoes the words "Old Colony Shoe Company, Rockland, Mass." They sold shoes bearing this trademark up to the year 1893, when the Company was dissolved. Subsequently a corporation by the name of the Coleman, Burden, & Warthen Company, was incorporated, to do a shoe business in Atlanta, Georgia. This latter company purchased the trademark as one of the assets of the former company. In 1894, and prior to that time, the Dannenberg Company, of Macon, Georgia, were selling shoes bearing this trademark. Ascertaining this fact, the Coleman, Burden, & Warthen Company demanded of the Dannenberg Company that it desist from using the trademark. This demand was refused, and the Coleman, Burden, & Warthen Company thereupon filed an equitable petition, seeking to enjoin the Dannenberg Company from the use of the trademark, and to recover damages which it had sustained by reason of such use. Upon the trial of the case it appeared from the evidence that at the time this trademark was adopted, in 1889, Rockland, Massachusetts, had a reputation for making fine shoes; that the shoes upon which this trademark was placed were not made in Rockland; they were not manufactured by the "Old Colony Shoe Company, Rockland, Mass." (there being in fact no such company in existence), but by the Commonwealth Shoe & Leather Company, of Boston, Massachusetts. The pleadings and the petitioner's evidence hav-

41 L. R. A.

ing shown these facts and others unnecessary here to mention, the court below dismissed the action. The plaintiff excepts to this ruling, and assigns it as error.

We have carefully considered the record, and are satisfied that the court did not err in dismissing the action. It is a well-recognized principle of equitable jurisprudence that he who comes into equity must come with clean hands. No person is entitled to equitable relief in a case where it is shown that his action is founded upon a matter in which his conduct is deceiving or is calculated to deceive the public. On the subject of trademarks the rule as to misrepresentations by the plaintiff seems to be well settled. In so far as it relates to misrepresentation as to the place of manufacture, it is announced in 26 Am. & Eng. Enc. Law, 463, as follows: "It has been decided in a number of cases that a false statement with reference to the origin of an article . . . is such deceit as will disentitle the plaintiff to relief against infringement. So, also, with reference to the place of manufacture; if an article is made in one place, but claimed to be derived from another, such a statement will deprive the plaintiff of relief. Thus, where the plaintiff had resided at one place, but subsequently moved his factory to another near by, but failed to state upon his label that he had made the change, or that he was manufacturing at the new place, relief was refused him." In the case of *Joseph v. Macowsky*, 96 Cal. 518, 19 L. R. A. 53, it was held that "a person who comes into a court of equity for an injunction in a case of this kind must come with clean hands; he cannot be granted relief upon a claim to the exclusive use of a trademark which contains a false representation, calculated to deceive the public as to the manufacturer of the article and the place where it is manufactured." In *Ex parte Farnum*, 18 Off. Gaz. 412, Marble, C., said: "Were I to admit the word 'Lancaster' to be an essential feature of the mark, the case would then seem to be open to the further objection that the use of such word would convey a false impression to the public,—viz., that the goods were manufactured in Lancaster, when, in fact, they were made in Philadelphia. . . . Words calculated to deceive the public as to the place of manufacture should not be allowed registration." In the case of *Hobbs v. Francais*, 19 How. Pr. 567, it is said: "To secure to the plaintiff by injunction an exclusive use of such a label, and the exclusive privilege of thereby deceiving the public, is an object to which a court of equity will not lend its aid. The court does not refuse its aid in such a case from any regard to the defendant, who is using the same efforts and misrepresentations to deceive the public; but on the principle that it will not interfere to protect a party in the use of trademarks which are employed to deceive the public." In the case of *Palmer v. Harris*, 60 Pa. 156, 100 Am. Dec. 557, Sharawood, J., said: "The party who attempts to deceive the public by the use of a trademark which contains on its face a falsehood as to the place where his goods are manufactured, in order to have the benefit of the reputation which such goods have acquired in the market, is guilty of the same fraud of which he complains in the

defendant." See also *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 27 L. ed. 706; *Siegert v. Abbott*, 61 Md. 276, 48 Am. Rep. 101; *Kenny v. Gillet*, 70 Md. 574. In the present case the trademark placed upon the shoes of the plaintiff represents such shoes to have been made by the Old Colony Shoe Company, Rockland, Massachusetts. The evidence shows that there was no such company, and that the shoes were made, not at Rockland, but at another place, and by the Commonwealth Shoe & Leather Company. The trademark of the plaintiff is therefore a misrepresentation, which

is calculated to deceive the public, by leading consumers to believe that the shoes were manufactured at a place which had a reputation for making fine shoes, and by a manufacturing company located at that place. Under the rulings of the above-cited cases, which are decisive of the question, we think that the plaintiff is not entitled to any relief in a court of equity against one who uses the same deceptive trademark on the same character of goods.

Judgment affirmed.

OHIO SUPREME COURT.

Jacob WEBER, *Piff. in Err.*,
v.

STATE of Ohio.

(58 Ohio St. 616.)

"In a criminal case the court has the power to suspend the execution of the sentence, in whole or in part, unless otherwise provided by statute, and has power to set aside such suspension at any time during the term of court at which sentence was passed. Whether such suspension can be set aside at a subsequent term is not decided.

(June 24, 1898.)

ERROR to the Circuit Court for Franklin County to review a judgment affirming a proceeding of the Court of Common Pleas suspending the execution of sentence upon defendant and subsequently during the same term revoking the suspension. *Affirmed.*

Statement by the Court:

On May 8, 1897, being at the April term of the court of common pleas of Franklin county, Jacob Weber, the plaintiff in error, pleaded guilty to an indictment for keeping a room for gambling; and the court sentenced him to pay a fine of \$400 and costs, and that he be confined in the county jail for the period of ten days, and to said sentence added the following words: "But execution of the sentence to jail is hereby suspended." Afterwards, at the same term of court, on the 9th day of August, 1897, the court, on its own motion, set aside the suspension of the execution of the sentence of imprisonment, for the reason that the said Jacob Weber had violated the conditions of said suspension by engaging in gambling, directly or indirectly, and ordered the sheriff to carry said sentence into execution, and ordered a *capias* to issue for that purpose. The court heard evidence, and a bill of exceptions was taken, setting out all the evidence introduced, and exception taken to the action of the court. The circuit court affirmed the proceedings of the court of common pleas, and thereupon a petition in error was filed in this court, seeking to reverse the judgments of the lower courts.

Mr. Cyrus Huling for plaintiff in error.

*Headnote by the court.

NOTE.—For suspension of sentence after conviction, see *note* to *People v. Cummings* (Mich.) 14 L. R. A. 285; also *State v. Voss* (Iowa) 8 L. R. A. 767; *People, Forsyth, v. Monroe County Ct. of Sessions* 41 L. R. A.

Messrs. Charles W. Voorhees and Henry A. Williams, for defendant in error:

Every court which has power to award an execution may grant a suspension of its own sentences.

1 Bishop, *Crim. Proc.* § 1299; *Weaver v. People*, 33 Mich. 296; *People v. Graves*, 31 Hun, 382; *People, Forsyth, v. Monroe County Ct. of Sessions*, 141 N. Y. 288, 23 L. R. A. 856.

The power to suspend sentence at common law is asserted by writers of acknowledged authority on criminal jurisprudence, by the uniform practice of the court and numerous adjudged cases.

2 Hawk. P. C. chap. 51, § 8; 1 Bish. *Crim. Proc.* § 1124; 4 Bl. Com. chap. 81; *People v. Graves*, 31 Hun, 382; *People v. Harrington*, 15 Abb. N. C. 161; *People v. Whipple*, 9 Cow. 715; *Carnal v. People*, 1 Park. *Crim. Rep.* 262; *Com. v. Dowdican's Bail*, 115 Mass. 186; *State v. Addy*, 43 N. J. L. 114, 39 Am. Rep. 547; *Weaver v. People*, 33 Mich. 297; *People v. Reilly*, 58 Mich. 260; *Com. v. Maloney*, 145 Mass. 205; *Sylvester v. State*, 65 N. H. 193; *Gibson v. State*, 68 Miss. 241; *State v. Crook*, 115 N. C. 760, 29 L. R. A. 260; *State v. Whitt*, 117 N. C. 804; *Bird v. Cincinnati*, 12 Week. L. Bull. 101.

Per Curiam:

The power to stay the execution of a sentence, in whole or in part, in a criminal case is inherent in every court having final jurisdiction in such cases, unless otherwise provided by statute. The suspension, being in favor of the prisoner, is for his benefit, and is valid, whether consented to by him or not. When the suspension is upon conditions expressed in the judgment, the prisoner has the right to rely upon such conditions, and, so long as he complies therewith, the suspension will stand. But when the suspension is without express conditions, as in this case, it is within the power of the court to set aside the suspension at any time during the same term, on its own motion, and to order the sentence to be executed. Cases cited by counsel are to the effect that the suspension may be set aside at a subsequent term; but this case does not require us to go to that extent, because here the suspension was set aside at the same term at which sentence was passed.

Judgment affirmed.

(N. Y.) 23 L. R. A. 856; *Re Webb* (Wis.) 27 L. R. A. 356; *State v. Crook* (N. C.) 29 L. R. A. 260; *State, Smith, v. Allen* (Ill.) *post*, 473.

ILLINOIS SUPREME COURT.

PEOPLE of the State of Illinois, *ex rel.* Frederick W. SMITH,

R. L. ALLEN, Warden of the Northern Penitentiary.

(155 Ill. 61.)

Power over a prisoner is lost upon indefinite suspension of sentence without recognizance after his plea of guilty, and the court cannot subsequently sentence him.

(January 14, 1898.)

PETITION for a writ of habeas corpus to obtain the discharge of petitioner from custody of the warden of the Northern Penitentiary. *Petitioner discharged.*

The facts are stated in the opinion.

Mr. Edgar Lee Masters, for relator:

The writ of habeas corpus will not lie as a writ of error, for the purpose of reviewing the proceedings of another court where errors have been committed. It is in no sense a writ of error, but lies for relief from irregularities, which render a proceeding absolutely void.

2 Hurd, Habeas Corpus, chap. 2, pp. 229, 233, 384, 844, 569; *Miller v. Allen*, 11 Ind. 389; *Brown v. Rice*, 57 Me. 55, 2 Am. Rep. 11; *Ex parte Ah Cha*, 40 Cal. 426; *State v. Addy*, 48 N. J. L. 118, 39 Am. Rep. 547; *State v. Gray*, 37 N. J. L. 368; *People, Tweed, v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211.

When a judgment is void for illegality, authority is given to discharge on habeas corpus. Illegality in this sense, denotes a "complete defect in the proceedings.

Tidd, Pr. 435; *People v. Whitson*, 74 Ill. 20; *Ex parte Smith*, 117 Ill. 63.

The judgment or sentence of the court is usually given soon after the conviction, at least during the same term of the court at which the prisoner is convicted, unless the rendering of the judgment is stayed by the filing of a bill of exceptions for the purpose of taking the opinion of the supreme court upon the case. No court has authority to suspend sentence indefinitely against criminals who have been found guilty by a jury or have pleaded guilty; a suspension of sentence or stay is not authorized, except upon a certiorari or writ of error or an application in arrest of judgment, or for a new trial.

1 Colby, Crim. L. 390, -392; Archbold, Crim. Pr. ¶ 180; *People v. Morrisette*, 20 How. Pr. 118; *People v. Graves*, 2 N. Y. Crim. Rep. 123; *Brandon v. People*, 42 N. Y. 265; *Real v. People*, 42 N. Y. 280; *Connors v. People*, 50 N. Y. 240; *People v. Brown*, 72 N. Y. 574, 28 Am. Rep. 183; *People v. Casey*, 72 N. Y. 394; *People v. Crapo*, 76 N. Y. 288, 32 Am. Rep. 802; *People, Benton, v. Monroe County Ct. Sessions*, 8 N. Y. Crim. Rep. 355; *Weaver v. People*, 33 Mich. 296; *People v. Reilly*, 53 Mich. 260.

Wilkin, Ch. J., delivered the opinion of the court:

At the November term of this court the relator presented his petition for a writ of ha-

beneas corpus, directed to R. L. Allen, warden of the Illinois State Penitentiary at Joliet, to the end that he might be discharged from imprisonment in that institution. Upon consideration of the petition, a writ was awarded, commanding the warden to cause the relator to be brought before the court, together with cause of his detention. A return was duly made to the writ by bringing the prisoner into court, and stating in writing that he was held in said penitentiary as a convict, under sentence of the criminal court of Cook county, by virtue of a warrant of commitment attached and made part of the return. The warrant attached is of the September term, 1893, of the criminal court and in the usual form of a mittimus on a plea of guilty. To this return relator filed a plea averring that said mittimus and the sentence of the criminal court were each void for the reasons stated in his petition, which he was ready to verify. On the issue thus formed the cause was submitted for decision.

The undisputed facts in the case are that at the December term, 1889, of the criminal court of Cook county relator was indicted for conspiracy; that at the February term, 1890, he entered his plea of guilty to the charge, but judgment upon his plea was stayed, and he was allowed by the court to depart therefrom, without recognizance, to again appear for sentence or any other purpose. No order whatever was made in the case from that time until the July term, 1893, when, on motion of the state's attorney it was stricken from the docket. At the following September term, on motion of the state's attorney, the case was reinstated on the docket of the court and, after overruling relator's motion for leave to withdraw his plea of guilty, entered at the February term, 1890, as well as his motion in arrest of judgment, the judge then presiding (not the one before whom the plea was entered) without further pleas, sentenced him to three years' hard labor in the state penitentiary at Joliet, and ordered his commitment, as shown in the warden's return to the writ. It clearly appears that the relator did not escape after his plea of guilty, and that he remained in the city of Chicago, and engaged in business, between the time of entering his plea and his final arrest and sentence. It is thus made to appear from the record of the criminal court, and all the facts in proof before us, that the attempt upon the part of that court was to indefinitely suspend sentence upon the plea of guilty; and the question now is, Having then withheld judgment upon the plea, and permitted the prisoner to go at liberty, without in any way requiring him to further appear in answer to the charge, had the court jurisdiction, more than three years thereafter, to cause his arrest, and pass sentence upon him? It must be admitted that, if such power remained in the court three years, it would continue indefinitely, and might be exercised at any future time, and that, too, without any reason for doing so, except such as might exist in the mind of the judge causing the rearrest and pronouncing judgment. Thus, a youth charged

NOTE.—As to suspension of sentence, see *Weber v. State* (Ohio) *ante*, p. 472, and footnote thereto. 41 L. R. A.

with crime, to which he pleads guilty, may be, in effect, assured by the court before whom he enters the plea that he ought not to suffer punishment, and be given his liberty, and yet, in after years, no matter what may then be his family relations or position in society, that judge, or another of the same court, may consign him to the penitentiary for any term of years within the limit fixed by law. On the other hand, the state has a right to demand, and the welfare of society requires, that those who are convicted or plead guilty to violations of the law shall be promptly and certainly punished. There is nothing whatever in this case indicating that the court acted from any improper motive, but the foregoing considerations argued so strongly against the practice that we should not hesitate, even in the absence of other reasons or authority, to hold that the sentence pronounced at the September term, 1893, was without jurisdiction, and void.

But the authorities clearly sustain this conclusion. Our statute provides: "All trials for criminal offenses shall be conducted according to the course of the common law, except when this act points out a different mode." 1 Starr & C. Crim. Code, § 188, p. 868. There is nothing in the act authorizing an indefinite postponement of sentence upon a conviction or plea of guilty. In Archbold, Crim. Pr. ¶ 180, the author says: "If no motion be made in arrest of judgment, or if made and decided against the defendant, the judge at the assizes or the recorder or chairman at the sessions proceeds to pass sentence. Sometimes this is done immediately after each trial; sometimes at the end of each day; sometimes on some other day of the assizes or sessions. The first seems to be the better method." "The judgment or sentence of the court is usually given soon after the conviction,—at least during the same term of the court at which the prisoner is convicted,—unless the rendering of the judgment is stayed by the filing of a bill of exceptions for the purpose of taking the opinion of the supreme court upon the case." "No court has authority to suspend sentence indefinitely against criminals who have been found guilty by a jury or have pleaded guilty; a suspension of sentence or stay is not authorized, except upon certiorari, or writ of error, or an application in arrest of judgment or for a new trial." 1 Colby, Crim. L. pp. 890-892. In *People v. Morrinette*, 20 How. Pr. 118, Balcom. J., uses the following language: "I am of the opinion the court does not possess the power to suspend sentence indefinitely in any case. As I understand the law, it is the duty of the court, unless application be made for a new trial, or a motion in arrest of judgment be made for some defect in the indictment, to pronounce judgment upon every prisoner convicted of crime by a jury, or who pleads guilty. An indefinite suspension of the sentence prescribed by law is a quasi pardon, provided the prisoner

be discharged from imprisonment. No court in the state has any pardoning power. That power is vested exclusively in the governor."

This language is peculiarly applicable to all convictions for crime in this state. Our Constitution confers the pardoning power upon the executive branch of the state government, and the governor alone can prevent the infliction of punishment after a legal conviction. Courts may undoubtedly set aside verdicts of guilty and grant new trials or arrest the judgment, but they have no power, to allow the conviction to stand, and at the same time defeat its operation by an indefinite postponement of sentence. If the conviction is wrongful or the punishment fixed by the jury excessive, or if material and substantial errors have intervened in the finding and return of the indictment or upon the trial, the court has ample power, and it is its duty, to interfere; but when that relief is denied the prisoner, it is the plain duty of the court to pronounce judgment.

In the case of *Weaver v. People*, 88 Mich. 296, Weaver had entered a plea of guilty to an indictment in the circuit court on July 8, 1874, before Judge Stone. He was sentenced by Judge Tamant on October 25, 1875. In reviewing the case the supreme court of that state said: "The failure to take steps during the October term of 1874 was a practical abandonment of the prosecution, and corroborates the opinion that such must have been understood as the object of the suspension.

To sentence a prisoner to the penitentiary under such circumstances, and when the trial judge has distinctly said he ought not to be so sentenced, is not supplying his omissions, but is overruling his decision. This, we think, not admissible, and the sentence was unauthorized, and the judgment must be reversed, and the prisoner discharged."

These authorities are cited in the brief of counsel for relator, and we have been referred to none to the contrary. Others to the same effect as those quoted from could be cited. Until the legislature shall vest courts in this state with powers not now given them, it is their duty, in the trial of criminal cases, upon a conviction or plea of guilty to pronounce judgment at that time, unless, upon motion for new trial, in arrest of judgment, or for other cause, the case is continued for further adjudication, and the defendant, by recognition or being held in custody, required to continue to answer the charge. And if they fail to perform that duty, but discharge the prisoner, or permit him to go indefinitely, their power and jurisdiction over him cease, and a subsequent sentence is without judicial authority. It follows that the relator was unlawfully imprisoned and entitled to an order from this court discharging him, which has accordingly been entered.

Relator discharged.

MAINE SUPREME JUDICIAL COURT.

City of AUGUSTA

v.

David P. KIMBALL *et al.*, Trustees under the Will of Horace Williams, Deceased.

(91 Me. 605.)

A tax cannot be assessed on nonresident trustees for property held by them outside of the state, under Rev. Stat. chap. 6, § 14, cl. 6, as amended by Laws 1889, chap. 175, providing for the assessment of trustees in the place where the person to whom the income is payable is an inhabitant, notwithstanding the fact that they derive their title from a devise under a Maine will through confirmation by a Maine probate court to which they have agreed to render accounts.

(Haskell and Savage, JJ., dissent.)

(June 17, 1888.)

AGREED STATEMENT for the opinion of the Law Court upon the question of the liability of trustees residing in a foreign state to taxation upon the fund which they hold in trust for local beneficiaries. *Judgment for defendants.*

The facts are stated in the opinion.

Messrs. W. S. Choate and Thomas Leigh, Jr., for plaintiff:

The legislature has found no trouble in providing for the taxation of part of property in one jurisdiction and part in another.

Kittery v. Portsmouth Bridge Co. 78 Me. 93.

If the title to any piece of property is held by persons residing in several taxing jurisdictions, what possible objection can there be to taxing each, according to his share, in the place where he is legally taxable?

Davis v. Macy, 124 Mass. 198; *Hardy v. Yarmouth*, 6 Allen, 277; *State, Harkness v. Matthews*, 10 Ohio St. 481; *Baltimore v. Stirling*, 29 Md. 48; *Appeal Tax Ct. v. Gill*, 50 Md. 877; *Hunt v. Perry*, 165 Mass. 287.

The *cestuis que trust* residing here have a beneficial interest in the trust fund which is valuable, and they are in effect the equitable owners thereof.

Hunt v. Perry, 165 Mass. 291.

There is no valid objection to assessing their interest to the trustees in proportion to the interest of the respective parties.

Davis v. Macy, 124 Mass. 198.

The language of the statute includes non-resident as well as resident trustees.

Shaw v. Hartford, 56 Conn. 351.

This property could be taxed in the state of Maine to the beneficiaries.

The interest of the beneficiaries is such as to give the state jurisdiction to tax.

Hunt v. Perry, 165 Mass. 287; *Bath Sav. Inst. v. Hathorn*, 88 Me. 122, 82 L. R. A. 877; *Williston Seminary v. Hampshire County Comrs.* 147 Mass. 427; 1 Perry, Tr. 2d ed. § 49; *Dallinger v. Rapello*, 14 Fed. Rep. 82, 15 Fed. Rep. 434; *Gould v. Graves*, 80 Me. 509.

NOTE.—For place of taxation of trust property, see *Richmond County Academy v. Augusta (Ga.)* 20 L. R. A. 151; also *Detroit v. Lewis (Mich.)* 32 L. R. A. 429.

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If the property could be taxed to the beneficiary then it can be taxed to the trustee whether resident or nonresident.

1 Perry, Tr. p. 415; *McCulloch v. Maryland*, 4 Wheat. 438, 4 L. ed. 606; *Case of State Tax on Foreign-Held Bonds*, 15 Wall. 300, 21 L. ed. 179; *Tappen v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. ed. 189; *Dunleith v. Reynolds*, 53 Ill. 45; *Catlin v. Hull*, 21 Vt. 159.

Personal property held under a testamentary trust in this state can be taxed here as this is the legal situs of such property until distributed.

Lewis v. Chester County, 60 Pa. 325.

The fundamental principles of taxation require that property held as this is held be taxed to the trustee in the place where the beneficiaries reside.

Case of State Tax on Foreign-Held Bonds, 15 Wall. 300, 21 L. ed. 179; 27 Am. & Eng. Enc. Law, *Duties of Trustees*, p. 164.

The true construction of the statute includes nonresident trustees.

This is a tax on property; the property is within the jurisdiction of the state of Maine to tax, and if within the statute the plaintiffs must prevail.

Hardy v. Yarmouth, 6 Allen, 277.

Generally a man is not spoken of as the owner of property, who merely holds it as a trustee and in a representative capacity.

People, Darrow, v. Coleman, 119 N. Y. 137, 7 L. R. A. 407.

Can anyone conceive of any reason why a stock in trade, bank stock, mules, horses, cattle, and lumber should be taxed in Augusta though the owner lived in Massachusetts and the tax be legal, and that trust property the real title to which is held by an inhabitant of Augusta cannot be taxed there.

Shaw v. Hartford, 56 Conn. 351; *Leonard v. New Bedford*, 16 Gray, 292.

If we apply the rules universally recognized by the courts and law writers to the interpretation of the statute, they will inevitably lead to the construction contended for by the plaintiffs as the true one.

Endlich, *Interpretation of Statutes*, § 2, p. 4; *Anthony v. Caswell*, 15 R. I. 159.

Our interpretation is in direct line with the true principles of taxation, and puts the tax where it belongs, and makes it payable where it should be paid.

Pittsburgh v. Kalchthaler, 114 Pa. 547; *Gower v. Jonreboro*, 83 Me. 142.

The fundamental rule in the construction of statutes is that they are to be construed according to the intention of the legislature.

Smith v. Chase, 71 Me. 185; *Lyon v. Lyon*, 88 Me. 401; *Gray v. Cumberland County Comrs.* 83 Me. 436; *Holmes v. Paris*, 75 Me. 561; *Clark v. Main Shore Line R. Co.* 81 Me. 481; *Union Ins. Co. v. Greenleaf*, 64 Me. 129; *Coffin v. Rich*, 45 Me. 511, 71 Am. Dec. 559.

This court had no question as to the application of this statute before the amendment of 1889 to a testamentary trust.

Gould v. Graves, 80 Me. 509.

It is for the legislature to determine upon what subject-matter taxation shall be imposed upon land, upon loans, upon stocks, etc., but

the subject-matter once fixed, the rule is general, and applies to all property within its provisions.

Brewer Brick Co. v. Brewer, 62 Me. 73, 16 Am. Rep. 895; *Cooley*, Taxn. 2d ed. pp. 241, 242; *Lexington v. McQuillan*, 9 Dana, 513, 35 Am. Dec. 159.

The amount of the fund to be taxed is that part which will yield a net income of \$8,000, and to produce that net income the trustees must set aside a fund which will produce that amount "after deducting taxes and other expenses."

Arnold v. Mower, 49 Me. 561; *Clark v. Foster*, 8 Met. 568; *Williams v. Herrick*, 18 R. I. 120; *Peirce v. Burroughs*, 58 N. H. 305.

Messrs. H. M. Heath and C. L. Andrews for defendants.

Emery, J., delivered the opinion of the court:

By his will probated in Kennebec county, Horace Williams, late of Augusta, in that county; appointed the defendants executors of the will, and also devised the residuum of his estate to them as trustees for the purposes therein named. Prior to April 1, 1896, the defendants had fully executed the will, and had been discharged as executors. They took out letters from that court as trustees under the will to execute two trusts therein created: (1) To set apart and hold sufficient of the estate to provide annuities for eight different persons, two of whom lived in Augusta, and the others of whom lived without the state; (2) to hold all the rest of the estate, and the reversion of that portion set apart for annuities, in trust to be divided at a future time among certain descendants of the testator. They qualified as such trustees, and filed in the probate court a schedule of the property held under each trust. The property by them held under the first trust, that for annuities, consisted entirely of stocks, bonds, and mortgages of corporations and lands without the state. The securities themselves were all kept without the state in Boston, Massachusetts, and were there held in actual possession by the defendant Kimball, and under the personal control of both defendants. Neither defendant was a resident of or domiciled in Maine, the defendant Kimball being a resident of Massachusetts, and the defendant Vandewater being a resident of Tennessee.

The tax assessors of Augusta for the year 1896 desired to subject to taxation in Augusta the interest of the two annuitants living in Augusta. They did not assess a tax directly against these annuitants for the annuities payable to them, nor for any sums due them or to come to them under the trusts. They, instead, undertook to assess directly against the defendants a tax upon the corpus of so much of the estate thus held by them in trust as was held to provide the annuities for the two Augusta annuitants, which amount the assessors calculated to be $\frac{1}{3}$ of the whole property scheduled under that trust.

This suit is for that tax. The plaintiff contends that the Augusta assessors were empowered to make the assessment on the corpus of the estate, and directly upon the defendants, by the statute (Rev. Stat. chap. 6, § 14, cl. 6, as amended by Laws 1889, chap. 175), which is as follows:

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"Personal property held in trust by an executor, administrator or trustee, the income of which is to be paid to any other person, shall be assessed to such executor, administrator, or trustee, in the place where the person to whom the income is payable as aforesaid is an inhabitant. But if the person to whom the income is payable as aforesaid resides out of the state, such personal property shall be assessed to such executor, administrator, or trustee, in the place where he resides."

The defendants contend that the section cited did not and could not empower the assessors of Augusta to assess any such tax against them, being nonresidents and nondomiciliants of the state, upon their property, also entirely without the state.

If the defendants' title to the property thus situated had come to them from any other source than a devise to them as trustees under a will made by a resident of Maine, and probated in Maine, with a confirmation of the trust by a probate court in Maine, it would be evident that this state could not by any statute effectually empower the assessors of any town to assess a tax directly against them for this property. Neither they nor the property were within the state or within its jurisdiction or reach. Conceding, for the sake of the argument at least, that the state can tax every person subject to its jurisdiction for all of his property, wherever situated, and can tax persons without its jurisdiction for all their property left by them within its jurisdiction, yet the taxing power of the state necessarily stops at the state boundary lines. It cannot reach over into any other jurisdiction to seize upon persons or property for purposes of taxation. Apart from the source of their title and authority as trustees, these defendants could not be made in any way amenable to the taxing powers of this state, since neither they nor any of their property were within the state or subject to its jurisdiction. *Northern O. R. Co. v. Jackson*, 7 Wall. 262, 19 L. ed. 88; *Tax on Foreign-Held Bonds*, 15 Wall. 300, 21 L. ed. 179; *New York, L. E. & W. R. Co. v. Pennsylvania*, 153 U. S. 628, 38 L. ed. 846; *Graham v. St. Joseph Twp.*, 67 Mich. 652; *South Nashville Street R. Co. v. Morrow*, 87 Tenn. 406, 2 L. R. A. 853; *Cooley*, Taxn. 15. The statute cited could not affect trustees and property thus situated, even though the beneficiaries should reside in this state.

The question therefore is whether the circumstances, that these nonresident owners in trust of property without the state derive their title from a devise under a Maine will through confirmation by a Maine probate court, and have agreed to render accounts in that court, bring them or the property fairly and effectually within the purview of the statute.

The plaintiff's theories seem to be (1) that although the defendants as individuals and in every other capacity are nonresidents, yet, as such trustees and in that capacity, they have become so far residents of this state that its tax statutes will actually and effectually grasp them; (2) that, although all the articles of the property devised to them or purchased by them with trust funds are actually without the state, and physically beyond its reach, yet the estate which they form is that of the deceased, Horace Williams, and hence the estate, the entity

(of which the various articles are only component parts), is under the control of the proper Maine probate court, and thus holds their situs within this state. These are ingenious theories, but they will be found to run against actual facts and conditions.

1. The defendants themselves, the persons who own the property although in trust, none the less and notwithstanding the plaintiff's theory, actually reside without the state, with no domicile in the state. They acquire thereby none of the peculiar rights or privileges of a resident of Maine. Should they bring suits in the courts of Maine to enforce against strangers their title to any of this property, they could be required to furnish security for costs as non-residents. They cannot maintain suits concerning the trust property in the Federal courts in Maine against citizens of other states, but can maintain such suits in those courts (if for the requisite amount) against citizens of Maine. If themselves sued as such trustees in a state court by a citizen of Maine for the requisite amount, they could remove the suit to the proper Federal court upon the ground of diverse citizenship. Indeed, the plaintiff suggests that this suit could be maintained against them in the Federal courts in the states of their residence, thereby conceding them to be nonresidents of this state even as trustees.

Although their title to the property came to them from a resident of Maine through a probate court in Maine, the title is in them, and not in the court. The property vested in them. They were not annexed to the property. There was no loss nor division of the personality of either. So long as either is resident without the state, he is not resident within the state.

These propositions, if not self evident, are fairly deducible from judicial decisions. See, among others, *Childress v. Emory*, 8 Wheat. 642, 5 L. ed. 705; *Rice v. Houston*, 18 Wall. 66, 20 L. ed. 484; *Relfe v. Bunde*, 108 U. S. 222, 26 L. ed. 337; *Hess v. Reynolds*, 118 U. S. 73, 28 L. ed. 927; *Clark v. Bever*, 189 U. S. 86, 85 L. ed. 88; *Anthony v. Caswell*, 15 R. I. 159; *Ailman's Petition*, 17 R. I. 363; *Clark v. Powell*, 62 Vt. 442; *People, Western R. Corp., v. Albany Bd. of Assrs.* 40 N. Y. 154; *People, Darrov, v. Coleman*, 119 N. Y. 137, 7 L. R. A. 407; *Latrobe v. Baltimore*, 19 Md. 18; *Appeal Tax Ct. v. Gill*, 50 Md. 377; *Davis v. Macy*, 124 Mass. 193; *Price v. Hunter*, 34 Fed. Rep. 855; *Detroit v. Lewis*, 109 Mich. 155, 32 L. R. A. 439.

2. The other theory of the plaintiff seems equally opposed to actual facts and conditions. The estate of Horace Williams no longer exists. Its official custodians as such estate, the executors, have been discharged. It has been settled and distributed, and the distributed portions have vested in new and different owners. The portions now under consideration, the bonds, mortgages, and stock certificates, etc., vested in nonresidents, and were transferred by their nonresident owners to Massachusetts, and there they actually are. The corporation and lands out of which these securities arose were and remain out of the state. The plaintiff's theory is not powerful enough to bring within the state any of these securities, corporations, or lands. They are still in fact beyond the reach of any levying process this state can

devise. No officer, however armed by statute or court process of this state, can seize upon it for taxes or other claims. The securities are held by their owners within the jurisdiction of Massachusetts, within reach of its officers and processes, and, so far as this state is concerned, are wholly subject to such taxes as that state may see fit to impose. They cannot escape her taxing power by any theory of constructive situs which the plaintiff or this court may advance. *Cullin v. Hull*, 21 Vt. 152; *People, Westbrook, v. Trustees of Ogdensburg*, 48 N. Y. 390; *People, Jefferson, v. Smith*, 88 N. Y. 576-585; *Re Whiting*, 150 N. Y. 27, 34 L. R. A. 232; *Re Morgan*, 150 N. Y. 35; *Re Houdayer*, 150 N. Y. 37, 34 L. R. A. 235; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558; *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 499, 22 L. ed. 189, 194; *Redmond v. Rutherford Comrs.* 87 N. C. 122; *State v. St. Louis County Ct.* 47 Mo. 594; *Finch v. York County*, 19 Neb. 50, 56 Am. Rep. 741; *Buck v. Miller*, 147 Ind. 586, 37 L. R. A. 384; *Schmidt v. Failey*, 148 Ind. 150, 37 L. R. A. 442.

The only case cited which apparently supports the plaintiff's theory is *Lewis v. Chester County*, 60 Pa. 325. In that case, Mrs. Lewis, while residing in New York, became executrix and testamentary trustee of the estate of a New York decedent in the surrogate court of that state. She settled her final account as executrix, but no order of distribution was made, and she was not discharged as executrix. She was directed to retain and invest the balance until distribution should be ordered. She afterwards, but before distribution, removed to Pennsylvania, and invested part of the estate in mortgages upon lands there. The court held that under the Pennsylvania statute she could be taxed there for those mortgages, but also held that the statute did not extend to the property invested in other states. The court seemed to assume that Mrs. Lewis, in relation to the estate so held by her, was taxable in New York, but such an assumption was not necessary to the decision, and is only *dictum*.

In that case, however, the estate had not been distributed, and was regarded as still the estate of the New York decedent, and not as Mrs. Lewis's estate. In the case at bar the estate had been distributed, and could no longer be regarded as the estate of the Maine decedent.

On the other hand, the case *Anthony v. Caswell*, 15 R. I. 159, seems to be express authority against the plaintiff. The Rhode Island statute was very like ours, and was thus quoted by the court:

"All personal property held in trust by any executor, administrator, or trustee, the income of which is to be paid to any other person, shall be assessed against the executor, administrator, or trustee, in the town where such other person resides; but if such person resides out of the state, then in the town where the executor, administrator, or trustee resides, and if there be more than one such executor, administrator, or trustee, then in equal proportions to each of such executors, administrators, and trustees in the towns where they respectively reside." Pub. Stat. chap. 42, § 12.

The defendant Caswell was trustee under a will, and, as such trustee, held property in

trust for two beneficiaries resident in Rhode Island; but the trustee himself was a resident of New York, and none of the trust property was within the state of Rhode Island. The court held that the defendant was not taxable in Rhode Island for the trust property without the state, and that the statute only extended to persons and things within the state. The case does not affirmatively disclose that the will under which the defendant Caswell claimed authority and title as trustee was that of a Rhode Island decedent probated in a Rhode Island court; but no other ground is disclosed as the basis of a power to assess and collect a tax against the nonresident defendant. If the defendant's title came from a will and probate in another state, so decisive a fact would have been mentioned by the court.

We must hold that our statute does not em-

power the assessors of Augusta to assess directly against these nonresident defendants a tax upon the *corpus* of the property owned by them in trust, and situated without the state, and hence that this action to recover such a tax cannot be maintained. We do not hold, however, that the assessors of Augusta cannot assess a tax directly against the annuitants resident in Augusta for their annuities or other interests arising out of the property or trust.

Judgment for defendants.

Haskell, J.:

I do not concur, because I think the official residence of the trustees is where the trust is under administration.

Savage, J., concurred.

MARYLAND COURT OF APPEALS.

William H. BENEDICK, *Appl.*,

v.

William A. POTTS.

(.....Md.....)

1. Injury to a person who was on a car when it entered a tunnel on a mimic railway operated as an amusement, and was not on the car when it emerged, but was found in an unconscious state in the tunnel, does not raise a presumption of the proprietor's negligence, when there was no defect in or abnormal condition affecting the means of actual transportation, and the other occupants of the car passed safely through.

2. A presumption of negligence does not arise from the fact of an injury, when the act that caused the injury is wholly unknown or undisclosed.

(June 28, 1898.)

APPEAL by plaintiff from a judgment of the Circuit Court for Queen Anne's County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. A. Constable, H. W. Vickers, and John B. Brown for appellant.

Mr. Hope H. Barroll, for appellee:

In order to maintain his case successfully the appellant must, as the foundation of his claim, show negligence on the part of the defendant.

Washington, C. & A. Turnp. Co. v. Case, 80 Md. 45; *Baltimore & O. R. Co. v. State, Sarington*, 71 Md. 599.

There must be legally sufficient evidence to prove negligence, and to connect that negligence with the injury, before a court is justified in allowing a case to go to the jury. Speculation or mere conjecture will not do.

NOTE.—As to the presumption of negligence from the occurrence of accidents in general, see *note to Barnowski v. Helson* (Mich.) 15 L. R. A. 33. See 41 L. R. A.

Baltimore & Y. Turnp. Road v. Cason, 72 Md. 380; *Baltimore & O. R. Co. v. State, Mahone*, 63 Md. 143; *Uobrook v. Utica & S. R. Co.* 12 N. Y. 236; *Pennsylvania R. Co. v. MacKinney*, 124 Pa. 462, 2 L. R. A. 820.

Where the accident is to the passenger, and not to the train, no presumption of negligence on the carrier's part can arise.

Thomas v. Philadelphia & R. R. Co. 148 Pa. 180, 15 L. R. A. 416; *Keller v. Hestonville, M. & F. Pass. R. Co.* 149 Pa. 65; *State, Barnard, v. Philadelphia, W. & B. R. Co.* 60 Md. 555; *Baltimore & O. R. Co. v. State, Sarington*, 71 Md. 599; *Baltimore & P. R. Co. v. State, Abbott*, 75 Md. 159; *Hovser v. Cumberland & P. R. Co.* 80 Md. 158, 27 L. R. A. 154; *Baltimore & P. R. Co. v. Swann*, 81 Md. 400, 31 L. R. A. 813; *Baltimore & O. R. Co. v. State, Good*, 75 Md. 538.

McSherry, Ch. J., delivered the opinion of the court:

This is an action to recover damages for a personal injury, and the single question which the record presents is whether there was legally sufficient evidence of the defendants imputed negligence to carry the case to the jury. The facts are few and simple. The defendant, who is the appellee in this court, was, at the time the occurrences about to be stated took place, engaged in running amusements at Tolchester Beach, a pleasure or excursion resort in Kent county. He owned and operated a mimic railway, called "Pike's Peak Railroad." This is a wooden structure covering a space 150 feet long and 65 feet wide. It is elevated 85 feet at its highest point. From this point a circular, or, rather, an elliptical, inclined track runs downward, making three circuits before reaching the ground. The total length of this spiral track is about 2,000 feet. Open and uncovered cars, weighing about 600 pounds, and having two horizontal seats, wide enough for two passengers, each, are

also *Stearns v. Ontario Spinning Co. (Pa.)* 30 L. R. A. 842.

hoisted up an incline to the highest point of the railway, and are then run by gravity down and around the circular track to the ground. In making the descent, the cars pass through a tunnel which is part of the structure, and which is located about the middle of the last circle, nearest the ground. This tunnel is 150 feet long, and completely incases that portion of the track, and hides the cars and their occupants from all observation when passing through it. The roof of the tunnel is flat, and is covered with tongued and grooved boards running crosswise, and securely nailed to rails. Down the center of this roof, and on its inner surface, there is a narrow board, 2½ or 3 inches wide, which is fastened to the roof by wire nails that are clinched on the outside. The cars are provided with handles for the occupants to grasp during the rapid descent. In August, 1895, the appellant, in company with his wife, his sister-in-law, and Miss Magee, visited Tolchester Beach. While there, he, his sister-in-law, and Miss Magee entered one of these cars; the two ladies occupying the front seat, and the appellant the rear one. The car was started, and made the descent; but when it reached the ground, at the end of the track, the appellant was not in it, though as it entered the tunnel he was seen to be upon it. Search was at once made, and he was found inside the tunnel, in an unconscious condition, with a wound upon his head. He was carried out, and taken back to Baltimore, and, after several days, was restored to consciousness. For the injuries thus sustained, this suit was brought. There was some evidence tending to show that a part of the board running down the center of the tunnel roof had been slabbled off at one point, but there was nothing to indicate when that had happened. The car did not leave the track, no part of it was shown to be out of repair, the track was not defective, and no explanation is given in the record as to what caused the injury. The appellant distinctly stated that he made no effort to rise as he passed through the tunnel, and that he did not release or relax his grasp of the sides of the car. He was on the car when it passed into the tunnel. He was not on it when it emerged. How he got off is not shown. Upon this state of facts, the trial court instructed the jury that there was no legally sufficient evidence to show that the defendant (the appellee) had been guilty of negligence, and the verdict and judgment were accordingly entered for the defendant. Thereupon the plaintiff brought up the record to this court by appeal.

It is a perfectly well settled principle that, to entitle a plaintiff to recover in an action of this kind, he must show, not only that he has sustained an injury, but that the defendant has been guilty of some negligence which produced that particular injury. The negligence alleged, and the injury sued for, must bear the relation of cause and effect. The concurrence of both, and the *nexus* between them, must exist, to constitute a cause of action. As an injury may occur from causes other than the negligence of the party sued, it is obvious that, before a liability on account of that injury can be fastened upon a particular individual, it must be shown, or there must be evidence legally tending to show, that he is responsible

for it; that is, that he has been guilty of the negligence that produced or occasioned the injury. In no instance can the bare fact that an injury has happened—of itself, and divorced from all the surrounding circumstance—justify the inference that the injury was caused by negligence. It is true that direct proof of negligence is not necessary. Like any other fact, negligence may be established by the proof of circumstance from which its existence may be inferred. But this inference must, after all, be a legitimate inference, and not a mere speculation or conjecture. There must be a logical relation and connection between the circumstances proved and the conclusion sought to be adduced from them. This principle is never departed from, and, in the very nature of things, it never can be disregarded. There are instances in which the circumstances surrounding an occurrence, and giving a character to it, are held, if unexplained, to indicate the antecedent or coincident existence of negligence as the efficient cause of an injury complained of. These are the instances where the doctrine of *res ipsa loquitur* is applied. This phrase, which, literally translated, means that "the thing speaks for itself," is merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as the cause of that accident; and the doctrine which it embodies, though correct enough in itself, may be said to be applicable to two classes of cases only, *viz.*: "(1) when the relation of carrier and passenger exists, and the accident arises from some abnormal condition in the department of actual transportation; (2) where the injury arises from some condition or event that is, in its very nature, so obviously destructive of the safety of person or property, and is so tortious in its quality as, in the first instance, at least, to permit no inference save that of negligence on the part of the person in the control of the injurious agency." Thomas, Neg. 574. But it is obvious that in both instances more than the mere isolated, single, segregated fact that an injury has happened must be known. The injury, without more, does not necessarily speak, or indicate the cause of that injury. It is colorless. But the act that produced the injury, being made apparent, may, in the instances indicated, furnish the ground for a presumption that negligence set that act in motion. The maxim does not go to the extent of implying that you may, from the mere fact of an injury, infer what physical act produced that injury; but it means that when the physical act has been shown, or is apparent, and is not explained by the defendant, the conclusion that negligence superinduced it may be drawn, as a legitimate deduction of fact. It permits an inference that the known act which produced the injury was a negligent act, but it does not permit an inference as to what act did produce the injury. Negligence manifestly cannot be predicated of any act until you know what the act is. Until you know what did occasion an injury, you cannot say that the defendant was guilty of some negligence that produced that injury. There is therefore a difference between inferring, as a conclusion of fact, what it was that did the injury, and inferring from a known

or proved act occasioning the injury that there was negligence in the act that did produce the injury. To the first category the maxim, *Res ipsa loquitur*, has no application. It is confined, when applicable at all, solely to the second. In no case where the thing which occasioned the injury is unknown has it ever been held that the maxim applies, because, when the thing which produced the injury is unknown, it cannot be said to speak, or to indicate the existence of causative negligence. In all the cases, whether the relation of carrier and passenger existed or not, the injury alone furnished no evidence of negligence. Something more was required to be shown. For instance, in *Pennycantia R. Co. v. MacKinney*, 124 Pa. 462, 2 L. R. A. 820, it was said: "A passenger's leg is broken while on his passage in a railroad car. This mere fact is no evidence of negligence on the part of the carrier until something further be shown. If the witness who swears to the injury testifies also that it was caused by a crash in a collision with another train of cars belonging to the same carrier, the presumption of negligence immediately arises,—not, however, from the fact that the leg was broken, but from the circumstances attending the fact." And, so, in *Byrne v. Boodle*, 2 Hurlst. & C. 728, there was not only proof of an injury, but there was evidence to show how the injury happened; and the presumption of negligence was applied, not because of there being an injury, but because of the way or manner in which the injury was produced. And in *Houser's Case*, 80 Md. 146, 27 L. R. A. 154, the injury was caused by cross-ties falling from a moving train upon the plaintiff, who was walking by the side of the track; and the presumption of negligence was allowed, not as an inference deducible from the injury itself, but as a conclusion resulting from the method in which, and the instrumentality by which, the injury had been occasioned. In the recent case of *Consolidated Traction Co. v. Thalheimer*, 59 N. J. L. 474, it appeared that the plaintiff was a passenger of the appellant, and, having been notified by the conductor that the car was approaching the point where she desired to alight, got up from her seat, and walked to the door, while the car was in motion; and, while going through the doorway, she was thrown into the street, by a sudden lurch, and thus injured. The court said: "At all events, the fact that such a lurch or jerk occurred as would have been unlikely to occur, if proper care had been exercised, brings the case within the maxim, *Res ipsa loquitur*." The inference of negligence arose, not from the injury to the passenger, but from the act that caused the injury. In *Baltimore & O. R. Co. v. Worthington*, 21 Md. 276, 88 Am. Dec. 578, the train was derailed in consequence of an open switch, and it was held that the injury thus inflicted on the passenger was presumptive evidence of negligence,—not that the mere injury raised such a presumption, but that the injury, caused in the way and under the circumstances shown, indicated actionable negligence, unless satisfactorily explained. Whether, therefore, there be a contractual relation between the parties or not, there must be proof of negli-

gence, or proof of some circumstances from which negligence may be inferred, before an action can be sustained. And whether you characterize that inference as an ordinary presumption of fact, or say of the act that caused the injury, "The thing speaks for itself," you assert merely a rebuttable conclusion, deduced from known and obvious premises. It follows, of course, that, when the act that caused the injury is wholly unknown or undisclosed, it is simply and essentially impossible to affirm that there was a negligent act; and neither the doctrine of *res ipsa loquitur*, nor any other principle of presumption, can be invoked to fasten a liability upon the party charged with having by negligence caused the injury for the infliction of which a suit has been brought.

Now, in the case at bar there is no evidence that the car on the track was out of repair. The car went safely to its destination, carrying the other occupants. There is no evidence that the roof of the tunnel struck the appellant, or that the fact that a small part of the central plank of the tunnel roof had been slabbled off had the most remote connection with the accident. It is a case presenting not a single circumstance showing how, or by what agency, the injury occurred, and in which, with nothing but the isolated fact of the injury having happened being proved, it is insisted that the jury shall be allowed to speculate as to the cause that produced it, and then to infer from the cause thus assumed, but not established, that there was actionable negligence. It is not an attempt to infer negligence from an apparent cause, but to infer the cause of the injury from the naked fact of injury, and then to superadd the further inference that this inferred cause proceeded from negligence. If in *Houser's Case*, 80 Md. 146, 27 L. R. A. 154, there had been no other evidence than the mere fact of an injury, it cannot be pretended that the jury would have been allowed to speculate as to how the injury had occurred. The appellant was on the car when it entered the tunnel. He was not on the car when it emerged, but was found, in an unconscious state, in the tunnel. There was no defect in, or abnormal condition affecting, the means of actual transportation. The other occupants of the car passed safely through. What caused the appellant to be out of the car is a matter of pure conjecture. No one has explained, or attempted to explain, how he got where he was found. Indeed, the two persons who occupied the front seat were ignorant of the appellant's absence from the car until it had reached its destination; and the appellant himself distinctly testified that he did not relax his hold to the car, and did not attempt to rise, but lowered his head, as he entered the tunnel. All that is certain is that he was injured in some way, and he asks that the jury may be allowed, in absence of all explanatory evidence, to infer that some act of a negligent character, for which the appellee is responsible, caused the injury sustained by the appellant. No case has gone to that extent, and no known principle can be cited to sanction such a position. There has been no circumstance shown which furnishes the foundation for an inference of negligence, and the

circumstances which have been shown obviously do not bring the case within the doctrine of *res ipsa loquitur*. There was consequently no error in the ruling complained of,

and the judgment of the circuit court must be affirmed.

Judgment affirmed, with costs above and below.

NEBRASKA SUPREME COURT.

CHICAGO, BURLINGTON, & QUINCY
RAILROAD COMPANY, *Pf. in Err.*,

v.

STATE of Nebraska, *ex rel.* City of OMAHA.

(47 Neb. 549.)

- *1. The essential quality of the police power, as a governmental agency, is that it imposes upon persons and property burdens designed to promote the safety and welfare of the public at large.
2. The legislature cannot, under the guise of police regulations, arbitrarily invade personal rights or private property. There must be some obvious and real connection between the actual provisions of such measures and their assumed purpose.
3. "Due process of law," as the term is used in the state and Federal Constitutions, does not necessarily imply a hearing, by one whose property is taken or damaged for public use, according to the established practice in courts of common law or equity, but is satisfied whenever an opportunity is afforded to invoke the equal protection of the law by judicial proceedings appropriate for the purpose, and adequate to secure the end and object sought to be attained.
4. The power of the legislature to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety is inherent in the sovereignty of the state, and cannot be bartered away by contract or otherwise.
6. Such power may be asserted directly by the legislature, or may, in the absence of constitutional restrictions upon the subject, be delegated to the several municipal corporations or other agencies provided for its exercise.
6. The power of the legislature over private property is not absolute. But while it cannot, at will, impose upon property burdens so excessive and unreasonable as to work a practical confiscation thereof, the court will never interfere to prevent the enforcement of statutes on account of any mere difference of opinion between them and the lawmaking power of the government respecting the wisdom or necessity of particular measures.
7. The provision of the charter of the city of Omaha (Comp. Stat. chap. 12a, § 48), authorizing said city, by ordinance, to require railroad companies to construct and keep in repair viaducts over streets therein crossed by their tracks, is a valid exercise of the police power of the state.
- 8 Ordinance requiring the reconstruction by two railroad companies of

*Headnotes by Post, Ch. J.

NOTE.—As to the liability of a railroad for the cost of changing a grade to abolish a grade crossing, see note to Kelly v. Minneapolis (Minn.) 28 L. R. A. 92.

41 L. R. A.

specific portions of a viaduct previously erected by them jointly with the city held not to violate prior contract obligations.

9. Nor is such ordinance void, as against the railroad companies therein named as the owners of said roads, for the failure of the city to proceed against other companies engaged in operating one or more of said tracks as lessees of the owners, the charter obligation being imposed upon railroad companies owning or operating separate lines of track.

10. The duty of railroad companies to construct or repair viaducts within the city of Omaha may be enforced by writ of mandamus.

(March 18, 1898.)*

ERROR to the District Court for Douglas County to review a judgment requiring defendant to repair a section of a viaduct within the City of Omaha. *Affirmed.*

The facts are stated in the opinion.

Messrs. Charles J. Greene, Greene & Breckenridge, and J. W. Deweese for plaintiff in error.

Mr. W. J. Connell for defendant in error.

Post, Ch. J., delivered the opinion of the court:

This was a proceeding, on the relation of the city of Omaha, to require the Chicago, Burlington, & Quincy Railroad Company (hereafter referred to as the "respondent") to repair the south one third of the so-called "Eleventh Street Viaduct," in said city. There was a trial upon issues joined in the district court for Douglas county, resulting in a finding and judgment in accordance with the prayer of the relator, and which has, by appropriate proceedings, been removed into this court for review. It is essential to a perfect understanding of the questions discussed to refer in detail to the legislation of the state and the city, so far as it relates to the subject of the controversy; and, in so doing, we will follow the order in which they are presented in the valuable brief submitted in behalf of the respondent.

In the year 1869 the Omaha & Southwestern Railroad Company was organized under the General Statutes of this state, and immediately thereafter constructed a line of road from the city of Omaha, in a southwesterly direction, to a point on the Platte river, in Sarpy county, and which it continued to operate until the year 1871, when it transferred all of its property and franchises to the Burlington & Missouri River Railroad Company, also a Nebraska corporation, by lease for 999 years. Said road was by the last named company operated until 1880, in which year it was, together

*Affirmed by the Supreme Court of the United States, April 11, 1898.

has been defined as one intended to affect transactions which occurred or rights which accrued before it became operative as such, and which ascribes to them effects not inherent in their nature, in view of the law in force at the time of their occurrence. Bishop, Written Laws, § 88; Black, Interp. Laws, p. 247. The language employed in the statute is "any viaduct or viaducts," and must, when read in the light of the authorities cited, be held to include such as were then in existence, as well as those subsequently constructed. The essential quality of the police power, as a governmental agency, is that it imposes upon persons and property burdens designed to promote the safety and welfare of the general public. It is one of the powers which has been reserved by the people of the state, and which cannot be surrendered, to require persons and corporations to so exercise and enjoy their rights as not unnecessarily to injure others. That the principle stated is especially applicable to existing rights, without regard to the time of their acquirement, or to the source from whence they are derived, appears to us a self-evident proposition, not requiring argument, and the subject will not thereafter be further pursued in this connection.

The next and most important subject of inquiry is presented by respondent's contention that the ordinance under which the city proceeded in ordering the repairs in question contemplates the taking of its property without due process of law, within the meaning of the state and Federal Constitutions, and also impairs the obligation of the contract under which its track was laid, and under which said viaduct was constructed. The difficulty attending a solution of the questions presented by this assignment is augmented from the fact that courts have not always observed the distinction between the different reserved powers of the state, and have cited indiscriminately cases involving the police power, the taxing power, and the power of eminent domain. Nor is the confusion on that account at all strange, when we remember that those powers all depend for their vitality upon a common principle, *viz.*, the subordination of private rights to the public welfare,—of the individual to the community. Of the cases frequently cited to illustrate that principle, many involve an application of two or more of the powers enumerated, while in others the line of distinction is by no means clearly apparent. Many attempts at defining the "police power" have been made, but in none has the limit of its exercise been defined with precision. It is, in the language of Chief Justice Shaw in *Com. v. Alger*, 7 Cush. 53, "much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise." Doubtless, the safe course to pursue in attaining the desired result is that which is characterized by Mr. Justice Miller, in *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 618, as "the gradual process of judicial inclusion and exclusion." We held in *Smiley v. MacDonald*, 42 Neb. 5, 27 L. R. A. 540, that the legislature cannot, under the guise of a police regulation, arbitrarily invade private property or personal rights, but that the court must be able to perceive some clear

and real connection between the assumed purpose of the law and its actual provisions. The obvious purpose of the legislation in this case, both state and municipal, is to promote the convenience and safety of the public at a grade crossing, which is judicially recognized as a place of danger. It is, in short, the exercise of the governmental power and duty to secure a safe and necessary highway, and must be upheld, if at all, as a legitimate exercise of the police power of the state. The authorities which fully sustain this proposition will be noticed in the course of our further examination of this case, and need not be here cited. The questions presented by this assignment are, in principle, nearly allied, covering substantially the same field of inquiry, and will, for convenience, be considered together.

The proceeding by the mayor and council is, it is claimed, essentially judicial in character; and, to use the language of the respondent, "such a proceeding, without notice to those concerned, and without giving them an opportunity to be heard, violates every maxim and principle of constitutional government." The term "due process of law" is, like the "police power of the state," not susceptible of a precise definition. However, that of Judge Cooley [Const. Lim. 6th ed. p. 484] appears to have proved the most acceptable to the courts of this country, *viz.*: "'Due process of law,' in each particular case means, such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." In *Alfala Irrig. Dist. Directors v. Collins*, 46 Neb. 411, we held, in effect, that the constitutional requirement with respect to that subject does not imply a hearing according to the established practice in courts of common law or equity, but that it is satisfied whenever the citizen whose property is taken or damaged for public use is afforded an adequate remedy therefor in a court of competent jurisdiction. And the doctrine is now firmly established, although after some diversity of opinion, that previous notice, and an opportunity to be heard, by persons thereby affected, is not indispensable to a valid exercise of the police power, or the power to levy and collect taxes, whether *ad valorem*, by the ordinary means, or such as are denominated "special assessments," and chargeable against particular property. In *McMillen v. Anderson*, 95 U. S. 37, 24 L. ed. 335, Mr. Justice Miller, in holding that the courts of the United States could not be invoked to prevent the collection of an alleged illegal license tax levied by the state of Louisiana, on the ground that the effect thereof was to take the petitioner's property without due process of law, said: "It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal, when he was assessed. But this is not, and never has been, considered necessary to the validity of a tax. . . . Nor is the person charged with such a tax without legal remedy by the laws of Louisiana. It is probable that in that state, as in others, if compelled to pay the tax by a levy upon his prop-

erty, he can sue the proper party, and recover back the money as paid under duress if the tax was illegal." True, it was said in *Barker v. Omaha*, 16 Neb. 269, that "notice of some kind must be given to a property owner, . . . before an assessment upon his property becomes finally and irrevocably fixed." But the learned author of that opinion did not say or imply that the means of redress afforded in other cases against illegal assessment fails to satisfy the constitutional inhibition against the taking of property without due process of law. What is meant—and what is the doctrine of the authorities there cited—is that a property owner shall, before being required to pay, have an opportunity to be heard in the courts, in a proceeding instituted by himself, or by the municipality to which the taxing power of the state has been by law intrusted. Although there are many cases in the state and Federal courts in harmony with the opinion of Justice Miller, from which the foregoing is quoted, and fully sustaining the proposition here asserted, we prefer to confine our examination of such as involve an exercise of the police power, rather than the power of taxation.

In *Woodruff v. Catlin*, 54 Conn. 295, it is said: "The legislature having determined that the intersection of two railways with a highway in the city of Hartford, at grade, is a nuisance, dangerous to life, in the absence of action on the part either of the city or of the railroads, may compel them severally to become the owners of the right to lay out new highways and new railways over such land, and in such manner as will separate the grade of the railways from that of the highway at intersection; may compel them to use the right for the accomplishment of the desired end; may determine that the expense shall be paid by either corporation alone, or in part by both. . . . And it has the power to do all this for the specified purpose, and to do it through the instrumentality of a commission."

New York & N. E. R. Co.'s Appeal, 58 Conn. 532, involved the constitutionality of an act of the legislature limiting the amount chargeable to a town or village, on the separation of the grade of a highway from that of a railway track situated therein, to one fourth of the whole cost of such improvement. Such a limitation, it was argued, authorized the taking of the appellant's property without due process of law, inasmuch as it prevented the commissioner to whom the discretion was intrusted from apportioning to the city a just and equitable share of the burden imposed by the act. But the court held otherwise. Carpenter, J., speaking for the court, after remarking that the policy of the law was to abolish grade crossings, said: "Legislation on this subject assumes that each party, in the discharge of its duty, is concerned in creating the danger, and that each may justly be required to contribute to the expense of its removal, or that either may be required to pay the whole, and, if each contributes, that the proportion which each shall pay may be determined by the legislature in each case as it arises, or by a general rule, by itself, or by a delegation of its power to the railroad commissioners. This exercise of power is justifiable on the ground that government itself, in the discharge of its govern-

mental duties, undertakes to remove the danger; and does it in the same manner, and through the same instrumentalities, that it provides and maintains highways through, and at the expense of, the towns and other corporations. So far as towns are concerned, it is a duty that has ever devolved upon them to keep the highways reasonably safe. They are compelled to act without compensation or pecuniary profit. Their sole motive is the public welfare. Railroad companies, in some sense, are but the agents of the government in affording to the public a more expeditious and vastly-improved method of travel. . . . Unlike towns, they do not act upon compulsion, but by choice. Their motive is private gain; public benefit is incidental. . . . They contribute largely to the danger, and the state may well require them to contribute largely to its removal. . . . Requiring the railroad company to pay three fourths of the expense, however just it might be to require the town to pay more than one fourth, is not a matter of which the railroad company can legally complain." That doctrine was reasserted by the same court in *New York & N. E. R. Co.'s Appeal*, 62 Conn. 527, which was, upon proceedings in error to the Supreme Court of the United States, affirmed, and the validity of the act in question expressly upheld. See *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 270. In the opinion last referred to this language was used by Chief Justice Fuller: "Nor is there necessarily such denial, nor an infringement of the obligation of contracts, in the imposition upon them [railway companies], in particular instances, of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a state, that in such particulars a law enacted in the exercise of the police power of the state is valid, will not be reversed by this court on the ground of an infraction of the Constitution of the United States." And substantially similar views are expressed by that court in *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, and *Eldridge v. Trezevant*, 160 U. S. 452, 40 L. ed. 490.

In *Train v. Boston Disinfecting Co.* 144 Mass. 529, 59 Am. Rep. 118, a regulation of the board of health for the disinfecting of certain vessels and goods imported therein, at the owner's expense, was assailed on the ground that no provision was by law made for a hearing, or for review by appeal or otherwise. But the court pronounced the regulation a reasonable one, and defensible as an exercise of the police power of the state.

In *Com. v. Roberts*, 155 Mass. 281, 16 L. R. A. 400, an act required all buildings used for a designated purpose to be supplied with sufficient water-closet connections. It was held, although there was no provision for notice or hearing, that said act was a valid exercise of the police power, and applicable to buildings erected before its enactment as well as to those subsequently constructed.

In *People, Kimball, v. Boston & A. R. Co.* 70 N. Y. 569, the appellant company was required to construct a bridge over a turnpike road, on the ground that the state may, under the powers reserved to the legislature, impose upon railroad corporations such additional burdens as are essential to the public welfare.

In *State v. Missouri P. R. Co.* 83 Kan. 176, the power of the city of Atchison to compel the respondents to construct viaducts was sustained under legislation substantially like that here involved. Referring to the subject of notice, the court, by Valentine, J., observed: "We might, however, say that we do not think that it is necessary that the city should have given the railroad company notice before passing the ordinance requiring them [respondents] to construct the viaduct. Notice afterwards, with an opportunity on the part of the railroad companies to contest the validity of the ordinance, and the right of the city to compel them to construct the viaduct, is sufficient."

But the clearest and most satisfactory exposition of the subject is found in *New York Health Department v. Trinity Church*, 145 N. Y. 82, 27 L. R. A. 710, which was an action to recover a penalty under a statute requiring all tenement houses to be supplied with water on each floor occupied, or intended to be occupied, by one or more families, whenever so directed by the board of health. The statute made no provision for notice to property owners, and none was in fact given, while it was admitted that it would cost the respondent a considerable sum of money to comply with the order of the board. In the opinion of Peckham, J., it is said: "The legislature has power, and has exercised it in countless instances, to enact general laws upon the subject of the public health or safety, without providing that the parties who are to be affected by those laws shall first be heard before they shall take effect in any particular case. . . . The fact that the legislature has chosen to delegate a certain portion of its power to the board of health . . . would not alter the principle, nor would it be necessary to provide that the board should give notice and afford a hearing to the owner before it made such order." And in answer to the argument that the effect of the act was to impair contract obligations the same learned judge said: "Laws and regulations of a police nature, although they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure." See also *People v. Union P. R. Co.* 20 Colo. 186; 1 Dill. Mun. Corp. 4th ed. § 141, and note; *Com. v. Alger*, 7 Cush. 83; *Baker v. Boston*, 12 Pick. 184, 22 Am. Dec. 421; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; Tiedeman, Pol. Power, § 124; Prentice, Police Powers, pp. 58, 67. And the principle which underlies all of the cases cited was distinctly recognized by this court in *State, Lancaster* 41 L. R. A.

County, v. Chicago, B. & Q. R. Co. 29 Neb. 412.

It will not, of course, be contended that the power of the legislature is in that respect absolute, or that it may at will impose upon property burdens so unreasonable as to work a practical confiscation. There is, as all admit, a limit beyond which it cannot go, and within which it will be confined by the judicial power of the state. Prentice, Pol. Powers, p. 31; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185. But it is unnecessary, if it were possible, to point out the boundary line between reasonable and unreasonable exactions. It is enough that the courts will not interfere to prevent the enforcement of statutes on account of any mere difference of opinion between them and the lawmaking branch of the government respecting the wisdom or necessity of particular measures.

To summarize briefly, we conclude from the foregoing authorities, and many others examined, that the legislation assailed in this cause is a valid exercise of the police power of the state over the subject to which it applies; that it does not authorize the appropriation of the respondent's property without due process of law, in a constitutional sense, since the latter is able to invoke the equal protection of the law by any appropriate proceeding, and because it did in fact put in issue by the answer, both the validity of the ordinance, and the reasonableness of the amount apportioned to it for the repair of the viaduct in question. Nor is such legislation violative of any contract obligation, since the power to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety cannot be bartered away by contract or otherwise. Such power is inherent in the sovereignty of the state, and may be asserted directly by the legislature, or may, in the absence of constitutional restriction upon the subject, be delegated to the several municipal corporations or other agencies provided for its exercise. The single purpose of the legislation, whether contemplating the erection or reconstruction of the viaduct, is to reduce to a minimum the danger to life and limb for which the railroad companies are chiefly responsible, and it is not unreasonable to require the parties to maintain the street in a condition of safety, for whose benefit and convenience it was originally rendered unsafe.

The argument assailing the ordinance on the ground that it requires the respondent to repair the south one third of the viaduct, instead of contributing a designated part of the entire cost, is, we think, without merit. Section 48, above set out, confers upon the mayor and council of the city plenary powers with respect to the subject. They may, by ordinance, determine the proportion of the viaduct and approaches to be constructed by two or more railroad companies owning or operating separate lines of track to be crossed thereby, or may determine the cost thereof to be borne by each. The ordinance, if not within the letter of the city's charter, is clearly within its declared scope and purpose. But, in the absence of any statute regulating the manner of apportioning the cost of such repairs, it cannot be said that the plan adopted is either so inequit-

able or unreasonable as to amount to an abuse of the discretion conferred upon the officers of the city. Equally groundless is the contention that the city was required to proceed against the Chicago, Rock Island, & Pacific and the Chicago, Milwaukee, & St. Paul Railroad Companies, then engaged in operating, jointly with the Union Pacific Company, certain tracks belonging to the latter, across Eleventh street, and under said viaduct. The statute, as we have seen, authorizes the city to require two or more railroad companies owning or operating separate lines of track to erect, construct, reconstruct, or repair viaducts. If we admit the companies named, as lessees of the Union Pacific Company, to be within the terms of the act, it does not follow that they are in any sense necessary parties to the proceeding, since the city might still have proceeded against the owners of the tracks operated by them. Such is the plain and necessary inference from the language of the statute.

Lastly, it is argued that, conceding the respondent's duty to repair the viaduct as commanded by the ordinance, such duty is not one which will be enforced by means of the writ of mandamus. By reference to § 48 of the city's charter, it will be observed that authority to proceed by mandamus, or other appropriate proceedings, is therein expressly conferred. But, independent of that provision, mandamus has long been recognized as an appropriate remedy, if not the only adequate remedy, in cases of like character. Indeed, so firmly is that rule established by the decisions of this court as not to admit of a doubt at this time. See *State, Mattoon, v. Republican Valley R. Co.* 17 Neb. 647, 52 Am. Rep. 424, 18 Neb. 512; *State, Farmer, v. Grand Island & W. O. R. Co.* 27 Neb. 694; *State, Lancaster County, v. Chicago, B. & Q. R. Co.* 29 Neb. 412.

We discover no error in the record, and the judgment of the District Court is affirmed.

NEW YORK COURT OF APPEALS.

Christopher MALLOY, *Resp't.*,

v.

NEW YORK REAL ESTATE ASSOCIATION, Impleaded, etc., *App't.*

(156 N. Y. 205.)

1. The protection of a freight-elevator shaft by the usual method of a railing is, in the absence of direction by the superintendent of buildings, sufficient compliance with N. Y. consolidation act, § 487, as amended by Laws 1887, chap. 566, requiring a substantial railing or trap doors, or both, as directed and approved by the superintendent of buildings.

2. The insufficiency of a railing to comply with the statute requiring a substantial railing at an elevator shaft will not render the owner liable to a person who falls into the shaft, not because the railing is insufficient, but because it has been left out of place and the shaft left unguarded by the negligence of a third person using the elevator.

(June 7, 1896.)

APPEAL by defendant from a judgment of a General Term of the Superior Court of the city of New York affirming a judgment of a Trial Term in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendants' negligence. *Reversed.*

The facts are stated in the opinion.

Mr. Herbert C. Smyth, with Mr. Charles C. Nadal, for appellant:

The provision requiring hoisting shafts to be inclosed distinctly states that that shall be done if it is necessary "to protect the life or limbs of those employed in such establishment." Therefore it was a statute enacted for the benefit of

an employee alone, and not a stranger, even though he be in the premises on lawful business.

Flannigan v. American Glucose Co. 38 N. Y. S. R. 867.

In the law of 1887, governing the case at bar, two kinds of guards are mentioned, either, or both, of which may be used, "as may be directed and approved."

In the absence of any action on the part of the superintendent of buildings, the owner of the building did substantially comply with the statute by providing any one of the kind of guards specified therein.

Boehm v. Mace, 28 Abb. N. C. 188.

Assuming that the statute did impose a duty upon the defendant-appellant, which was not performed by it, the omission was well known to the plaintiff; and as he continued to use the elevator, knowing of the lack of guards, he must be deemed to have assumed the risk attending its use in that condition.

Knisley v. Pratt, 148 N. Y. 872, 32 L. R. A. 367; *O'Maley v. South Boston Gaslight Co.* 158 Mass. 185; *Goodridge v. Washington Mills Co.* 160 Mass. 284; *Britton v. Great Western Cotton Co.* L. R. 7 Exch. 180; *Diebold v. United States Baking Co.* 72 Hun, 408; *Siekles v. New Jersey Ice Co.* 153 N. Y. 83; *Horton v. Vulcan Iron Works Co.* 13 App. Div. 508; *Graves v. Brewer*, 4 App. Div. 327; *Riesler v. New York C. & H. R. R. Co.* 16 App. Div. 216; *Lamb v. New York C. & H. R. R. Co.* 18 App. Div. 579; *White v. Wittemann Lithographic Co.* 131 N. Y. 631; *Robinson v. Manhattan R. Co.* 5 Misc. 209; *Solomon v. Manhattan R. Co.* 103 N. Y. 437, 57 Am. Rep. 760; *Oard v. Manhattan R. Co.* 1 Silv. 199; *Hunter v. Cooperstown & S. Valley R. Co.* 126 N. Y. 18, 12 L. R. A. 429; *Roe v. Crimmins*, 10 Misc. 711.

NOTE.—As to negligence in respect to elevators used for carrying persons, see *Mitchell v. Marker* (C. C. App. 6th C.) 25 L. R. A. 83, and note.

For accidents in elevator shafts, see also *Gordon* 41 L. R. A.

v. Cummings (Mass.) 9 L. R. A. 640, and note; *Gibson v. Leonard* (Ill.) 17 L. R. A. 588; *Beehler v. Daniels* (R. I.) 27 L. R. A. 512.

The manner in which plaintiff approached the shaftway was negligent, and should bar a recovery.

Cullen v. Delaware & H. Canal Co. 118 N. Y. 607; *Weston v. Troy*, 189 N. Y. 281; *Whalen v. Citizens' Gaslight Co.* 151 N. Y. 70; *Diebold v. United States Baking Co.* 81 Hun, 195; *Ward v. New York*, 19 App. Div. 48; *Sparks v. Siebrecht*, 19 App. Div. 117.

An owner of real estate, or an employer of men, is not bound to use the greatest degree of care in providing for the safety of those who may lawfully be on the premises or use his machinery.

The owner is not bound to anticipate unlikely occurrences. He is only charged with the duty of protecting those rightfully on his premises from certain accidents, such as would reasonably be expected to happen.

Laflin v. Buffalo & S. W. R. Co. 106 N. Y. 186, 60 Am. Rep. 483; *Burke v. Witherbee*, 98 N. Y. 562; *Dougan v. Champlain Transp. Co.* 56 N. Y. 1; *Loftus v. Union Ferry Co.* 84 N. Y. 455, 38 Am. Rep. 538.

Messrs. Lester W. Clark and Harcourt Bull, for respondent:

Failure to comply with the requirements of a statute or ordinance is competent evidence of negligence to be submitted to the jury.

Jetter v. New York & H. R. Co. 2 Keyes, 162; *Knuffle v. Knickerbocker Ice Co.* 84 N. Y. 488; *McRickard v. Flint*, 114 N. Y. 222; *Minerly v. Union Ferry Co.* 56 Hun, 118; *Hanrahan v. Cochran*, 12 App. Div. 91; *Pitcher v. Lennon*, 12 App. Div. 356.

The factory law expressly makes it the duty of the landlord, as well as of the tenant, to supply the trap doors.

Factory Act, § 8, last sentence; Laws 1886, chap. 409, as amended; Laws 1890, chap. 398.

The unlawful condition of the premises existed at the time when the lease to the tenants was made. The landlord's liability continued in spite of the leasing and the possession of the tenants.

Irvine v. Wood, 51 N. Y. 224, 10 Am. Rep. 608; *Ahern v. Steele*, 115 N. Y. 203, 5 L. R. A. 449; *Timlin v. Standard Oil Co.* 126 N. Y. 514; *Reynolds v. Van Beuren*, 155 N. Y. 120; *Mathevs v. DeGross*, 13 App. Div. 356.

There can be no serious question that the erection and maintenance of this elevator shaft or well hole, without any trap doors whatsoever at the street entrance, in violation of express provisions of law, constituted it a nuisance.

6 Lawson, Rights, Rem. & Pr. § 2965, p. 4833; *Wood*, Nuisances, 23; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654.

As all the tenants used this elevator entrance in common, it was the duty of the landlord to keep the entrance in a safe and lawful condition, and an action against the landlord for failure to do so would lie at the instance of anyone injured while lawfully on the premises.

Peil v. Reinhart, 127 N. Y. 381, 12 L. R. A. 843; *Dollard v. Roberts*, 180 N. Y. 269, 14 L. R. A. 238.

It was for the jury to say, from all the circumstances of the case,—the position of the chain, as twice observed by plaintiff, connected with the fact that German was still standing on the sidewalk near the elevator, the rules regarding the chain and the sounding of the gong, 41 L. R. A.

the darkness of the elevator shaft, etc.,—whether or not, under those circumstances, plaintiff was guilty of negligence in the manner of his approach.

Glushing v. Sharp, 96 N. Y. 676; *Fitzgerald v. Long Island R. Co.* 10 N. Y. S. R. 433; *Palmer v. New York C. & H. R. R. Co.* 112 N. Y. 234; *Kans v. New York, N. H. & H. R. Co.* 182 N. Y. 160; *McNamara v. New York C. & H. R. R. Co.* 186 N. Y. 650; *Manley v. New York C. & H. R. R. Co.* 18 Misc. 502; *Wilber v. New York C. & H. R. R. Co.* 8 App. Div. 138; *Morrison v. Metropolitan Teleph. & Teleg. Co.* 69 Hun, 100.

The plaintiff cannot be held guilty of contributory negligence, as matter of law, because he continued to use that elevator after he knew that the defendant had wholly failed to provide the trap doors required by law.

1 Shearn. & Redf. Neg. 4th ed. § 92, pp. 140-143; *Johnson v. Belden*, 2 Lans. 438; *McPherson v. Buffalo*, 18 App. Div. 502; *Evans v. Utica*, 69 N. Y. 166, 25 Am. Rep. 165; *Peil v. Reinhart*, 127 N. Y. 381, 12 L. R. A. 843; *Dollard v. Roberts*, 180 N. Y. 269, 14 L. R. A. 238.

It has been held in *McRickard v. Flint*, 114 N. Y. 222, and *Willy v. Mulledy*, 78 N. Y. 310, 84 Am. Rep. 536, that the owner's duty under the building law was not dependent upon any action by the superintendent of buildings.

Parker, Ch. J., delivered the opinion of the court:

The defendant, in May, 1890, owned, but did not occupy, the premises 19-21 Thomas street, New York. It leased the ground floor, cellar, and subcellar to J. L. Bailey & Co. and Jonas Brooks & Co., and all of the rest of the building to Porter Bros. & Co. A steam freight elevator ran from the top floor to the subcellar, the motive power being furnished by the defendant. The operation of the elevator was entirely controlled by the tenants. On every floor except the ground floor there were trap doors. At the latter the elevator shaft was 5 feet and 10 inches inside of the building line; and this hatchway had a storm door and iron doors, which closed it up entirely in non-business hours. At other times a chain, one end of which was permanently fastened on the easterly side of the building and the other end caught into a staple by means of a hook, barred the way to the elevator shaft. The reason assigned for using a chain instead of a trapdoor at the ground floor is that the fire department required the elevator to be left on a level with the street when not in use, so that, in the event of the building being broken into in case of fire, the firemen would not fall down the shaft. It appears from the testimony of the plaintiff, who was a drayman, that the freight elevators in that neighborhood were similarly guarded. For more than seven years the plaintiff had been accustomed to take to and from this elevator cases of goods, and, as he testified, was familiar with it and its approaches on the ground floor. Between 12 and 1:30 o'clock of a bright sunny day, the plaintiff, supposing that the elevator was at the ground floor, attempted to step into it, but instead stepped into a well hole, and received serious injury. Only a few, if any, minutes

had elapsed since Charles Maxson, an employee of one of the defendants, had entered the elevator, and ridden on it to the floor above, where it was at the moment of plaintiff's fall. Whether Maxson unhooked the chain from its staple and hung it up by the side of the elevator is a subject of controversy; but that someone wholly unconnected with the defendant did it is firmly established.

The plaintiff's story of the accident and the circumstances surrounding it as told on his direct examination, is as follows: "I had been in the habit of using this elevator for about seven years prior to the accident, on and off. The first time that I ever rode on that elevator, that I can remember, was when the building was built,—in 1871, probably; I wouldn't swear to that. I became quite familiar with the elevator,—the approach to the elevator on the ground floor. I came from Church street up towards the store. J. L. Bailey's porter, Thomas Gorman, was on the walk, getting a case preparatory to shipment.

He told me . . . there was another case downstairs going in the same direction (Mallory Line Steamship Company), for Jonas Brooks & Co. I had heard of that previously, and passing by I looked to see if the elevator had been there, as I wanted to use it immediately, and the elevator was there. I noticed the chain. It was hooked up on the easterly side of the building, not across.

The elevator was on a level with the sidewalk. I went for my truck to Church street, and then came back, and I could not come within 15 or 20 feet of where the case was. . . . I backed in 9 or 12 feet west of the lamp post. I still seen the chain in the position in which it was when the elevator was there. I was in a hurry to get the goods away. It was on the 29th of May, and we were to have three holidays, Friday, Saturday, and Sunday, and I wanted to get everything cleaned up. I went for the elevator, to rush over diagonally across. I couldn't see the elevator; it was dark. I went with a rush, and could not stop myself, and went in the cellar,—thinking the chain was still hanging up in the position I had seen it." On cross-examination plaintiff testified as follows: "I took a diagonal look across, and saw the chain as it was when I passed it by. I could see the chain, but not the elevator. When I say I took a diagonal look, I mean to say that the westerly pillar came between me and the elevator as I sat on my truck. . . . Q. Now, what did you do then? A. I ran for the elevator. I took a run. I didn't walk. I ran to the elevator in my great haste to get through my work as soon as possible, and do it all that day. I couldn't tell you whether I ran a three-minute gait or less. I ran a good gait in my great haste to get up the case. . . . I couldn't stop myself, I went with such great haste. I did not intentionally jump in the elevator shaft. I was not going to commit suicide." The story may be told still more briefly. When the elevator was at the ground floor, the occupants of the building were not accustomed to have the guard placed across the opening into the elevator, because no accident could happen while the elevator remained in that position. The plaintiff, with this knowledge,

glanced at the elevator before going after his horse, and saw that the elevator was in position at the ground floor, and the chain hung up by the side of it. When he returned, which he did in great haste, he saw the chain still hanging up, and supposed that the elevator was in the position which the chain indicated, and so rushed on into the elevator shaft. He was relying upon the well-understood rule of the occupants of the building that the chain should be stretched across the opening to the elevator shaft whenever the elevator should be taken from the ground floor,—a rule which, if faithfully observed by all of the occupants of the building and their employees, would have prevented the accident; but, instead of being observed, it was violated, and the result was the injury for which a judgment has been obtained against this defendant. It is not pretended that this defendant, or any of its agents or servants, moved this elevator from the ground floor to the floor above while the plaintiff was trying to get his horse near the elevator entrance. On the contrary, all of the evidence points in the direction of Maxson, an employee of one of the occupants of the building, as the man who carelessly moved the elevator to the floor above, leaving the well hole unguarded.

Notwithstanding the fact that the negligent act which was primarily responsible for the accident is distinctly pointed out and found to be an act which the defendant neither committed nor was legally responsible for, a judgment has been obtained against it for the damages sustained by the plaintiff. This liability was worked out to the satisfaction of the court and jury upon the following lines: The defendant failed to furnish such a guard at the elevator shaft as was required at the time by the factory act or the building law, and it is established by many cases that a failure to comply with the requirements of a statute is competent evidence of negligence to be submitted to the jury. By this process of reasoning it is insisted that the defendant is legally chargeable in damages for the injuries clearly occasioned by the fault of another, as we have seen. Whether this position be well taken we shall now inquire. The learned judge at general term held that the factory act (Laws 1887, chap. 462) has no application to this case, as the building was not a manufacturing establishment within the meaning of the statute. We pass this question without other comment than that we agree with the position taken by the general term. That learned court also held, and correctly, we think, that § 487 of the consolidation act, which constitutes a part of the building law, was applicable. Counsel, however, seem to have made a mistake in not calling the attention of the court to the last amendment of that section, with the result that the court assumed in its discussion that that section, as amended by chapter 410 of the Laws of 1882, was in force at the time of the happening of this accident. The court correctly stated the effect of the statute as amended by the act of 1882 to be that it "requires that the opening in each floor of such a building shall be protected by such a substantial railing, and trapdoors to close the same, as shall be approved by the superintendent of buildings, and that such trapdoors

shall be closed at all times, except when the elevator is in actual use." It will be observed that in the statute referred to by the court both substantial railings and trapdoors are required to be used to guard the entrance to the elevator shaft, and such was the condition of the law when the accident happened out of which the action of *McRickard v. Flint*, 114 N. Y. 222, arose. Prior to the happening of this accident it was amended so as to read as follows: "In any building in the city of New York, in which there shall be any hoistway or freight elevator or well hole, not inclosed in walls constructed of brick or other fireproof material, and provided with fireproof doors, the openings thereof, through and upon each floor of said building, shall be provided with and protected by a substantial railing, or with such good and sufficient trap doors with which to close the same, or both, as may be directed and approved by the superintendent of buildings, and such railings and trap doors shall be kept closed at all times, except when in actual use by the occupant or occupants of the building having the use or control of the same." Laws 1887, chap. 586, § 487. In the *McRickard Case* the statute required both guards, and both were omitted, and this court decided that the failure of the superintendent of buildings to give directions could not constitute an excuse for the absence of the guards. But as the statute now stands two kinds of guards are mentioned, each or both of which may be used "as may be directed and approved." Thus the superintendent of buildings is permitted to exercise his discretion. He may direct that a railing be used, or that a trapdoor be employed as a guard, or that both a railing and a trapdoor be used. In the absence of direction on the part of the superintendent, it would seem that the adoption of either one of the three methods provided by statute would operate to save the owner from being charged with negligence solely on the ground of non-compliance with the statute. It is unnecessary to consider whether there might not be special circumstances surrounding a given situation which would call upon a prudent owner to make such a choice of statutory methods as would permit a jury to find him guilty of negligence for the choice made, but there are no such facts present in this case. The method selected was, on the contrary, the usual one for the ground floor, as appears by the testimony of the plaintiff. Under such circumstances it may be safely asserted that a charge of negligence cannot be based solely on the omission to adopt one of the other methods of guarding the well hole rather than the one chosen.

But the respondent says the owner did not provide a railing; he provided a chain instead. This distinction certainly seems too narrow to furnish a foundation for charging damages against a party for an injury which was the direct result of the carelessness of another. It is not pretended that a railing of iron or wire or wood would have been stronger or more servicable in any way than this chain. It appears from the testimony of the plaintiff that chains were generally used to rail in shaftways of elevators in the vicinity of the premises in question. It thus appears that the chain was treated, as it might well have been, as a "sub-

stantial railing" within the meaning of the statute. But if we assume that the chain is not a technical compliance with the statute we must still reach the conclusion that the defendant is not liable for the reason that its act in furnishing a chain instead of a railing did not occasion the injury. If a rail had been used instead of a chain, the result could not have been different. The statute provides that "such railing and trapdoor shall be kept closed at all times except when in actual use." This contemplates necessarily that the railing must be a movable railing, such as this chain was. Whatever might have been used as a railing, whether made of wood, iron bars, or even iron links, would have been movable at the pleasure of anyone desiring to use the elevator, so as to leave the elevator opened or closed, as work or prudence should require. There is nothing in the character of such a railing as the statute requires as enables it to protect an elevator shaft against the malicious or careless act of a party who leaves it open when he moves the elevator. Either guard is powerless to bar the ingress of the heedless into an elevator well hole if deliberately left open by persons operating the elevator. If either be sufficient to accomplish that purpose if left in proper position, it would seem to follow that it is not the act of the owner in providing the one rather than the other which is the proximate cause of the accident, but rather the act of him who puts away the guard, and refuses to permit it to perform its office of protecting the well hole during the absence of the elevator. For the act of the person who deliberately moved the elevator, leaving the well hole unguarded, this defendant is neither morally nor legally responsible, and should not be visited with its consequences. There are other exceptions upon which a reversal might well have been based, but we prefer to rest our decision upon the ground that this defendant was not at fault.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur.

Sarah Strong JONES, *Respt.*,
v.

NEW YORK CENTRAL & HUDSON
RIVER RAILROAD COMPANY, *Appt.*

(156 N. Y. 187.)

1. The sudden jolting of a passenger car on a mixed train while the train was being made up and a passenger was attempting to enter the car at a distance from the station, without the knowledge of any person in control of the train, although the station baggagemaster knew it, does not render the railroad

NOTE.—For injuries in getting on or off passenger trains, see *note* to *Carr v. Bel River & E. R. Co.* (Cal.) 21 L. R. A. 354; also *Odum v. St. Louis S. W. R. Co.* (La.) 23 L. R. A. 152; *Bogress v. Chesapeake & O. R. Co.* (W. Va.) 23 L. R. A. 777; *Woolsey v. Chicago, B. & Q. R. Co.* (Neb.) 25 L. R. A. 79; *Brashear v. Houston, C. A. & N. R. Co.* (La.) 23 L. R. A. 811; *Distler v. Long Island R. Co.* (N. Y.) 35 L. R. A. 762; *Howell v. Illinois C. R. Co.* (Miss.) 36 L. R. A. 545.

company liable to the passenger for resulting injuries, in the absence of any invitation to get on the car at that place.

2. A custom to take passengers on a mixed freight and passenger train at a distance from the station is not shown by the fact that they sometimes got on there, where no direction, authority, or consent to do so is shown, except the direction of a baggageman in a single instance and the fact that a flagman saw them board the train, while it appears that the train, when made up, always came to the station.

(*Bartlett, O'Brien, and Vann, JJ., dissent.*)

(June 7, 1898.)

APPEAL by defendant from a judgment of a General Term of the Supreme Court, Fifth Judicial Department, affirming a judgment of the Monroe County Circuit in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. Hamilton Harris, with Mr. Ashbel Green, for appellant:

It was plaintiff's duty to look and listen for the approaching engine before attempting to board the train. Not having exercised any care or prudence in getting on to the car she was guilty of negligence.

Philips v. Northern R. Co. 62 Hun, 288; *Hurlbert v. New York C. R. Co.* 40 N. Y. 146; *Georgia P. R. Co. v. Robinson*, 68 Miss. 643; *Pneco v. New York C. & H. R. R. Co.* 84 Hun, 80.

In the operation of railroad trains there must be more or less jarring, jerking, and sudden movements of the train, which are a necessary concomitant to their operation at all, and for which no right of action lies, even though injury results.

Miles v. King, 18 App. Div. 41; *Black v. Third Ave. R. Co.* 2 App. Div. 387; *Jonas v. Long Island R. Co.* 21 Misc. 306; *Keating v. New York C. & H. R. R. Co.* 49 N. Y. 673; *Daley v. Port Jervis, M. & N. Y. R. Co.* 80 Hun, 174.

Even if plaintiff, without a ticket, went into the yard to board the car because others had occasionally boarded cars there without invitation of defendant, yet that not being the place set apart for passengers to board the cars, the defendant owed her no active vigilance.

Walsh v. Fitchburg R. Co. 145 N. Y. 801, 27 L. R. A. 724.

The baggageman's business was to look after and take care of the baggage at the station. He was not connected with and had no charge of the train, and had no power or authority to stop her from going down into the yard.

There is not a particle of evidence that the conductor or any of the trainmen were in sight.

If a person is invited on a train by some employee of the company not having the supreme control in that department of the company's business, but is at the time out of the range of his employment, and the person invited is injured whilst so on the train, the company is not liable.

41 L. R. A.

Duff v. Allegheny Valley R. Co. 91 Pa. 460, 36 Am. Rep. 675; *Little Rock & Ft. S. R. Co. v. Miles*, 40 Ark. 298, 49 Am. Rep. 10; *Solomon v. Manhattan R. Co.* 103 N. Y. 442, 57 Am. Rep. 760.

Mr. Elbridge L. Adams, for respondent:

If a railroad company admit a passenger into a caboose car attached to a freight train, and take the customary fare, it incurs the same liability for his safety as though he were upon a regular passenger train.

Edgerton v. New York & H. R. Co. 89 N. Y. 227.

The jolt which caused plaintiff's injuries was so severe as to knock the plaintiff down between the coach and the freight car, although she had hold of the railing. If the jolt was the usual one in the starting of that train there was all the more reason why the defendant should have exercised some care for the safety of the passengers whom, by a long course of custom, it had permitted to take its train at this place. They should have had a brakeman there to warn passengers not to get on while the engine was backing down.

Keating v. New York C. & H. R. R. Co. 49 N. Y. 673; *Daley v. Port Jervis, M. & N. Y. R. Co.* 80 Hun, 174; *Newton v. Central Vermont R. Co.* 80 Hun, 491; *Edgerton v. New York & H. R. R. Co.* 89 N. Y. 227.

The negligence of starting a train with any motion while passengers are boarding it, is too well established to be questioned.

Bartholomew v. New York O. & H. R. R. Co. 103 N. Y. 716; *Hickenbottom v. Delaware, L. & W. R. Co.* 122 N. Y. 91; *Distler v. Long Island R. Co.* 151 N. Y. 424, 35 L. R. A. 762; *Chicago & A. R. Co. v. Arnold*, 144 Ill. 261, 19 L. R. A. 813; *Thomp. Car.* § 20, p. 234; 2 *Shearm. & Redf. Neg.* 4th ed. § 508.

Parker, Ch. J., delivered the opinion of the court:

The judgment awards to the plaintiff \$5,000 for injuries sustained by her in a fall occasioned by the sudden jolt of defendant's car while she was entering it. The story of the accident was told by the plaintiff, and from it we extract the following: "On the 9th of February, last year [1894], I left my home in Fairport, intending to make a visit. I left my house about half past eight in the morning, intending to take the West Shore local train for Pittsford. That train was due to leave Fairport a little after 9 o'clock, or about 9 o'clock. I went to the station of the West Shore. I think that is also the depot of the New York Central at Fairport. It is the only station there. It is east of Main street on the north side of the track. There are three or four tracks south of it. When I got to the station I went into the ladies' waiting room. I went up to the ticket agent at the ticket office, and asked him how long before that train was due. I spoke of the West Shore local train. He said it was due about 11 o'clock. The ladies' waiting room is on the west side of the station, and the baggage room is at the right, or still west of that. As I came out the door I saw Mr. Johnson, the baggage master of the railroad. He wears a uniform. I know him, and had seen him there before. I asked him if that train was the West Shore local for Pittsford, and he said

it was. He wanted to know if I wanted to take the train. I told him I did. He then signaled in this way, as I supposed, I don't know who, I suppose to the engineer. He simply raised his hand, and said, 'Take on this lady.' Then, after I started, I said, 'I guess I will go right on, and get on while the train is still, before the engine gets on,' and I started to go east. Mr. Johnson went off the steps before I did. He walked along out near the platform to the east, and I walked right on the platform until I came near the east end of it, and then I went off, and went in the path. We were nearly along together. Then he crossed over when he got to the end of the platform. I continued east to take the train on the northeast side of the track down as far as the caboose, way down to the end of the train. It was down to very near the first crossing. I couldn't tell you how far it is. The crossing is a drive. I don't believe I know how far that is. When I got down opposite the caboose I crossed over to take the car. I crossed two tracks. I don't know whether I crossed any more or not. When I got to the caboose I went up the steps the same as I always go into a car. I took the outside railing of the car as I went up. . . . And as I went to put my left hand onto the knob of the door to go in, I was . . . the next I knew after that I was thrown right backward, a sudden jolt, and I found myself right on my back with my head . . . something hit my head right there."

A recovery was had at the circuit, and sustained at the general term upon the ground that the plaintiff's injuries were due to the fault of the defendant. The particular wrong of which the defendant was held to be guilty is that in switching certain cars for the purpose of coupling them it brought them so sharply together as to jolt the other cars on the train, including the one passenger car which this plaintiff was at the time entering. If the passenger car had been alongside of the station platform, where people are invited by railroad companies to enter their cars, there could be no doubt that the judgment would be well grounded. When a passenger car is drawn up to the platform of a railroad station, the act of itself constitutes an invitation to enter it, extended to those desiring to become passengers therein, and the invitation necessarily carries with it an assurance that the passenger may safely enter without fear that there will be any sudden jerk or jolt of the car. But, as has already been observed in reading the testimony of the plaintiff, she did not enter the car at the station. It was standing some 525 feet from the station at the time she climbed on board of it. The train was what was known as a mixed freight and passenger. It consisted of one passenger car on the rear and such number of freight cars as the local business from time to time demanded. On this particular day, when the train came into Fairport station, and passed on beyond the depot for the purpose of doing the necessary switching, it consisted of the ordinary passenger coach and fourteen freight cars. Seven of the cars were taken out of the train at Fairport and left there, and a car which was on one of the side tracks was attached to the train, so that when it left that station for Pittsford

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the train had six cars less than it had upon its arrival. This necessary switching was being done at the time the plaintiff attempted to board the train, to do which she had left the platform, and passed down the track several hundred feet. "When [as she testified] I got down opposite the caboose, I crossed over to take the car. I crossed two tracks. I don't know whether I crossed any more or not." There was neither steps nor platform of any kind at this point upon which the plaintiff could stand while trying to reach the steps of the car, nor was there present a conductor, brakeman, or other person connected with the defendant to invite or assist her to enter the car. The car itself was empty. The plaintiff knew that the engine was detached from the train, and would have to be put on again before the train could move. This fact appears from the testimony which we have quoted, where the witness says that she said to another person, "I guess I will go right on, and get on while the train is still, before the engine gets on." To the situation thus briefly, but with sufficient accuracy, presented, we must apply such legal principles as it demands. And the first inquiry is, Did the defendant owe to the traveling public the duty of preventing this car from being jolted at the place where it was when the plaintiff boarded it? No special duty was owed to this plaintiff, for she was not personally invited to get on the car at this point by any of the defendant's officers or employees. It does not appear that the engineer, or any person in control of the train, knew that she was attempting to get on, and these facts justify the assertion made that the defendant owed no special duty to the plaintiff.

The further inquiry, then, is whether the defendant was under any obligation to the traveling public, of which the plaintiff forms a part, to prevent any jolting of the car at this point while making up the train. It is obvious that the answer to that question will be furnished by the evidence which discloses whether or not, by long and open user on the part of the public, with the knowledge and acquiescence of the representatives of the defendant, an invitation had been extended to the general public to board the car at this place; for certainly it will not be contended that in making up a freight train with an empty passenger car attached the engineer may not shunt the cars together with sufficient force to jolt every other car in the train. That this is so was well recognized by the learned justice who presided at the trial, who with clearness pointed out to the jury the right of the defendant to make up its train in its own way at any other point than one where passengers were invited to board it, and he left it to the jury to say whether, under the evidence presented, the custom was established on the part of the defendant of taking passengers on this freight train at this point. The jury found that such a custom was established, and, if there is evidence to support the finding, the judgment must stand, unless some other error shall call for reversal. It seems to us that there is no evidence to support such a finding. There was at Fairport a regular passenger station to which this train always came after being

made up, when there were any passengers to be taken. On this day as usual, and after the accident had happened to the plaintiff, it pulled up to the depot and two passengers got on. Three witnesses in all gave testimony upon which the plaintiff relied to prove her claim that the custom had been established of receiving passengers for this particular train at the place of the accident. One of the witnesses, Jacob Morrell, testified: "I live at Fairport. I know the train known as the West Shore local that leaves Fairport in the morning about 9 o'clock, going west to Pittsford. I took it the 8d day of July, 1898. My wife and children were with me. I was going to Pittsford. I took the train just below the station. I should think 5 or 6 rods below. I went down and got into the caboose at the end of the train. Q. Who told you to? A. I don't remember as anyone. . . . I didn't ask anybody where I was to take that train. The train was standing there, and I got on. . . . The conductor was in the car. I don't remember seeing the brakeman." This isolated instance does not even tend to prove custom. No one connected with the defendant as an officer or employee invited him to get on the train at that point. It is not altogether certain that the conductor saw him get on, but assuming that he did, what could the conductor do about it? He was without authority to put this passenger and his family off the train, or do any other act calculated to serve as punishment to them for failure to obey the well understood rule of steam-railroad corporations that passengers shall board their trains at stations, and not elsewhere. The plaintiff's son testified that he had been to Pittsford by the West Shore train. Q. Where did you take the train? A. Down; it was a little way beyond that little house there. East of the depot. Q. The first time you went, did you have anything to say to Johnson, the baggageman, or he to you, about taking the train? A. No, sir; only he told me to go down there, and get on. Down to the caboose. It was east of the depot, a little ways beyond that house there. I don't know what that house is. Some railroad house on the north side of the track. I did go down there and get on. The conductor or the brakeman was down on the steps there to the platform. He helped me on. I don't remember whether he had a uniform on. He looked like a railroad man." Here we have one instance where it is pretended an employee of the defendant invited a passenger to board the train at some other point than the depot platform, and it furnishes the only evidence we have in this record of either invitation or consent on the part of the employees to the boarding of a train by passengers at any other point than the station. The third witness, John D. Maloney, formerly a flagman of the defendant, testified that the train was a freight train with a passenger coach at the end of it, with some shifting generally to do at Fairport, where the train usually remained ten or fifteen minutes. "I have seen passengers take that train below the station and at the station. I have seen them take it perhaps 200 yards below the station. They would go down and get into the caboose while the engine was off shifting. Times when passengers would be at

the station when, I suppose, the engineer would be notified, and he would stop there. Days I have seen four or five people go down east and take this train, and days less. I suppose the conductor's orders are, before the train goes out, to go into the station, and inquire whether there is anybody to get on the train, — whether any person has bought tickets. I think that has been done. If there are passengers to get on, the train stops at the station; if there are no passengers to get on, it goes on. Not a word in the testimony of this witness tends to show that any one of the persons whom he saw boarding this car below the station did so at the invitation of any of the defendant's officers or employees. He testified that there were days when he had seen four or five people go down and take the train at this point, but he did not say how often it occurred. Probably it was not very often, for it is made quite clear by the testimony that there were days when there were no passengers whatever at this station. In all of this record, then, we have the testimony of one witness that he was told by the baggageman to go down east and get on the train while the engine was switching. Not another act on the part of a railroad employee of any grade tending to encourage the public, or any portion of it, in boarding the train at this point. Nothing to show that any employee of the defendant save the flagman, Maloney, ever saw passengers boarding the train except at the station, or that such employee consented to their boarding the train elsewhere. It is not at all likely that the defendant or its employees would encourage such conduct as would require the maintenance of two stations within about 500 feet of each other for the boarding of a single car, which many days was without passengers from the village of Fairport. We have, it is true, evidence that some people boarded the train at this point, but they boarded it apparently without direction, authority, or consent; and this trespass upon the well-understood regulations of all railroad companies that passengers shall board trains at railway stations only cannot support a finding that the defendant had invited the public to get on the train at this point as well as at the station. The safety of the traveling public has made it necessary to apply to common carriers, especially in respect to vehicles propelled by steam, far more stringent rules than govern many other relations that exist among men; but neither the public interest nor good morals would be subverted by permitting evidence of a few trespasses to establish a right in the public, and to impose a duty upon the railroad to be watchful lest future trespassers should come to harm. Reaching the conclusion that there was no negligence on the part of the defendant in this case, we omit a discussion of the other questions presented by the appellant.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

Gray, Haight, and Martin, JJ., concur with **Parker, Ch. J.,** for reversal.

Bartlett, J., dissenting:

I am unable to vote for the reversal of this judgment. The questions of plaintiff's contributory negligence and defendant's neg-

ligence were involved in a conflict of evidence, and properly submitted to the jury. It was for the jury to determine whether, by reason of the usual course of business, there was an implied assent on the part of defendant that passengers might board the freight caboose a considerable distance east of the passenger station platform. This being established, it was for the jury to further decide whether due care was observed by defendant in coupling cars at the time plaintiff sought to board the train. While this is a close case,

there were three witnesses besides the plaintiff who gave evidence tending to establish a general course of business and assent, either express or implied, on the part of defendant, that passengers might enter the train at or about the point, where the plaintiff did at the time of the accident. I am of the opinion that the judgment should be affirmed.

O'Brien and Vann, JJ., concur with Bartlett, J., for affirmance.

MINNESOTA SUPREME COURT.

Clara D. COYNE, *Resp't.*,
v.
MISSISSIPPI & RUM RIVER BOOM COMPANY, *Appl.*

(.....Minn.....)

- *1. **If a party, in the exercise of a legal right,—more especially one conferred by statute.—**
•Headnotes by COLLINS, J.

NOTE.—Liability for injuries to riparian owner by running logs in stream.

If the stream is not floatable within the rules shown in *note* to *Carlson v. St. Louis River D. & Imp. Co.* (Minn.) *ante*, 371, one attempting to use it to float logs will be liable for all injury done by him.

If the stream is not navigable a person who injures the dam of one owning the land on both sides of the stream by attempting to float logs in the stream will be liable for the injury. *Hoskins v. Archer*, 6 Ky. L. Rep. 671.

The one attempting to float logs down a stream which is not floatable will be liable for injuries done by him. *Gwaltney v. Scottish Carolina Timber & Land Co.* 111 N. C. 547.

A log owner, who fills the bed of a stream with logs in winter when it is not navigable, is liable to a lower mill owner who is injured thereby. *Wooden v. Mt. Pleasant Lumber & Mfg. Co.* 106 Mich. 412.

The mere fact that the statute requires dams to be constructed in such a way as to permit the passage of timber through them does not justify one who tears down a dam to permit his timber to pass, in case it is not shown that the stream is a common public highway. *Shipman v. Clothier*, 8 U. C. Q. B. 592.

Liable for negligence.

The rule of *COYNE v. MISSISSIPPI & RUM RIVER BOOM CO.*, that liability for injuries in case of floatable streams depends on negligence, is the one generally adopted by the courts, and is correct if the requirements of duty are not placed too low. Injury to riparian lands by logs floating in the stream should of itself raise the suspicion that all was not right. If the logs could not be run without causing the injury, then without the destruction of private rights the stream cannot be held to be floatable. If it is possible to run the logs without injury, the very fact that an injury happens should raise the presumption of negligence, casting the burden of showing due care on the one running the logs. Most of the injuries appear to result from jams or flooding dams. Jams in turn seem to be caused by overtaxing the capacity of the stream at the stage of the water when the run is made. Overtaxing the capacity of the

stream, or bad management of the flooding dam, would seem to be negligence. So that from whichever point the subject is viewed the injuries which ordinarily are caused to riparian owners should be paid for.

2. **The right of passage on a navigable stream is a common and paramount one,** but must be exercised with due regard to the rights of riparian owners, and with ordinary care and skill. Floating logs in such a stream may cause damage to the estate of such owners; but if driven in an ordinarily careful, prudent

stream, or bad management of the flooding dam, would seem to be negligence. So that from whichever point the subject is viewed the injuries which ordinarily are caused to riparian owners should be paid for.

These views are sustained by an Oregon decision, and by the cases in title *Flooding land*.

The right of floatage can only be used with due regard to the rights of the owners of the banks through which the stream flows. The right to float logs down a stream gives no right to run them upon the land, nor to cause the water to overflow its banks to the injury of the riparian owner. The one attempting to run the logs will be liable in case the logs run out of the channel, or lodge in the channel, or cause the water to dam and flow over upon the land of a riparian owner to his injury. Negligence is not necessary to give a right of action. *Haines v. Welch*, 14 Or. 819.

But most of the decisions are placed upon the more clearly established rule of negligence.

The easement of floatage must be exercised with due care for the avoidance of injury to the interest of riparian proprietors. *Burke County Comrs. v. Catawba Lumber Co.* 115 N. C. 590.

A person who puts logs on the ice, and gives them no attention, will be liable for the injury in case, when the ice breaks up, they, together with the ice, form a dam which causes the water to cut a new channel through the land of a riparian proprietor. *George v. Flak*, 32 N. H. 82.

The owner of a toll bridge which is carried away by logs floating in the stream through the negligence of their owner may hold the owner of the logs liable for the loss. *Sewall's Fall Bridge v. Flak*, 23 N. H. 171.

Negligently floating logs down a stream so as to destroy a milldam renders the one doing so liable for the injury. *Trevitt v. Barnes*, 21 N. Y. Week. Dig. 590.

If the works of a booming company are not properly constructed, and it is guilty of mismanagement and negligence in keeping too large a quantity of logs in the boom at a time, by reason of which the property of riparian proprietors is injured, it will be liable for the injury. *Doucette v. Little Falls Improv. & Nav. Co.* (Minn.) 73 N. W. 847.

manner, the party driving is not liable for damages which may result to the riparian owners.

(June 14, 1898.)

APPEAL by defendant from an order of the District Court for Anoka County denying a motion for new trial after verdict in favor of plaintiff in an action brought to recover damages for injury to plaintiff's land by defendant's booming operations. *Reversed.*

The facts are stated in the opinion.

Mr. John B. Atwater for appellant.

Mr. Everett Hammons, for respondent:

If there was "a taking" it matters not whether the appellant was negligent or not. If there was no taking then it became material to prove negligence. Respondent established both propositions by a fair preponderance of evidence.

This court has in three distinct cases decided that acts like those in evidence here constitute "a taking" within the meaning and intent of the law.

Weaver v. Mississippi & R. River Boom Co. 28 Minn. 534; *McKenzie v. Mississippi & R. River Boom Co.* 29 Minn. 288; *Cotton v. Mississippi & R. River Boom Co.* 22 Minn. 372; *Dou-*

Persons attempting to use a stream for floating logs are liable for injuries to a milldam the right to maintain which has been acquired by use for more than fifty years if caused by their negligence either in not securing their logs until a time when they can be safely turned adrift, or in the manner in which they are sent over the dam. *James v. Carter*, 96 Ky. 378.

One in possession of a milldam under a deed of property on which the dam was not situated, but in connection with which it was used, may maintain an action against one who negligently floats logs down the stream and injures the dam. *Trevitt v. Barnes*, 21 N. Y. Week. Dig. 580.

In *Silver v. Connecticut River Lumber Co.* 40 Fed. Rep. 122, an award of arbitrators for injuries done by logs running in a river was enforced after the remission of a part of the amount as representing what might have been allowed for the breaking of a particular bank which the referee found had been broken before and was not broken by the defendant's logs.

Conversely, if negligence is not shown, the log owner is not liable, however great may have been the infringement of the rights of the riparian owner.

The land of a riparian owner may, without compensation, be flowed to some extent by persons exercising the right to float logs. Every log that floats down the river over his land causes the water to rise above its natural level. Floating logs in large quantities may in various ways cause an appreciable and substantial damage to his real and personal estate; and the owner of the logs is not liable for damage resulting from an enjoyment of the public right of navigation. Logs may be lodged by the subsiding freshet, and the owner may reclaim them, without being liable for the mishap. *Thompson v. Androscoggin River Improv. Co.* 54 N. H. 558.

Where logs are driven in a navigable river in an ordinarily prudent and skilful manner, the owner is not liable for damages which result to the land of riparian owners. *Field v. Appie River Log Driving Co.* 67 Wis. 599.

A person running logs down the stream is not liable for injuries caused by the sudden breaking of a jam, in the absence of negligence on his part. 41 L. R. A.

cette v. Little Falls Improv. & Nav. Co. (Minn.) 78 N. W. 847.

Collins, J., delivered the opinion of the court:

Plaintiff had a verdict in an action brought to recover for injuries claimed to have been caused by reason of defendant's construction and maintenance of certain piling, piers, and booms in the Mississippi river, above plaintiff's farm, whereby huge quantities of logs and ice were accumulated and held back in the spring of 1897, and then, because of the breaking away of the piling, piers, and booms, alleged to have resulted from defendant's negligent management and operation thereof, suddenly precipitated down the river, and upon plaintiff's farm, by reason of which soil and trees along the banks were swept away and destroyed. Defendant's appeal is from an order denying its motion for a new trial, and the assignments of error go to the claim of counsel that the court should have dismissed the case when plaintiff rested; that there was error in the admission of certain evidence in rebuttal; that the charge to the jury was erroneous in respect to the grounds upon which plaintiff could recover, and also in reference to

Hopkins v. Butte & M. Commercial Co. 13 Mont. 229.

If in running the logs down the stream the water is not caused to rise higher than it would by reason of the logs moving down in its natural state an injury done to the riparian owner is *damnum absque injuria*. *Anderson v. Thunder Bay River Boom Co.* 61 Mich. 489.

A booming company is not liable for injuries caused to a riparian owner by a proper and reasonable use of the right of floating logs; but it is liable if by a wilful or negligent management it creates or enlarges jams in the stream and thereby overflows its banks to their injury. *White River Log & Boom Co. v. Nelson*, 45 Mich. 578.

Some of the above decisions were evidently made in view of the supposed necessity of getting the timber to market. But if the timber cannot pay for the injury which its transportation necessarily causes to third persons it might better stay in the forest.

Trespass on banks.

Log owners are liable to the riparian proprietor for the actual injuries caused by traveling upon the banks of a floatable stream for the purpose of propelling their logs. *Hooper v. Hobson*, 57 Me. 278, 90 Am. Dec. 769.

Legislative authority to maintain side booms will not authorize the grantee to enter the close of any person without his consent, or to place logs therein for safe keeping. *Perry v. Wilson*, 7 Mass. 333.

Fastening a boom to the shore without necessity is a trespass which will render the trespasser liable to the riparian owner. But there is a right to use the shore so far as it is necessary. *Weise v. Smith*, 3 Or. 445, 8 Am. Rep. 621.

A boom company cannot be given the right to use the banks belonging to a riparian owner without making compensation. *Cohn v. Wausau Boom Co.* 47 Wis. 314.

If logs are carried down a river and cast upon the land of a riparian owner without fault of their owner, he will be liable for the injury done in case he reclaims them, but not if he abandons them. *Sheldon v. Sherman*, 43 N. Y. 454, 1 Am. Rep. 569.

A person properly using a stream for floating

the time up to which damages might be estimated in case damages were awarded to her.

The defendant is a corporation duly organized and acting under the provisions of Minnesota Special Laws 1857, chap. 60, and several amendatory acts. Its power and authority to build and construct piling, piers, and booms in the river mentioned,—a navigable stream,—and its right to handle and drive logs, under its franchise, stand conceded. It was exercising

a lawful privilege when it erected piling and piers and maintained its booms at the point in question, but it was bound to exercise this privilege with due regard to the concurrent rights of riparian owners, above and below, to the use of their lands. And, as before noticed, the cause of action set forth in the complaint was based upon an allegation of defendant's negligence in the management and operation of its works above plaintiff's farm.

logs is not liable for injury occasioned by the stranding of logs which he has used every reasonable effort to retain within the stream, and he may reclaim the logs, being responsible only for unnecessary injury. *Carter v. Thurston*, 68 N. H. 104, 43 Am. Rep. 584.

If a person is negligent in handling logs in a floatable stream by reason of which they lodge on the banks of a riparian proprietor causing injury, the one causing injury will be liable to answer for it. If the logs were thrown there by inevitable casualty there can be no liability in case of failure to reclaim the logs. And if the owner seeks to reclaim them he will be liable only for the injury caused by leaving them there an unreasonable time. *Ford Lumber & Mfg. Co. v. McQueen*, 14 Ky. L. Rep. 522.

In *Weaver v. Mississippi & R. River Boom Co.* 30 Minn. 477, an injunction restraining defendant from causing logs or other material to run upon plaintiff's lands so as to injure them was modified pending proceedings to condemn a right in the land.

The owner of logs will not be liable for injuries done by their being cast upon the shore where it resulted from the raft being broken up by a violent storm while it was being towed through a navigable body of water, and before the logs could be collected they were driven ashore by another storm which in its fury and destructiveness had never, but once before, been heard of in that country. *New Orleans & N. E. R. Co. v. McEwen & Co-Murray*, 49 La. Ann. 1184, 38 L. R. A. 134.

In Maine the statute provides that if logs are lodged upon the banks the owner may, within a certain time, go upon the bank and remove them, tendering to the owner or the occupier of the land a reasonable compensation for his injury. *Brown v. Chadbourne*, 81 Me. 9, 50 Am. Dec. 641.

The Maryland act giving a riparian owner a lien of twenty-five cents upon each log cast by wind or tide upon his land, is valid. *Henry v. Roberts*, 50 Fed. Rep. 903.

Flooding land.

A boom company cannot cover the land of a riparian owner with water, logs, earth, and other material, to his injury, without paying compensation. *Weaver v. Mississippi & R. River Boom Co.* 28 Minn. 584.

A log-running company will be liable for injury caused to riparian lands by the raising of the water by obstructions to facilitate passage of logs. *Grand Rapids Boom Co. v. Jarvis*, 50 Mich. 308.

Persons putting logs into a navigable stream, or causing the same to be done, are liable to riparian owners for injury to their lands or crops caused by log jams raising the water to such an extent as to overflow the land. *Bauman v. Pere Marquette Boom Co.* 66 Mich. 544.

If a boom company, after its logs have jammed in the stream, continues to run logs against the jam until it extends and fills the river above the level of the adjoining land, where it is permitted to remain for a month, it will be liable for the loss of crops thereby caused to adjacent owners. *Witheral v. Muskegon Boom Co.* 68 Mich. 43.

If the boom causes the water to overflow the

land of riparian proprietors the one maintaining it will be liable, although the overflow only occurs at times of high water, which are rare, if the times of occurrence can reasonably be foreseen and anticipated. *McKenzie v. Mississippi & R. River Boom Co.* 29 Minn. 288.

A company which has been authorized by statute to improve the floatage of a stream will be liable to a riparian owner in case it injures his property by floods, or the jamming of logs. *White Deer Creek Improv. Co. v. Sassaman*, 67 Pa. 415.

The owner of a flooding dam will be liable for injury caused by his raising the stream so as to overflow land farther down the stream. *Hackstack v. Keshena Improv. Co.* 66 Wis. 439.

A boom company is not liable for the flooding of lands by the boom in co-operation with the unusual accumulation of logs and a large rise of water, if it was not negligent in the erection or management of the boom. *Lawler v. Baring Boom Co.* 56 Me. 443.

A company formed for the purpose of running logs cannot be held liable to riparian proprietors for injuries caused by log jams, unless, by the exercise of due care, the formation of such jams could have been prevented; but it is liable for the injury caused by unreasonable delay in breaking the jams. *Bauman v. Pere Marquette Boom Co.* 66 Mich. 544.

If the floating of the logs causes an unnatural flow of the water to the injury of a riparian owner the question of liability is for the jury. *Anderson v. Thunder Bay River Boom Co.* 61 Mich. 499.

In Michigan it has been held that if a boom company contracts to have logs driven in a stream the reasonable performance of which contract obligates the contractor so to run the logs and manage the water as to injure riparian owners, the company will be liable for the injury. *McDonell v. Rifle Boom Co.* 71 Mich. 61.

But in New York it has been held that if the log owner contracts with a third person to run the logs down the stream and deliver them at his boom he will not be liable for the negligence of the one driving the logs by which they jam and tear down a bridge. *Pierrepont v. Loveless*, 72 N. Y. 211.

Other injuries.

If a dam erected under authority of the legislature for the raising of a head of water to float logs causes the carrying away of the banks and widening and deepening of the channel, the riparian owner has no cause of action, it being *damnum absque injuria*. *Brooks v. Cedar Brook & S. C. River Improv. Co.* 52 Me. 17, 7 L. R. A. 480.

One obstructing a landing by logs floating down the stream, and by sand caused to be deposited by a boom, will be liable for the injury. *French v. Connecticut River Lumber Co.* 145 Mass. 261.

The owner of a wharf will not be liable for loss of a raft which is left moored so as to obstruct access to his wharf if without doing unnecessary damage, he unties it to permit a boat to come up to the wharf. *Harrington v. Edwards*, 17 Wis. 587, 84 Am. Dec. 768.

A millowner who is prevented from operating his mill by reason of the holding back of water by

A part of the evidence was directed towards establishing that a great quantity of logs and ice gathered at defendant's piling, piers, and booms, causing a jam, and then broke loose, rushing down in a mass, and tearing and washing out more or less of the soil along the shores of the stream where it flowed through the farm; and a part was produced for the purpose of showing that defendant was careless and negligent in the management and

operation of its booms, and carelessly and negligently allowed the jam to form, and then to break; and the court charged the jury upon this branch of the case. But it went further, and charged, in substance, that if the tearing and washing away of the soil along the shores were caused by the obstructions placed in the river by defendant, and this result might have been foreseen by an ordinarily prudent man, this constituted a taking of plaintiff's property,

a log-driving company so as to make the stream floatable at a time when it was not naturally so may recover for the injury. *Thunder Bay River Boom Co. v. Speechly*, 81 Mich. 386, 18 Am. Rep. 184.

If persons who have improved a stream for floatage purpose have held back the water so as to back up the stream to the injury of millowners lower down, the latter are entitled to an injunction to restrain such use of the stream. *Middleton v. Flat River Boom Co.* 27 Mich. 533.

If a boom company makes an unreasonable use of the stream in holding up and letting down the water it will be liable for injuries thereby inflicted upon the land of a riparian owner. *Thompson v. Androscoggin River Improv. Co.* 58 N. H. 108.

In case a dam is so erected as to interfere with the right of floating logs on a stream which is given by statute, a log owner may remove such portion of it as is necessary to permit the logs to pass without being liable for the trespass. *Little v. Ince*, 3 U. C. C. P. 523.

And if the log owner is not negligent, and the force of the logs passing over the dam tears away a large portion of the structure, he will not be liable for the injury. *Little v. Ince*, 4 U. C. C. P. 96.

If the legislature authorizes the construction of a bridge over a river, log owners must float their logs with due regard to the rights of the bridge owner, and must conduct the floatage in such a manner as to number and condition of the logs as to suit the passage through the bridge, and in case he fails to do so he will be liable for the injury he inflicts on the bridge owner. *Buckl v. Cone*, 25 Fla. 1.

Excessive floods.

If a boom is rightfully thrown across a river, and the owner is guilty of no negligence, he will not be liable in case it breaks by reason of heavy floods and causes the logs to jam against a bridge, thereby flooding the lands of a riparian owner. *Langstaff v. McRae*, 22 Ont. Rep. 78.

A company which has constructed a boom, in a particular manner, and by authority of the legislature, is not liable for the flowage of riparian lands by an extraordinary freshet such as it could not reasonably have anticipated and provided against. *Borchardt v. Wausau Boom Co.* 54 Wis. 107, 41 Am. Rep. 12.

If logs are placed on the bank of a stream which the public has a right to use, and by an unprecedented rise in the stream are carried down causing damage to property lower down the stream, the owner will not be liable if he had no reason to anticipate the flood and was not negligent in placing the logs where he did. *Goodin v. Kentucky Lumber Co.* 90 Ky. 625.

Contributory negligence.

The owner of a milldam cannot recover for injuries to his dam caused by logs carried down by a sudden rise in the stream through a boom negligently left open by the owner, if he knew that it was open and took no steps to have it closed, and was as cognizant of the liability of the stream to rise as was the owner of the boom. *Lilley v. Fletcher*, 81 Ala. 234.

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The owner of a dam so defectively constructed as to increase the danger of a jam cannot recover for injury to the dam caused by a jam, although it was caused in part by negligence of the one running the logs. *Miller v. Sherry*, 65 Wis. 129.

Statutes.

The Michigan statute provides for arbitration in case of injury to riparian property by floatage of logs and failure to agree on the damage. *Gratwick, S. & F. Lumber Co. v. Lewis*, 66 Mich. 533.

The New Hampshire statute authorizes the erection of dams to facilitate the floatage of logs, and provides that an owner of property injured thereby may apply to the supreme court for the assessment of damages. *Schoff v. Upper Connecticut River & Lake Improv. Co.* 67 N. H. 110.

A provision for appraisal of damages for injuries caused by running logs down a stream applies only to a natural and necessary injury, and not to those caused by negligence, and for the latter a common-law action will lie. *Mandlebaum v. Russell*, 4 Nev. 551.

The Vermont statutes providing damages for injuries caused by the lodging of lumber on the land or dam of a riparian owner, and authorizing the improvement of streams upon payment for the injuries caused, does not preclude a common-law action for injuries caused by floating logs on the stream. *Coe v. Hall*, 41 Vt. 325.

A boom company which in conveying property reserved the right to go upon the banks and remove logs is not affected by a statute subsequently passed which requires the payment of damages for injury caused by so doing. *Bradley v. Tittabawassee Boom Co.* 82 Mich. 9.

Injunction.

Equity will not enjoin the use of the stream by a boom company in favor of the owner of a milldam, although the dam is wrongfully injured; but will leave the owner to his remedy at law if it will be difficult to prevent the right by injunction without interfering with the rights of floatage. *Buchanan v. Grand River & G. Log Running Co.* 48 Mich. 364.

Equity may restrain the use of a nonfloatable stream for the attempted floatage of logs if the result will be irreparable injury to the riparian owner. *Haines v. Hall*, 17 Or. 165, 3 L. R. A. 609.

Riparian owners of piers and booms upon a navigable stream may enjoin the placing of obstructions in the stream for the purpose of aiding the running of logs which will interfere with their use of the stream. *Stevens Point Boom Co. v. Reilly*, 44 Wis. 295.

Where an improvement company has illegally caused land to be overflowed, and threatens and intends to continue to do so, injunction is a proper remedy. *Carlson v. St. Louis River Dam & Improv. Co. (Minn.) ante*, 371.

The difference in the result in the two cases of *Carlson v. St. Louis River Dam & Improv. Co. ante*, 371, and *COYNE V. MISSISSIPPI & RUM RIVER BOOM CO.* appears to have been caused solely by the attempt to put the latter case on the ground of wrongful taking when no taking could be shown.

H. P. F.

within the meaning of the law, for which defendant would be liable, without regard to its negligence or carelessness in maintaining or operating its works. To this part of the charge defendant's counsel duly excepted. We infer that the court relied upon the case of *Weaver v. Mississippi & Rum River Boom Co.* 28 Minn. 534, when using this language. But the facts are not at all similar, for in that case it appeared that the company built its piers and hung its booms on Weaver's land, and directly invaded and appropriated it, not only by those acts, but by flooding with water, and casting quantities of logs and drift thereon, which, remaining when the water subsided, destroyed the usefulness of the land. It was with reference to these facts that it was held that there had been a taking of plaintiff's property by defendant, for which compensation could be recovered. It was not a mere consequential injury to plaintiff's land which was under consideration in the *Weaver Case*, but a physical invasion and appropriation by a defendant who was not exercising a legal right when so doing. The authority relied on is not in point. The defendant, in the exercise of its corporate franchise, and to facilitate its authorized work of handling and driving logs in a navigable river, constructed its piling and piers, and then hung booms,—one extending from an island on the east side of the main channel to the east shore; the other, from an island on the west side of said channel to the west shore; leaving the main channel, between the two islands, unobstructed. Logs were pocketed in both of these booms, but the latter did not give way, nor did the logs escape. The injuries complained of resulted from the jam which formed in the channel between the islands while defendant was lawfully handling and driving the logs from above. As the river was a navigable stream, the public, as well as defendant under its charter, had the right to use it as a highway for the floating or driving

of logs; and the rights of riparian owners were subordinate to this use, if reasonably exercised. *Doucette v. Little Falls Improv. & Nav. Co.* (Minn.) 73 N. W. 847. The doctrine stated in 1 Hilliard, Torts, p. 103, thus, "If a party, in the exercise of a legal right,—more especially one conferred by statute, . . . does an injury to another's property, he is not liable for damages, unless they were caused by his want of the care and skill ordinarily exercised in like cases,"—is the one applicable where the right of passage in a navigable stream is involved. The right is a common and paramount one, but must be exercised with due regard to the rights of riparian owners. The use of the stream must be reasonable, and must be exercised with ordinary care and skill, such as the great mass of mankind would exercise under like circumstances when driving logs. The party using the highway is not an insurer, but he must not be negligent and careless. Floating logs may cause damage to the estate of the riparian owner; but, if the party floating or driving the same uses due care and skill, he is not liable for such damage. "Land on navigable streams is subject to the danger incident to the right of navigation, and where logs are driven in a stream in an ordinarily careful, prudent manner the owner is not liable for damage which may result to the riparian owner." *Field v. Apple River Log Driving Co.* 67 Wis. 569; *Harold v. Jones*, 86 Ala. 274, 3 L. R. A. 406; *White River Log & Boom Co. v. Nelson*, 45 Mich. 578; *Lawler v. Baring Boom Co.* 56 Me. 443; *Hollister v. Union Co.* 9 Conn. 436, 25 Am. Dec. 36; *Lansing v. Smith*, 8 Cow. 146; *Thomson v. Androscoggin River Improv. Co.* 54 N. H. 558.

The gravamen of an action of this kind is defendant's negligence, and the charge was incorrect. We need not consider other alleged errors.

Order reversed.

PENNSYLVANIA SUPREME COURT.

COMMONWEALTH of Pennsylvania, *ex rel.*
Susan Matilda SCOTT, *Appt.*,

v.

BOARD OF PUBLIC EDUCATION.

(187 Pa. 70.)

1. The power of the sectional boards of school directors to elect principals of grammar schools under act May 26, 1871 (P. L. 1157), applicable to Philadelphia, is subject to the prior acts on the same subject which authorize the board of education to provide the qualifications of all teachers, and grade and classify them into principals and others, and to classify each grade.

2. Teachers are not included in the provision of Const. art. 10, § 3, that "women twenty-one years of age and upwards shall be

eligible to any office of control or management under the school laws."

3. The exclusion of women from the principalship of grammar schools for boys or mixed or combined grammar schools is within the discretion of the Philadelphia board of education, which is empowered to determine the qualifications of teachers and classify or grade them.

(July 21, 1898.)

A PPEAL by relator from a judgment of the Court of Common Pleas, No. 2, for Philadelphia County denying a writ of mandamus to compel defendants to approve her election to the principalship of a grammar school. *Affirmed.*

The facts are stated in the opinion.

Messrs. William Henry Lex and John G. Johnson, for appellant:

It is the duty of the board of controllers to provide a system of examination of all persons

NOTE.—As to right of women to hold office, see note to *State, Crow, v. Hoettner* (Mo.) 88 L. R. A. 208.

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who may desire to become teachers in the public schools, and it is the right of the sectional board to elect any person so examined and qualified and receiving a certificate of qualification which is unimpaired and is in no way restricted to the selection of a person of a particular sex.

The act of May 25, 1871 (Pub. Laws, 1157), enacts: "The sectional board of school directors in the first school district are hereby authorized and empowered to elect the principal or principals of the grammar school or schools in their respective sections, and the said person or persons so selected shall be entitled to act without further confirmation."

In *Chestnut v. Philadelphia*, 17 Phila. 32, Allison, P. J., of Common Pleas, No. 1, Philadelphia County, in considering this act said that the rules of the board of controllers 18 and 21 (now 19 and 22) which provide that before a person elected a teacher shall be entitled to the rights, privileges, and emoluments of such position, his or her election must be approved "in so far as they related to the election of principals of grammar schools, may therefore be regarded as abrogated by the latter statute [1871], and in so far as they are to be considered as a part of the statute of 1865, because passed in pursuance of that act, the act to that extent is repealed."

In *Com., Sherry, v. Jenks*, 154 Pa. 368, it is said: "No woman qualified for supervising principal should be refused appointment because of sex alone."

Messrs. James Alcorn and John L. Kinsey, for appellee:

In *Com., Sherry, v. Jenks*, 154 Pa. 374, the power of the board of public education to provide qualifications for teachers, and to consider the sex of the applicant, was sustained by this court.

Everything pertaining to the public schools, within the city and county of Philadelphia, has been committed to the board of controllers, excepting only the public purse, which has been kept carefully in the hands of the city councils.

Philadelphia v. Johnson, 47 Pa. 382.

In *Chestnut v. Philadelphia*, 17 Phila. 32, it was held that the board of public education, notwithstanding the act of 1871, had all the authority conferred upon it by the act of 1865 to provide rules and regulations for the qualifications of the teachers, and that a sectional school board could not elect as a principal of a grammar school anyone who did not have the qualifications provided by the board of public education.

The rule of the board, that certain positions should be occupied by male teachers only, has been in force many years. It was recognized as within its power in *McManus v. School Controllers*, 7 Phila. 23.

A teacher is not an officer in the ordinary sense of the word. He has duties to perform incident to his employment, but they are not official duties and he is not under oath.

Seymour v. Over-River School Dist. 53 Conn. 509; 25 Am. & Eng. Enc. Law, p. 741; *Com. v. Stokley*, 20 W. N. C. 315; *Com. v. Filler*, 147 Pa. 283, 15 L. R. A. 205.

The discretionary power of the board of public education in the selection of suitable

and duly qualified persons as principals of mixed grammar schools will not be interfered with by the court.

Kell v. Ruay, 1 Pa. Super. Ct. 507.

Mitchell, J., delivered the opinion of the court:

By the act of February 17, 1865 (Pub. Laws, 176), the controllers of the public schools of Philadelphia (now called the "Board of Public Education") were directed to "establish a system for the examination of the qualifications of all persons who may desire to become teachers in the public schools of said district." And, by § 2, "no person shall, from and after the passage of this act, be elected to the position of teacher in any of [the public schools of said district] by any of the sectional boards of school directors within the same, unless such persons shall have been found duly qualified for the position to which he or she shall have been elected, nor unless he or she shall have received a certificate of qualification, duly issued by the authority of said controllers, after his or her examination, provided for in the 1st section of this act." The purpose of this act was to vest the entire control of the general subject of teaching and teachers for the whole district in the central and superior body, leaving to the local bodies of sectional directors the selection of individual teachers out of the class coming within the regulations of the board. The act of 1818 had previously committed to the controllers the general superintendence of all the schools, including authority to provide "such suitable books as they shall deem necessary for the use of the pupils belonging to the different schools within the district." 7 Smith's Laws, p. 54. In *Com., Sherry, v. Jenks*, 154 Pa. 368, it was said that, under these acts, "the regulation of the grade of schools and the transfer of a school from one grade to another is within the powers, and it is among the duties, of the board." In like manner, the grading or classification of teachers is as much within the powers and duties of the board as the grading of schools. The public school system of this district includes a central high school for boys, a normal school and a high school for girls, and from these downward through the more elementary grades of education, to the kindergartens. The system therefore requires teachers of very various qualifications, including acquirements, capacity to impart knowledge as well as to acquire it, age, experience, ability to maintain order and discipline, etc.; and the classification and assignment of teachers by such qualifications to the various grades of schools is entirely within the province of the board of education. This was clearly settled in *Com., Sherry, v. Jenks*, 154 Pa. 368.

The gradation of teachers into principals and subordinates is of long standing, and is recognized in our acts of assembly. In fact, an executive head, by whatever name called, is necessary to the harmonious and effective conduct of any school having several classes under different teachers. But the qualifications of principles themselves, considered in relation to the various schools over which they may be called to preside, may, and practically do, vary so widely as to require classification; and this

is also a matter within the discretion and control of the board of education. It appears by the pleadings that the board has, in fact, classified principals to a certain extent, and for certain purposes, by the following proviso to § 8 of by-law 21: "And provided, further, that male teachers only shall be eligible to the principalship of a grammar school for boys, a mixed grammar school, or a consolidated school having three or more full grammar divisions, and to the position of supervising principal of a combined school containing a grammar school for boys or a mixed grammar school."

The relator, holding a general certificate of qualification as a principal, was elected by the sectional board as principal of the mixed or combined grammar schools of the eighth section, and now claims that her election is not subject to any confirmation by the board of education, whose duty to certify her name to the city controller is ministerial and imperative. For this position reliance is placed upon the act of May 25, 1871 (Pub. Laws, 1157), providing that "the sectional boards of school directors in the first school district are hereby authorized and empowered to elect the principal or principals of the grammar school or schools in their respective school sections, and the said person or persons so elected shall be entitled to act without further confirmation." But it is entirely clear that this act must be read in connection with the prior acts on the same subject, and was not intended to take away or diminish the powers of the board of education to prescribe the qualifications of all teachers, and, in so doing, to grade them into principals and others, and to classify each grade as among themselves according to knowledge, age, experience, or other test as the board may deem proper. The act of 1871 consists of the single section above quoted, and is merely declaratory of the law as it existed before. The act of 1865, already quoted, authorized the board of education to prescribe the qualifications of "all persons who may desire to become teachers," and in the proviso to the 2d section declared that "the exclusive right of the several sectional boards of school directors within said district to elect the teachers of their respective sections shall be and remain unimpaired, except in so far as the same is qualified by this act." The use of the single word "teachers" in this proviso was thought to raise a doubt as to the power of the sectional boards to elect principals, who might be claimed under the subsequent phrase, "except in so far as the same is qualified by this act," to be subject to a discretionary confirmation by the controllers. The act of 1871 quieted this doubt. No other intent can be perceived in it, and it has no other effect on the previous law. This view is confirmed by the act of May 25, 1887 (Pub. Laws, 264), on the same subject, where, in providing for the certification of names by the sectional boards to the board of education, care is taken to include expressly "all persons qualified as aforesaid, who shall hereafter be elected to the position of principal or assistant teachers," etc. The rights of the respective boards are well defined, and in no wise doubtful. It is the right of the board of education to prescribe the qualifications of all teachers,

and to classify or grade them in accordance therewith, in such manner and by such tests as the board, in its discretion, may deem best for the interests of the public school system of the district. It is the right of the sectional boards to select, from the classes thus established, the individuals to fill the required positions in their several sections. They are directed to certify the names of the persons so selected, whether as principals or assistant teachers, to the board of education. The board of education then has the right to inquire whether the person so certified is a qualified member of the class from which the particular position should be filled, and, if so, it is charged with the duty of certifying the name and position to the city controller. The latter duty is ministerial and imperative, but it only arises after the board has ascertained, in pursuance of its right of inquiry, that a proper occasion is presented for its performance.

So far in dealing with the subject of qualifications of teachers, I have omitted mention of sex, as that is a matter of present controversy. But it is manifest that, apart from the legal point involved, sex is a most important element to be considered in the selection of teachers. The system, as already said, includes schools of all grades, from high school to kindergarten; and the curriculum embraces instruction in sewing, cooking, and in mechanical or manual occupations. To set men over kindergartens of children from four to six years of age, or to teaching small girls to sew or larger ones to cook, would in the present state of the world's social organization, seem incongruous, although there are men cooks and men tailors. So, on the other hand, women in charge of a night school of mechanics, or of a school of half grown and intractable youths, could hardly be expected to have a successful administration. Unless, therefore, some positive mandate of law prevents, it would seem that the question of sex in relation to the qualifications of teachers for different kinds of schools was one peculiarly within the discretionary control of the board of education. It is claimed by the relator that such mandate is found in the provision of § 8 of article 10 of the Constitution that "women twenty one years of age and upwards shall be eligible to any office of control or management under the school laws of this state." It may well be questioned whether teachers are officers of a school in any but a very restricted sense, as contrasted with pupils or scholars. But even conceding them to be officers in some vague popular sense, they are officers of instruction, and not of "control and management." The meaning of these words was well known at the time of the adoption of the Constitution. They referred to the public officers recognized by the statutes of the state as intrusted with the general administration of the public school system—the state superintendent of public instruction and local school directors and controllers, empowered to lay school taxes, build schoolhouses, establish schools, appoint teachers, regulate the admission of pupils, the course of study, etc. These were officers of control and management. To these offices women were not eligible. It is part of the current history of the times that the sentiment for the participation of women

in the affairs of government had its initiative point, both in England and in this country, in connection with the education of the young, for which they had certain very manifest natural capacities. It was the force of this sentiment that inserted the provision in question in the Constitution of 1874. Teachers were not intended to be included, for there was no occasion to think of them in that connection. It is said in the appellees' argument that nearly 97 per cent (8,016 out of a total of 8,117) of the teachers in the public schools of Philadelphia at the present time are women, and the proportion at the time of the adoption of the Constitution was not materially different. The school laws of the state put women under no disability as teachers that required removal,

and it was not with any reference to such positions that the constitutional provision was adopted.

It appears, then, that the board of education has classified principals with reference to certain classes of schools to which they may be appointed; that the relator though holding a general certificate of qualification as a principal, is not within the class entitled to appointment to the particular school to which she was elected; and that the test of sex established with reference to such schools is not unlawful but is within the discretion of the board. Judgment, therefore, was properly entered for the defendants.

Judgment affirmed.

SOUTH CAROLINA SUPREME COURT.

STATE of South Carolina

v.

C. E. COOP, *Appt.*

(.....S. C.....)

The sale of a frame for a portrait, made in another state to fill an order taken by a solicitor in the state where it was delivered, is a mere incident to the taking of the order for the portrait, and is not within the provisions of a state statute against peddling without a license, where the order for the portrait contained a provision that it should be delivered in a frame which the purchaser of the portrait should have the option of buying at wholesale price.

(*Jones, J., dissents.*)

(July 5, 1898.)

APPEAL by defendant from a judgment of the General Sessions Circuit Court for Orangeburg County convicting him of violating the statute against peddling without a license. *Reversed.*

The facts are stated in the opinion.

Mr. P. H. Nelson, for appellant:

A hawker and peddler is "one who travels from town to town, or from plantation to plantation, carrying to sell or exposing to sale, goods, wares, and merchandise."

State v. Belcher, 1 McMull. L. 40.

The defendant could not, by any construction, be held a hawker and peddler; he was not offering goods for sale to anyone; nor was he carrying them from point to point; but, on the contrary, was delivering portraits which had been ordered by certain persons, at particular points, and to those certain persons exhibiting frames, which they had been notified, and expected, would be presented with the portrait

when same was delivered for acceptance and payment.

State v. Moorehead, 42 S. C. 211, 26 L. R. A. 585; *Alexander v. Greenville County*, 49 S. C. 527; *Davenport v. Rice*, 75 Iowa, 74; *Com. v. Farnum*, 114 Mass. 267; 9 Am. & Eng. Enc. Law, pp. 807, 808.

Robbins v. Shelby County Taxing Dist., 120 U. S. 489, 80 L. ed. 694, 1 Inters. Com. Rep. 45, is similar to this case. The court held the act unconstitutional, saying: "Interstate commerce cannot be taxed at all by a state, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state."

A city cannot be empowered by the laws of its own state to impose a license tax upon a commercial drummer or other person of another state, for merely offering to sell goods within the city by sample, where the goods are to be brought from another state, and where the owner of the goods does not reside within the state where the goods are offered for sale.

Fort Scott v. Pelton, 39 Kan. 764; *Bloomington v. Bourland*, 187 Ill. 534, 8 Inters. Com. Rep. 667; *Stuart v. Cunningham*, 88 Iowa, 191, 20 L. R. A. 430; *State v. Scott*, 98 Tenn. 254, 36 L. R. A. 461; *Com. v. Gardner*, 183 Pa. 284, 7 L. R. A. 666.

Mr. W. St. Julien Jervey, for the State:

The act of 1898 (Hawkers and Peddlers) is not inimical to art. 1, § 8, of the Constitution of the United States.

Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; *Cardwell v. American Bridge Co.*, 118 U. S. 205, 28 L. ed. 959; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382.

Nor to art. 14, § 1.

Slaughter-House Cases, 16 Wall. 86, 21 L. ed.

NOTE.—For case similar to the above, see *State v. Scott* (Tenn.) 86 L. R. A. 461.

For other cases as to the right to take orders in interstate business, see *Re Spain* (C. C. E. D. N. C.) 14 L. R. A. 97, and *note*. See also *Com. v. Harmel* (Pa.) 27 L. R. A. 888; *South Bend v. Martin* (Ind.) 29 L. R. A. 581; *State v. Gorham* (N. C.) 25 L. R. A. 810; 41 L. R. A.

State v. Wheelock (Iowa) 80 L. R. A. 429; *Com. v. Myers* (Va.) 81 L. R. A. 879; *Carrollton v. Bazzette* (Ill.) 81 L. R. A. 622.

The cases in *Titusville v. Brennan* (Pa.) 14 L. R. A. 100, were reversed by the Supreme Court of the United States in *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 668.

894; *Strauder v. West Virginia*, 100 U. S. 808, 25 L. ed. 664.

There is no discrimination. Hawkers and peddlers constitute a distinct and well-defined class.

State v. Belcher, 1 McMull. L. 40; 9 Am. & Eng. Enc. Law, pp. 807, 808.

The act of 1893 refers to hawkers and peddlers as a class already ascertained.

State v. Moorehead, 42 S. C. 211, 26 L. R. A. 585.

Gary, A. J., delivered the opinion of the court:

The defendant was tried and convicted before a magistrate for selling picture frames without a license. The case contains the following agreed statement of facts, to wit: "The Chicago Portrait Company is a corporation of the state of Illinois, its place of business being in the city of Chicago, in the said state, engaged in the business of making portraits in oil, India ink, water color, and pastel, from photographs. That in the prosecution of its business the said company has agents traveling in this and other states, who solicit orders, and upon securing an order the agreement marked 'Exhibit A' in the brief is signed by the agent and turned over to the party giving the order, and a duplicate forwarded to the company at Chicago. When the portrait ordered is ready for delivery, a notification, as appears by Exhibit B, is sent to the person who had ordered same, and the agent of the company delivers the portrait at the time therein named, in a frame, which the party can purchase if he sees fit. The portraits and frames are shipped from Chicago to the place where they are to be delivered, consigned to the Chicago Portrait Company, and are received and receipted for by the agent of the company. The defendant, C. E. Coop was delivering portraits in frames on the 5th day of May, 1897, in the town of North, county of Orangeburg, state aforesaid, in pursuance of the agreement and notification above set forth, when he was arrested, tried and convicted for not complying with the act of 1893, in reference to hawkers and peddlers."

Exhibit A is as follows:

Crayon, \$1.98, unframed. Pastel, \$3.96, unframed. Chicago Portrait Company, 241-247 South Jefferson Street, Chicago. Portraits made in oil, India ink, watercolor, and pastel. We manufacture all the latest designs and everything in the line of frames which the trade demands. On or about May 2, 1897, we agree to deliver to the holder of this ticket a finely finished pastel portrait, 16x20, same as shown by our salesman. The purchaser agrees to pay \$1.98 for the portrait when delivered. We do not compel you to buy a frame from us, but owing to the delicate nature of the work, all portraits are delivered in appropriate frames, which our patrons may buy, if they desire, at wholesale prices. Elegant patterns, that retail from \$4.00 to \$8.00 we furnish from \$1.25 to \$2.90. Remember we do not insist on your buying frames from us, but we think it advisable for you to be prepared to purchase in case we make you prices from one third to one half the usual retail prices. Please remember the date of delivery, and have the money

ready, as our delivery man can make but one call to collect charges for same. Please be at home, or leave the money with nearest neighbor.

[Signed] J. S. Jewell, Advertising Solicitor Chicago Portrait Company.

\$20 pastel portraits for \$3.96. \$10 crayon portraits for \$1.98. Groups extra.

Exhibit B is as follows:

Chicago, Ill. —, 1897.

Your order for a life-size portrait has been finished, and will be delivered at your residence on or about —, 1897. Crayon, 16x20, \$1.98 each. Pastel, 16x20, \$3.96 each. Please be prepared to receive the same, as delivery man will have only a few hours in your city. Remember our delivery man will show you a fine selection of frames, and if you desire you can purchase one at wholesale prices. Elegant patterns that retail from \$3 to \$8.00 we will furnish from \$1.25 to \$2.90. It will be to your interest to be prepared to purchase. Please do not be uneasy if we are late, as we are sometimes delayed owing to bad weather, etc. If you have moved, or will not be at home on the above date, please leave the money with your nearest neighbor, and drop a card in your postoffice addressed to our delivery man, and tell him where you have moved, or where you have left the money for your picture.

Yours, respectfully,

J. L. Walkup, Delivery Man.

For further information address Jewell S. Jewell, State Manager, Columbia, S. C., Chicago Portrait Company, Studio, 241-247, S. Jefferson St., Chicago, Ill.

The defendant appealed to the Circuit Court. His honor, Judge Buchanan, dismissed the appeal, whereupon the defendant appealed to this court upon the following exceptions: "(1) Because his honor erred in overruling the defendant's exceptions and grounds of appeal from the ruling of and judgment of the magistrate herein. (2) Because his honor erred in not holding, as he was requested to do, that the defendant was not a hawker and peddler of whom a license was required under the provisions of the said act. (3) Because his honor erred in not holding, as he was requested to do, that said hawkers' and peddlers' act is unconstitutional in so far as it relates to the defendant for making the sales of pictures and frames in this case or in similar cases, and in conflict with article 1, § 8, and art. 14, § 1, of the Constitution of the United States."

The statute under which the appellant was convicted has been construed by this court in the recent decisions of *State v. Moorehead*, 42 S. C. 211, 26 L. R. A. 585, and *Alexander Bros. v. Greenville County*, 49 S. C. 527. In those cases it was decided that a person engaged in the sale of articles by sample does not become amenable to the statute against hawkers and peddlers, who does not make it his practice, but occasionally sells the sample which he is then carrying around. The reason for this rule is because the sale of the sample is merely incidental to the regular employment of selling by sample for future delivery. Was

the sale of the picture frame a mere incident to the business in which the appellant was regularly engaged? It is not contended by the state that the sale and delivery of the portraits for which orders had been previously given was in violation of the hawkers' and peddlers' act, but that it was unlawful to sell the frames. The portraits and frames are shipped to the agent at the same time, and the portraits are delivered in frames, which the party is not compelled to purchase, but may do so if he sees fit. A portrait is not complete without a frame, and the frame may be properly regarded as a part of or incidental to the picture. If the person to whom the portrait was delivered did not purchase the frame in which it was then placed, he would very likely purchase a frame elsewhere. It does not appear that the agent sells the frame to any except those who had given orders for the portraits; nor that he goes to any place to sell the frames except where he is required to go to deliver the portraits. The person ordering the portrait knows then that it will be delivered in a frame, and that he will have an opportunity of purchasing it at that time. The tendency of these negotiations is to lead to a sale of the frame at the wholesale price, when the portrait is delivered. This case does not fall either within the letter or the spirit of the statute against hawkers and peddlers, and, even if the statute could be construed as intending to embrace a case like this, it would be unconstitutional on the ground of interference with interstate commerce. This court does not undertake to say that the agent might not have sold the frames in such a manner as to have violated the said statute, but the language herein used must be construed as applicable alone to the facts of this case, which show that the sale of the frames was a mere incident to the regular employment of the agent. But it is also conclusive of this case that it was a part of the obligation of the contract that the party selling the picture would deliver it in the frame, with the right of the person to whom it was delivered to purchase the frame if he so desired.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and that the circuit court order a new trial.

Jones, J., dissenting:

I dissent. The defendant, under the facts in this case, so far as concerns the picture frames, was a hawker or peddler, within § 294 of the Criminal Statutes of 1893. The sale of the picture frames was not exceptional, or occasional merely, but was within the general scope and purpose of defendant's business. It was a part of defendant's avocation to sell a picture frame to any and every customer who had given an order for a portrait. Therefore the rule in *State v. Moorehead*, 42 S. C. 211, 26 L. R. A. 585, and *Alexander Bros. v. Greenville County*, 49 S. C. 527, has no application here. These picture frames were not sold by sample or pursuant to an order solicited, but were carried about from place to place within this state, and sold, or offered for sale, for a price separate and distinct from the price of the portrait ordered. The fact that the frame was convenient for the use, protection, and enjoyment of the portrait can 41 L. R. A.

make no sort of difference in determining the question whether "picture frames" come within the definition of goods, wares, and merchandise, and whether the sale of such goods by an itinerant, carrying them from place to place for such purpose, constitutes hawking and peddling. Nor do I think the act in question unconstitutional as interfering with interstate commerce. The act does not discriminate against the citizens and products of another state. Without elaborating, I refer to *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754; *Ficklen v. Shelby County Tazing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79; *State v. Emert*, 108 Mo. 241, 11 L. R. A. 219, 3 Inters. Com. Rep. 527; note to *People v. Wemple* (N. Y.) 27 Am. St. Rep. 562, 563 (181 N. Y. 64); note in *Re Spain*, 14 L. R. A. 97 (47 Fed. Rep. 206).

Town of CHESTERFIELD, Appt.,

v.

W. N. RATLIFF et al., Respts.

(.....S. C.....)

1. Evidence that persons charged with shooting firearms without reasonable excuse within the corporate limits of a town shot at a rabbit in the corn patch of one of them, who had suffered from the depredations of rabbits in his garden, is admissible as tending to show a reasonable excuse for the shooting.
2. The reasonableness of an excuse for shooting firearms within the limits of a municipality is a question of fact for the jury, and not for the court.

(July 7, 1898.)

APPEAL by plaintiff from a judgment of the Common Pleas Circuit Court for Chesterfield County reversing proceedings of the town council finding defendants guilty of violating a town ordinance forbidding the shooting of firearms within the corporate limits. *Affirmed.*

The facts are stated in the opinion.

Mr. E. J. Kennedy for appellant.

Messrs. Stevenson & Matheson for respondents.

McIver, Ch. J., delivered the opinion of the court:

The defendants were prosecuted before the town council of Chesterfield for the violation of an ordinance of said town forbidding the shooting of firearms anywhere within the corporate limits of the town without a reasonable excuse for doing so. Upon their trial they demanded a jury, which was accorded to them. Evidence was offered on the part of the prosecution tending to show that the defendants had fired, one a pistol, and the other an ordinary shotgun, within the corporate limits of the town; but when the defendants offered testimony tending to show that they had shot a

NOTE.—For negligence in respect to guns and similar dangerous agencies irrespective of any statute or ordinance, see note to *Chaddock v. Plummer* (Mich.) 14 L. R. A. 675.

rabbit in a corn patch of one of the defendants, who had suffered from the depredations of rabbits in his garden, such testimony was objected to, and ruled to be incompetent. "After argument of counsel and the charge of the court, the jury brought in a verdict against the defendants as follows: 'We find the defendants, W. N. Ratliff and D. H. Laney [guilty] of shooting firearms in the corporate limits in the town of Chesterfield,'—the same being the form prescribed by the Intendant, the form of which appears in the reports of the town council; whereupon the court sentenced each of the defendants to pay a fine of \$10 or be imprisoned in the county jail for ten days." The defendants appealed upon numerous grounds to the circuit court, where the appeal was heard by his honor, Judge Klugh, who reversed the judgment of the court below upon two grounds: (1) Error in ruling out the testimony offered by defendants for the purpose of showing that they had a reasonable excuse for shooting; (2) for error in charging upon the facts. From this judgment the town council appeals upon numerous grounds, which in various forms impute error to the circuit judge in reversing the judgment of the town council upon the two grounds above stated. We shall therefore confine our attention to the inquiry whether Judge Klugh erred in reversing the judgment of the town council upon the two grounds stated.

The ordinance which the defendants were charged with violating reads as follows: "Be it ordained by the town council of Chesterfield that any person who shall shoot any firearms anywhere within the corporate limits of the town, without a reasonable excuse for doing so, shall be fined not less than one or more than ten dollars, or be imprisoned not less than one or more than ten days." So that the offense denounced by the ordinance consists, not merely in shooting firearms within the corporate limits of the town, but in doing so "without a reasonable excuse." Hence it is apparent that when one is prosecuted for a violation of this ordinance it must appear, not only that the accused fired a pistol, gun, or some other species of firearms within the corporate

limits, but also that he did so without reasonable excuse; or at least, if he can show that he had a reasonable excuse for shooting, that would be a good defense. Hence it was clearly competent for the defendants to introduce any testimony tending to show that the shooting was not done wantonly, but for a reason that the jury might regard a good excuse. When, therefore, the defendants offered testimony tending to show that it was customary for persons "to shoot cats, rabbits, birds, and other wild animals in the corporate limits of the town of Chesterfield," such testimony was competent as a circumstance going to show that it was regarded as a reasonable excuse to do so. And certainly, when testimony was offered to show that defendant Laney had a garden upon which the rabbits had been depredating, such testimony was competent as tending to show that there was a reasonable excuse for the shooting with which the defendants were charged. It is clear, therefore, that there was no error in the first ground upon which the circuit judge based his judgment reversing the judgment of the town council.

So, too, we agree with the circuit judge as to the second ground. Whether there was a reasonable excuse for the shooting was clearly a question of fact for the jury, and not for the court, to determine. It involved two inquiries: First, What was the excuse relied on? and, second, Was such excuse reasonable? The ordinance did not pretend to define what should be a reasonable excuse, nor is there any law which defines those terms, so far as we are informed. It must, therefore, necessarily be left for the jury to determine, under all the circumstances of each, what was the excuse offered, and whether such excuse was reasonable. If any authority be needed to sustain what seems to us to be so plain a proposition, it may be found in the cases cited in respondents' argument, to which we will add a case of our own which clearly sustains the same doctrine,—*State v. Hatcock*, 20 S. C. 419, 47 Am. Rep. 842.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

UTAH SUPREME COURT.

IN THE MATTER OF the Estate of Hermon J. CHRISTENSEN, Deceased.

(.....Utah.....)

*1. Acquaintances of a person whose sanity is the subject of judicial inquiry, when able to instance expressions or acts of sanity or insanity, though not experts, may give their opinions as to the sanity or insanity of such person.

2. A decree of divorce granted without jurisdiction of the subject-matter or of the person, or without any cause for divorce stated, and without proof, is absolutely void.

*Headnotes by ZANE, Ch. J.

NOTE.—As to validity of legislative divorces, see *Jones v. Jones* (Ala.) 18 L. R. A. 96, and *note*.
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3. The act of the legislature of the territory of Utah of March 6, 1852, so far as it purported to confer general common-law and chancery jurisdiction on probate courts, was absolutely void.

4. A decree rendered against a defendant, without jurisdiction of the subject-matter of the suit, or of the person, or without any cause of action stated in a petition or complaint, and without proof, cannot be validated or confirmed by subsequent legislative enactment.

5. If the law purporting to confer jurisdiction on the court to try a case is void no intentment of law or presumption of fact can be made in favor of its jurisdiction.

6. If the court has jurisdiction of the subject-matter of the suit and of the per-

son of the defendant, and omits some essential step which the legislature had the right to dispense with, and renders judgment against him, the legislature may validate the judgment.

7. The lawmaking power cannot validate void judgments.
8. The affirmation of a void decree, nine years after it was rendered, as claimed by defendant, would be an exercise of judicial power by Congress in granting a decree,—a power it does not possess, and which it has never attempted to exercise.
9. The legislature cannot grant a divorce at the instance of the party at fault, without the consent of the party not at fault.
10. A divorce cannot be lawfully granted except for sufficient cause, and without notice to the party complained of, or appearance, and such a proceeding is judicial in its nature.
11. An estoppel cannot be based on a void decree.

(June 27, 1896.)

APPEAL by Theodore E. Christensen, guardian, etc., of Hannah Christensen, from an order of the District Court for Sanpete County denying her petition to be awarded rights in the decedent's estate as his widow. *Reversed.*

The facts are stated in the opinion.

Messrs. W. D. Livingston and Moyle, Zane, & Costigan, for appellant:

The statute conferring jurisdiction in divorce cases on the probate court was absolutely void, because contrary to the organic act, § 9 of the organic act (Laws 1888, vol. 1, p. 44), gave common-law and chancery jurisdiction to the district courts.

Ferris v. Higley, 20 Wall. 875, 23 L. ed. 383; *Garcia y Perea v. Barela*, 5 N. M. 458, 6 N. M. 239.

Matters of divorce in this country belong to the general chancery jurisdiction.

Stebbins v. Anthony, 5 Colo. 348.

The Poland Bill, § 8, p. 104, 1 Comp. Laws 1888, is a curative act, and is to be governed by the principles of law applicable to such acts.

The decree, being absolutely void for want of jurisdiction, could not be validated and confirmed by act of Congress.

This court has recognized marriage as conferring rights.

Higbee v. Higbee, 4 Utah, 19; *Holmes v. Holmes*, 4 Barb. 255.

It has denied judicial authority to the legislature in *Re Handley*, 15 Utah, 212.

This principle precludes a legislature from making a void decree valid.

Sutherland, Stat. Constr. § 484; *Cooley*, Const. Lim. p. 393; note to *State v. Torimes* (Minn.) 37 Am. Rep. 397; *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 658; *Roche v. Waters*, 72 Md. 264, 7 L. R. A. 533; *Willis v. Hodson*, 79 Md. 327; *Greenough v. Greenough*, 11 Pa. 489, 51 Am. Dec. 567; *Richards v. Rote*, 68 Pa. 248; *Nelson v. Kountree*, 23 Wis. 370; *McDaniel v. Correll*, 19 Ill. 228, 68 Am. Dec. 587; *Yeatman v. Day*, 79 Ky. 186; *Marwell v. Goetschius*, 40 N. J. L. 883, 29 Am. Rep. 242.

Messrs. Reid & Cherry and Rawlins, Thurman, Hurd, & Wedgwood for respondent.

41 L. R. A.

Zane, Ch. J., delivered the opinion of the court:

It appears from the record in this case that Hermon J. Christensen, late of the city of Manti, in the county of Sanpete, in the state of Utah, died intestate on June 26, 1897, the owner of real and personal property valued at \$77,571.96; that three children by Hannah Christensen, his first wife, and two children by his last alleged lawful wife, Petrea Sorenson Christensen, from whom he was divorced, after their birth, survived him; that after Luther T. Tuttle had been appointed administrator of the intestate's estate, and had filed an inventory thereof in the probate court of said county, Hannah Christensen, by her guardian, Theodore E. Christensen, filed her petition, as the intestate's widow, for an allowance from his estate. It also appears that the administrator of the intestate answered the petition admitting the marriage, but alleging a divorce on December 5, 1854, by a decree of the probate court of Sanpete county, and that petitioner afterwards intermarried with John Haihaway, and that she was therefore estopped from claiming she was the widow of the decedent. It further appears that the district court, sitting for the disposition of probate business, after hearing the evidence offered by both sides, without making findings, entered an order denying the prayer of the petitioner. From this order the petitioner, by her guardian, has appealed to this court.

These alleged facts present for our decision the question, Was petitioner the lawful wife of the intestate at the time of his death, and as his widow is she entitled to an interest in his estate? The determination of that question requires us to decide upon the validity of the alleged decree; and if we shall find the decree to be void, to decide whether her conduct estops her from obtaining the rights of a widow. An issue as to petitioner's sanity was also raised on the trial. Insanity, if found, would appear to be more pertinent to the question of estoppel, but we think it should have a bearing upon the decision of the other question. Therefore we will first consider the evidence upon that issue.

It appears from the evidence in the record that the petitioner and the intestate were married in the Kingdom of Denmark about 1843; that three sons were born to them there; that a daughter was born to them upon the plains.

Mrs. Snow, an old resident of Manti, who knew them in Copenhagen, and emigrated to Utah in the same company, testified, in substance, that Hannah Christensen had great trouble because her husband, after they reached this country, always wanted to get rid of her and take the children from her, and was always looking after other women; that he took up with a girl by the name of Elizabeth, while crossing the plains, whom he married at Springville, Utah, on the way to Manti. Witness knew the petitioner was left behind at Salt Lake City; that she followed out to the Jordan river, and her husband took her back; that she knew them afterwards in Manti; that her troubles appeared to unbalance her mind; that she had a great deal of trouble, and had queer ways; that there always appeared to be something on her mind vexing her, caused by

her husband's actions; that petitioner's peculiar actions indicated her mind was affected; that her mental condition has appeared better since the death of her husband.

Elsie C. Dungaar also testified, in substance, that she came across the plains in the same company with Hermon J. Christensen and Hannah, his wife. Their first stop was at Salt Lake City. Remembered the time when Hermon tried to get rid of his wife. He put her away. She wanted to come with him and the children. When the company left, she went out in the night to the camp. They had three little boys, and a little baby, Sarah, born on the plains. The petitioner followed out to the camp, and her husband and another man took her back to Salt Lake City, because he did not want to take her with him. He took the boys, and left the baby with her mother. He had a woman with him, who was the first one he married afterwards. The petitioner afterwards followed her husband. She was troubled after she reached Manti because her husband had put her away, and she was flighty,—wrong in her mind. She could work a little. She had no place to go to. She remained in Manti many years, and lived at witness's home part of the time. After her sons grew up, they built her a small house. Afterwards she was moved to Gunnison, a neighboring town, for a time. She traveled around the streets night and day. She came to witness's house many times, and would sleep there. She was running around like an irresponsible person. She had no home there.

Theodore Christensen testified, in substance, that he was the second son of petitioner and intestate. The eldest son was dead. Witness was born in the Kingdom of Denmark, in 1845, and came with his parents to Utah, in 1853, and remembered the trouble when his mother was left behind, and the children were brought to Manti. Remembered her following out to the camp when they left Salt Lake, and how she hung on to the wagon, and tried to come with the children. Remembered all that. "At that time, after the trouble began, my mother's mind failed her. It became very weak. She appeared to be losing her reason. Witness noticed the change even as a boy. His mother followed them to Manti, a few months after she was left behind. When she got there she was not allowed to see her children. She came to the house, and to the windows, and was screaming and crying, and we children wanted to get out to her, and were not allowed to. Quilts were put up to the windows, and some woman came, and said 'For God's sake, let her see her children.' After that she would come every little while to see us, but was not allowed to stay. She appeared to be out of her right mind. Recently her mental condition has improved." The children on the streets called her "Crazy Hannah" (witness objected to that). At times she would talk rationally, and at other times she appeared crazy. Witness's father brought another woman with him to Manti. Did not know why his mother was left behind and deserted. When witness grew up he built a little house for her, and his mother and Sarah lived there until she moved to Gunnison. We boys took care of

her after we grew up. She has wandered around a good deal.

Titus Christensen, the third son, testified, in substance, that he was two years old when his father and mother reached Salt Lake City, and can remember as far back as 1860. Witness remembered that he liked to go and see his mother, but his father would object. That his mother talked about his father a great deal, and appeared to be confused and bothered. After witness got old enough, he thought she was deranged. She said wild things. She treated witness well, but she would talk to herself about reformation. Was troubled about the way father was doing. After witness grew up, people told them they ought to have a guardian appointed for her.

Witness Luke testified, in substance, that he had known petitioner since 1854. That his wife had employed her to wash for her. Sometimes she would talk reasonably, and at other times her mind appeared to be unbalanced. That was his deliberate judgment. When the name of her husband was mentioned, or her children were spoken of, she would fall all to pieces. She would say Hermon was a villain. Had robbed her of her children. Witness would try to pacify her, but it did no good. Some people called her "Crazy Hannah." She was treated like a crazy person.

Sarah Martin testified, in substance, that she was the daughter of petitioner and intestate, and was born on the plains. Could remember living with her mother as a child. She made pictures on the walls, and said that was witness's father. Sometimes she would say the devil was after him with big sticks. She would run out at all hours of the night screaming, and witness would lie in bed, when a little girl, also screaming. "Her mental condition has continued the same until the present, except of late years she has been more calm, but she still makes the pictures on the walls, and thinks they are trying to murder her." Whenever she would talk about witness's father, she would go into a frenzy. Witness and her mother lived for a while in an old cellar. Her mother broke pictures once, and set the house on fire at another time, and partially burned it. She said something bothered her; that she could hear it all the time, but she could not tell what. It was reported that Hathaway was a deserter from Johnson's army, and drifted to Manti, and her mother was a poor demented woman running around, and that he took advantage of her.

In substance, such was the testimony of the witnesses who knew the petitioner longest and most intimately. Other witnesses who saw petitioner occasionally, and whose acquaintance was not so intimate, did not think she was insane. Some of them, however, who had talked with her, testified that, when her husband's name would be mentioned, she would become agitated and greatly excited.

The opinions of witnesses not competent as experts, and not intimately acquainted with persons whose sanity is the subject of investigation, unless they have closely observed their appearance and expressions, are worth but little; while the opinions of intimate acquaintances who have been close observers of their conduct, though not competent as experts,

when they can instance acts indicating mental derangement, are often most reliable and more valuable than professional experts, who have not had the benefit of such intimate acquaintance. It must be conceded that the treatment of this woman, and the wrongs and hardships she endured, were well calculated to agitate her feelings, and arouse her emotional nature, becloud her reason, and to impair and unsettle her mental balance and equilibrium. One witness, who had known her in Denmark, after speaking of her troubles on the plains, at Salt Lake, and Manti, said, in her judgment, "They unbinged her mind." Another said, "Her mind became unbalanced." Another said that "she talked queer,—not like others in similar trouble; that she was flighty, and her mind was wrong." Another said she was regarded as crazy; that she was called "Crazy Hannah." Her daughter said she would get out of bed at night, and go screaming into the street; that she covered the walls of her house with pictures, and called some of them devils with big sticks after her husband; that she broke pictures on one occasion, and set her house on fire on another, saying they bothered her; that she was tired of living there; that she could bear them all the time, but she did not know what.

Such are some of her acts and expressions, detailed by those who knew her best. It would appear that her feelings and her emotional nature were subject to uncontrollable excitement and agitation, and that her mind was haunted with delusions, and that, therefore, it was not in its normal condition. There is no evidence tending to prove that her mind was unsound before her husband deserted her and took another wife, and forcibly separated her from her children. After she had been put away by her husband (as one witness expressed it), and she was left behind, and had attempted to follow and hold on to the wagon in which her children were, and after she had been in the night forcibly brought back to Salt Lake by her husband and another man, and after she had followed her husband and children more than 150 miles, to Manti, and was denied admission to the house where her children were, or the privilege of seeing them, she became incapable of controlling her feelings and emotions, and of exercising her reason. Her mental equilibrium and balance was overthrown, and a cloud passed over her mind, her life was blasted, and she was left a mere wreck. There can be no doubt that the case of this much wronged and abused woman appeals strongly for remedial justice, and that she should be given a portion of her husband's estate during the remainder of her days, if the rules of law will permit.

The decree on which the administrator relies to show the petitioner was not the intestate's wife, at the time of his death, is as follows:

December 5, 1854.

Probate court of Sanpete county, in session, by a special call by his honor, George Peacock, in place of the regular term on the following Monday, and proceeded to business. The court then proceeded to investigate the charge contained in the petition presented by *Hammond J. Christensen v. Hanne Christensen*. 41 L. R. A.

for divorce. Polance Koffert was sworn as interpreter to interpret the Danish language. The court heard the testimony, and decided that Hammond J. Christensen be divorced, and that he have control of three children, namely, Julius H. Christensen, Theodore Edward, and Titus I. E. Christensen, and Hanne Christensen to have F. C. Christensen, aged eighteen months, until otherwise directed by the court, and the said Hammond J. Christensen to pay all costs of suit, which is \$10. Court adjourned.

George Peacock, Probate Judge.

To its admission in evidence the petitioner, by his counsel, objected on numerous grounds, and exceptions were taken to its admission. The decree recites that the court was in special session by a special call of the judge, in place of the regular term, to convene on the following Monday. By what authority such special session was called and held does not appear from the record. The decree also recites that the court proceeded to investigate the charge contained in the petition presented by Hammond J. Christensen against Hanne Christensen for divorce. It appears from the transcript that petitioner's husband was named Hermon J. Christensen, while the name in the decree is Hammond J. Christensen. It is not stated what the charge in the petition was, or what the petition contained, and there were no findings made by the court, and it does not appear otherwise that there was any petition filed. It is recited that the court heard the testimony, and decided that Hammond J. Christensen be divorced (from whom it is not mentioned), and that he should have control of three children, naming them, and that Hanne Christensen should have F. C. Christensen, aged eighteen months, until otherwise ordered.

Counsel for the petitioner insist that the foregoing decree is absolutely void for several reasons.—First, because the probate court, who assumed to render it did not have jurisdiction of the subject-matter of the suit. An act of the territorial legislature in force March 6, 1852, under which the probate court assumed jurisdiction to enter the decree, expressly provided that probate courts should have jurisdiction in all cases of divorce. But that legislature possessed only such authority to confer jurisdiction on those courts as the act of Congress known as the "Organic Act" conferred upon it. While that act conferred common-law and chancery jurisdiction upon the supreme and district courts, respectively, it gave to the probate court only such jurisdiction as its name indicated,—such as that court had theretofore exercised in England and in the United States. It did not give it general jurisdiction in chancery or at law, nor did it authorize the legislature of the territory to do so. Divorce causes belong to chancery jurisdiction. In *Ferris v. Higley*, 20 Wall. 875, 22 L. ed. 388, the Supreme Court of the United States held that the territorial law now in question, so far as it purported to confer general common-law and chancery jurisdiction on the probate courts, was absolutely void. *Garcia v. Perea v. Bareln*, 6 N. M. 239, 5 N. M. 458; *Cast v. Cast*, 1 Utah, 112; *Higbee v. Higbee*, 4 Utah, 19. The authority of the

court to try a cause and render judgment must be determined from the facts alleged as the cause of action, and the law conferring and limiting its powers. If the only law purporting to confer jurisdiction on the court to try the case is void, then all acts of the court are without authority, and also void. In such a case, no intendment of law or presumption of fact can be made in favor of its jurisdiction, whether it be as to the subject-matter or the person, or as to averment or proof. Therefore we must hold the decree admitted in evidence absolutely void: (1) Because the court had no jurisdiction to try a divorce case; (2) because there was no proof of service of notice on the defendant; (3) because it does not appear that any cause for a divorce, such as the law required, was stated; and (4) because it does not appear that any proof was made on which to grant the decree. It is true that one witness testified that Hannah Christensen was present, and said she did not want to be divorced. That could only be regarded as an objection to the divorce, not as an entry of appearance, even if she had been competent to enter her appearance. *Freem. Judgm.* (4th ed.) §§ 120, 123; *Galpin v. Page*, 18 Wall. 851, 21 L. ed. 959. "A judgment pronounced by a tribunal having no authority to determine the matter in issue is necessarily and incurably void, and may be shown to be so in any collateral or other proceeding in which it is drawn in question." 1 *Freeman, Judgm.* § 120; *Brown, Jurisdiction of Courts*, § 1.

Counsel for the intestate's estate rely on the following provision of § 8 of an act of Congress in force June 23, 1874, as follows: "All judgments and decrees heretofore rendered by the probate courts which have been executed, and the time to appeal from which has by the existing laws of said territory expired, are hereby validated and confirmed." A preceding clause of the same section expressly provides that "probate courts, in their respective counties, shall have jurisdiction in the settlements of estates of decedents and in matters of guardianship and other like matters; but otherwise they shall have no civil, chancery, or criminal jurisdiction whatever: they shall have jurisdiction of suits of divorce for statutory causes concurrently with the district courts." In addition to the territorial statute of March 6, 1852, intended to confer jurisdiction upon the probate courts of the territory to grant divorces, the same legislature passed an act in force January 19, 1855, § 29, declaring: "The several probate courts in their respective counties have power to exercise original jurisdiction, both civil and criminal as well in chancery as at common law, . . . and they shall be governed in all respects by the same general rules and regulations as regards practice as the district courts." Under this provision the probate courts for nine years had assumed jurisdiction to try causes and render judgments in criminal and civil cases both at law and in equity. During this time men had been tried in those courts in the various counties, and convicted of various crimes, and sentenced to imprisonment or fined, and had served terms of imprisonment; others had paid their fines. Judgment had also been rendered against parties for sums varying in amounts,

which had been paid, and determining property rights that had been executed. Doubtless Congress presumed the parties had been served with process, or had appeared, and had received justice; that in some cases sentences had been made upon pleas of guilty; that some of the judgments and decrees in civil cases had been by agreement or confession; that many had been paid, and possession of property, personal or real, had been given under others; and in that way the judgments or decrees had been executed, and justice had been done. It does not appear from the language of the curative provision that Congress understood that the judgments and decrees referred to were absolutely void. Judgments and decrees that had been executed, and from which the time for appeal had expired, were intended. No appeal can be necessary from a judgment that is entirely and absolutely void. Such judgments and decrees are of no effect, and parties endeavoring to execute them may be treated as trespassers. As we have seen, "a judgment pronounced by a tribunal having no authority to determine the matter in issue is necessarily and incurably void, and may be shown to be so in any collateral or other proceedings in which it is drawn in question." Again, the same author says: "A void judgment is, in legal effect, no judgment. . . . From it no rights can be obtained. Being worthless in itself all proceedings founded upon it are equally worthless. It neither binds nor bars anyone. All acts performed under it, and all claims flowing out of it, are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress." 1 *Freeman, Judgm.* §§ 117, 120.

At the time the curative provision in question was enacted by Congress, the cases of *Cast v. Cast*, 1 Utah, 112, and *Ferris v. Higley*, 20 Wall. 875, 23 L. ed. 883, declaring the probate courts of Utah had not common law or chancery jurisdiction, and that so much of the act of the territorial legislature as purported to give them jurisdiction in divorce cases and general jurisdiction in criminal and civil cases were absolutely void, had not been rendered. We are therefore not disposed to hold that Congress intended to make a decree like the one admitted in evidence, and relied upon in this case, valid,—a decree rendered without jurisdiction to grant a divorce, and without jurisdiction of the person of the defendant, and in which it did not appear that a petition was filed stating any cause for divorce, as the law required, and in which it did not appear that any proof was made of a cause for divorce, as required by law; and if the national legislature had, by the provision in question, intended to validate such a decree, absolutely void beyond all question, the provision would have been as void as the decree. The United States is based on the will of the people, possesses only such powers as they have expressly conferred upon it, and such as are necessary to the use of such as are expressed, and no more. And the legislative branch of those delegated powers Congress possesses. It does not possess absolute power. It has no more power to make a valid decree out of a void one than it

has to make such a decree out of a sheet of blank paper. It cannot make black white, or white black, or something out of nothing. Undoubtedly the law making department of the government may validate judgments and decrees voidable on account of errors or irregularities merely. If the court has jurisdiction of the subject-matter of the suit and of the person, and some essential step is omitted which the legislature had the right to dispense with, it may validate the judgment or decree, notwithstanding the omission or irregularity. The legislature prescribes the methods and mode of procedure, and the rules under which judicial power shall be exercised, and in doing so may dispense with such formalities as are not essential to the jurisdiction of the court. Whatever it may have dispensed with by law before action brought, it may dispense with by statute afterwards. It cannot, however, dispense with jurisdiction of the subject-matter of the suit, or of the parties, nor with a complaint, declaration, petition, or claim. There must be some right, duty, or claim specified. There must be a subject-matter stated, and it must be such a one as the court has the right to take jurisdiction of, and, if the judgment or decree is to be based upon facts, they must be first ascertained and found to exist. These requirements are essential to remedial justice, and appear to be axiomatic.

Judge Cooley says [Cooley, Const. Lim. 6th ed. p. 126]: "We have elsewhere referred to a number of cases where statutes have been held unobjectionable which validated legal proceedings, notwithstanding irregularities apparent in them. These statutes may as properly be made applicable to judicial as to ministerial proceedings; and although, when they refer to such proceedings, they may at first seem like an interference with judicial authority, yet if they are only in aid of judicial proceedings, and tend to their support by precluding parties from taking advantage of errors which do not affect their substantial rights, they cannot be obnoxious to the charge of usurping judicial power. The legislature does, or may, prescribe the rules under which the judicial power is exercised by the courts; and in doing so it may dispense with any of those formalities which are not essential to the jurisdiction of the court; and whatever it may dispense with by statute anterior to the proceedings, we believe it may also dispense with by statute after the proceedings have been taken, if the court has failed to observe any of those formalities. But it would not be competent for the legislature to authorize a court to proceed and adjudicate upon the rights of parties, without giving them an opportunity to be heard before it; and, for the same reason it would be incompetent for it, by retrospective legislation, to make valid any proceedings which had been had in the courts, but which were void for want of jurisdiction over the parties. Such a legislative enactment would be doubly objectionable: First, as an exercise of judicial power, since, the proceedings in court being void, it would be the statute alone which would constitute an adjudication upon the rights of the parties; and, second, because, in all judicial proceedings, notice to parties and an opportunity

to defend are essential—both of which they would be deprived of in such a case. And for like reasons a statute validating proceedings had before an intruder into a judicial office, before whom no one is authorized or required to appear, and who could have jurisdiction neither of the parties nor of the subject-matter, would also be void."

The weight of authority is undoubtedly against the proposition that the lawmaking power may validate void judgments and decrees, and we find no authority for the validation of such a decree as the one relied upon by the administrator. Authority is against it. Some of the cases, however, fail to distinguish between void and voidable judgments. Nor do we think it can be supported on principle. *McDaniel v. Correll*, 19 Ill. 236, 68 Am. Dec. 587; *Richards v. Rote*, 68 Pa. 248; *Roche v. Waters*, 72 Md. 264, 7 L. R. A. 533; *Nelson v. Rountree*, 28 Wis. 367; *Yeatman v. Day*, 79 Ky. 186; *Maxwell v. Goetschius*, 40 N. J. L. 383, 29 Am. Rep. 242.

It is claimed, however, that Congress had the power to grant the divorce in question, and could therefore validate this void decree by a law enacted ten years after it was framed. Congress attempted to validate judgments in criminal and civil cases which had been executed. The effect of the curative act was (if held to validate the decree in question) to divorce the petitioner from her late husband, and make the divorce take effect ten years before it was actually granted. But Congress is a legislative body. It is not vested with judicial powers, like the British Parliament and many of the states of this Union during their early history; nor has Congress ever attempted to exercise such judicial power, as some of the state legislatures, after their Constitutions had partitioned the powers of the state government, and confined their functions to lawmaking, have. U. S. Const. art. 1, § 1, declares that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." And § 1, art. 2, declares that "the executive power shall be vested in a President of the United States of America." And § 1 of article 3 of the same instrument declares "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." All the legislative power delegated to the national government is vested in Congress, except so far as the President may participate therein, in the approval of laws or by his veto; and all the executive power is vested in the President, except so far as the Senate may give effect to appointments and treaties by its advice and consent; and all the judicial power delegated to the national government is vested in one supreme court, and in such inferior courts as Congress may from time to time ordain and establish, except as the Senate may use such power in impeachment trials, and in such investigations as it may make in exercising its legislative power, and in requiring witnesses to appear and testify therein. It is plain that no express or implied authority to try divorce or other causes is vested in Congress, but, on the contrary, all

judicial power, except as above pointed out, is vested in the judicial department of the government.

There are decisions to the effect that the granting of a divorce may be regarded as a legislative act, and that the legislature may, without any alleged cause for divorce, and without any notice to either party or opportunity to be heard, and without any proof, by an authoritative order or fiat, grant divorces; and there is a second class of cases which hold that divorce is a judicial act in those cases upon which general laws confer on the courts authority to grant divorces for cause, and that in such cases the legislature cannot grant divorces, but that the legislature may by special act grant divorces for other causes. A third class of cases, however, hold that marriage secures to the respective parties legal rights which cannot be dissolved except for sufficient cause, which must be alleged, and that the other party should have notice and an opportunity to be heard; that the truth can only be ascertained by proof; that a decree of divorce can only be granted on such proof; and that such a proceeding is necessarily judicial; and, in those states whose Constitutions vest all judicial power in the judicial department of the government, decrees of divorce can only be granted by courts of justice. In the case of *Higbee v. Higbee*, 4 Utah, 19, it appeared that Lyman P. Higbee, an attorney at law, residing with his wife in Idaho, sent her to California for her health, assuring her that he would follow. Soon afterwards he was elected to the legislature of that territory, and he induced that body to grant him a divorce from his wife without notice to her, without her knowledge, without assigning any cause for divorce, and without any proof. Afterwards he removed to the late territory of Utah, and after his death his wife, as his widow, was denied any interest in his estate by the probate court; but, on appeal to the supreme court of the territory, the legislative divorce of Idaho was held to be void, and his wife was held to be his widow, and entitled to a share of his estate. The case of *Maynard v. Hill*, 125 U. S. 190, 31 L. ed. 654, is relied upon to establish the authority of Congress to grant a divorce and to validate the void decree in evidence. The opinion was by a divided court. It held a divorce granted by the legislature of the territory of Oregon valid. In that opinion the court among other things said: "It is conceded that to determine the propriety of dissolving the marriage relation may involve investigations of a judicial nature, which can properly be conducted by the judicial tribunals. Yet such investigations are no more than those usually made when a change of the law is designed. They do not render the enactment, which follows the information obtained, void as a judicial act, because it may recite the cause of its passage. Many causes may arise, physical, moral, and intellectual,—such as the contracting by one of the parties of an incurable disease, like leprosy, or confirmed insanity, or hopeless idiocy, or a conviction of a felony,—which would render the continuance of the marriage relation intolerable to the other party, and productive of no possible benefit to society. When the object of the re-

lation has been thus defeated, and no jurisdiction is vested in the judicial tribunals to grant a divorce, it is not perceived that any principle should prevent the legislature itself from interfering, and putting an end to the relation, in the interest of the parties as well as of society. If the act declaring the divorce should attempt to interfere with rights of property vested in either party, a different question would be presented."

In this it is conceded that investigations of a judicial character, to determine the propriety of dissolving the marriage relation, may be involved, and that a decree of divorce cannot be granted except for cause; and it was further said, when the object of the marriage relation has been defeated, and no jurisdiction is vested in the judicial tribunals to grant a divorce, that no principle was perceived that should prevent the legislature from granting a divorce. It was also added that, if the act declaring the divorce should attempt to interfere with the rights of property vested in either party, a different question would be presented. Undoubtedly legislatures should pass a general law such as they may believe the happiness and welfare of society demands, specifying causes for divorces. There was such a law in force in the territory of Utah when the divorce in question was attempted to be granted, and when the validating act was passed, and the district courts were open, with undoubted jurisdiction.

Inasmuch as the welfare of society, and the happiness of the people of the state, depend so largely on the family founded on marriage, and the public has an interest in its protection and maintenance, as well as the parties, some courts have gone so far as to hold the legislature may ignore the rights of the parties, and dissolve the relation, without inquiry and without opportunity to the parties to be heard, and may disregard the rights of the husband or wife not at fault; that the legislature in that way may break up the family, and set the wife and the children adrift without any provision for support, for it is conceded that the legislature in granting the divorce cannot make a decree for alimony, or as to custody of children, or as to property. In effect, it is held by such cases that the legislature may at the instance of the delinquent or one at fault, without inquiry, strike in the dark, and break up the family, and without warning set the wife and children adrift, humiliated and disgraced, without any provision for their support and maintenance.

The weight of authority undoubtedly is to the effect that a divorce should not be granted except for sufficient cause; that the party complained of should have an opportunity to be heard,—should have a day in court; that the decree of divorce should be upon proof; and that such a proceeding is judicial in its nature. Our conclusion is that the trial of divorce causes should be had in courts of justice under Constitutions conferring judicial power on those tribunals. *Higbee v. Higbee*, 4 Utah, 19; *Ponder v. Graham*, 4 Fla. 23; *Bryson v. Bryson*, 44 Mo. 232; *State v. Fry*, 4 Mo. 181; 2 Kent, Com. 13th ed. 106; *Dartmouth College v. Woodward* (Story, J.) 4 Wheat. 694, 4 L. ed. 678; *Cooley*, Const. Lim. 6th ed. p. 132; *Greenough v. Greenough*, 11 Pa. 489, 51 Am.

Dec. 567; *Re Handley*, 15 Utah, 212; *Marwell v. Goetschius*, 40 N. J. L. 893, 29 Am. Rep. 242. When the people of Utah formed a state government, they set the question at rest for the future in this state, by forbidding the enactment of private or special laws granting divorces.

Counsel for the decedent's estate also insist that the petitioner is estopped from claiming any interest in her late husband's estate, because of her misconduct, after the void decree, in contracting a marriage with another man, or by acting towards him for a time as though they were married. An estoppel cannot be based on a void decree or judgment. If the decree or judgment is simply voidable, a different rule may be applied. When the court has jurisdiction of the subject-matter of the suit and of the parties, and the decree or judgment may be reversed or set aside for error or irregularity, if the defendant waives his right to do so, by executing or accepting it, he will be estopped from denying its binding effect; but, when such judgment is void for any reason, he will not be estopped. The void decree in controversy was obtained by the decedent when he knew he was not entitled to it. The evidence is conclusive that about a year before the divorce he married a young girl, and, in view of that fact, his lawful wife had a complete defense to a divorce at his instance. Besides, he had deserted and abandoned his wife, and had taken her children from her under circumstances so cruel and hard as to overthrow her reason. Under such circumstances, there is no legal rule or equitable principle that would have permitted the decedent during his lifetime to be divorced from her because of her imbecility or misconduct, which his unkind and inhuman treatment brought about. Nor can his administrator or heirs rely upon it to defeat her rights as his widow.

She is not responsible for the void decree, nor does it appear that she consented to it. In her forlorn, wretched, and pitiable condition she did say that she did not want a divorce, and it appears from the evidence that from that day she has been incapable of forming a rational conclusion with respect to the consequences and effects of her own actions. When her husband was the subject of conversation, her feelings and emotions overwhelmed her reason.

The disastrous consequences suggested that may follow a judgment of this court holding the decree of divorce in question of no effect, notwithstanding the curative act relied upon, are not likely to follow. Nearly forty years have elapsed since the last of such decrees or judgments was rendered. It will, in all probability, be found that the statute of limitations and the dispensations of time have shorn such decrees, and transactions in consequence of them, of the consequences feared by counsel. If they are now ascertained to have been void. Owing to the peculiar circumstances of this case, we are of the opinion that the petitioner's right to an interest in the decedent's estate has survived, notwithstanding the statute of limitations and the lapse of time; and that this aged woman, with her physical and mental infirmities, is entitled, as his widow, to an interest in decedent's estate, and to whatever comfort it may afford her during the remainder of her days.

The order appealed from is reversed, and the court below is directed to recognize the petitioner as the lawful widow of the decedent, and to adjudicate the rights of the respective parties found to have an interest in his estate, and to make payment or distribution thereof according to law.

Bartch and Miner, JJ., concur.

VIRGINIA SUPREME COURT OF APPEALS.

RICHMOND & ALLEGHANY RAILROAD COMPANY, Appt.,

v.

R. A. PATTERSON TOBACCO COMPANY.

(92 Va. 670.)

A state statute making a carrier which accepts anything for transportation to a point beyond its own route liable for its safe carriage to such point of destination in the absence of a written contract to the contrary, and imposing upon the carrier the burden of proving, even in case of such contract, that the loss or injury did not occur while the thing was in his charge, is not an unconstitutional interference with interstate commerce.

(March 12, 1896.)*

*This case was affirmed by the Supreme Court of the United States February 21, 1898.

NOTE.—For state regulation of contracts to limit carrier's liability, see also *Solan v. Chicago, M. & St. P. R. Co.* (Iowa) 28 L. R. A. 712; *Ohio & M. R. Co.* 41 L. R. A.

A PPEAL by defendant from a decree of the Circuit Court of the City of Richmond allowing the claim of intervenors for compensation for breach of a carriage contract in a suit to foreclose a mortgage on defendant's road. *Affirmed.*

The facts are stated in the opinion.

Messrs. William J. Robertson and Henry Taylor, Jr., for appellant:

It would be idle to say that the state cannot regulate transportation between the states, and at the same time admit its power to regulate the contract without which there can be no transportation. Any regulation, therefore, of the contract of transportation must, of necessity, be a regulation of commerce.

Louisville & N. E. Co. v. Railroad Commission, 19 Fed. Rep. 879; *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 847, 30 L. ed. 1187, 1 Inters. Com. Rep. 806; *Almy v. California*, 24 How. 169, 16 L. ed. 644; *Hannibal & St. J.*

v. Taber (Ky.) 34 L. R. A. 686; *McCann v. Eddy* (Mo.) 35 L. R. A. 110; and *Western U. Teleg. Co. v. Eubank* (Ky.) 36 L. R. A. 711.

R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527.

Where the subject to which the power to regulate commerce applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority.

Walton v. Missouri, 91 U. S. 275, 23 L. ed. 347; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 283; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 23; *Cooley v. Philadelphia Port Wardens*, 12 How. 299, 13 L. ed. 996; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Case of the State Freight Tax*, 15 Wall. 232, 279, 21 L. ed. 146, 163; *Henderson v. New York*, 92 U. S. 259, 273, 23 L. ed. 543, 549; *Hall v. DeCuir*, 95 U. S. 485, 490, 24 L. ed. 547, 549; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203, 29 L. ed. 158, 162, 1 Inters. Com. Rep. 382; *Walling v. Michigan*, 116 U. S. 446, 455, 29 L. ed. 631, 694; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178.

Messrs. Courtney & Patterson, for appellee:

The power of Congress in such matters does not always preclude the states from acting.

Cooley v. Philadelphia Port Wardens, 12 How. 299, 13 L. ed. 996; *Sherlock v. Alling*, 98 U. S. 99, 23 L. ed. 819.

As Congress has not undertaken to deal with this matter, the state has full power to act.

11 Am. & Eng. Enc. Law, pp. 555, 556; *The Lottawanna*, 21 Wall. 581, 22 L. ed. 664.

For many years the states have been enacting statutes in respect to bills of lading, and these acts have been upheld by the courts.

Talbot v. Merchants' Dispatch Transp. Co. 41 Iowa, 247, 20 Am. Rep. 589; *Shaw v. North Pennsylvania R. Co.* 101 U. S. 557, 25 L. ed. 892, 11 Cent. L. J. p. 181; *Tiedeman v. Knox*, 53 Md. 612.

The Virginia statute was not passed without due consideration. It was first brought into our Code by the revisors of 1887. Prior to that time a common carrier's liability for safe transportation of merchandise was limited to its own road.

McConnell v. Norfolk & W. R. Co. 86 Va. 248.

It was the purpose of our legislature in adopting the new Code to substitute the English for the so-called American rule in this state.

See Judge Burks' address before the Virginia State Bar Association, Vol. iv. Reports, p. 142.

The revisers had before them, in considering this change, the statutes of New York and Missouri touching the same subject. It is evident by comparison that our statute was copied from that of the last-named state.

Dimmitt v. Kansas City, St. J. & O. B. R. Co. 103 Mo. 433.

The constitutionality of that act was affirmed without a dissenting voice.

Independently of any statute, the courts had a right to hold, and did hold in many states, the initial carrier liable beyond the terminus of his own line.

Western U. Tel. Co. v. Tyler, 90 Va. 297, 4 Inters. Com. Rep. 481; *Nashville, C. & St. 41 L. R. A.*

L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238.

While it is competent for Congress to prescribe specific regulations touching foreign or interstate commerce, which regulations would supersede all conflicting local law which even incidentally affects such commerce, yet, until such action is taken by Congress, the state statute must prevail.

Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508.

Carriers possess facilities for tracing lost packages which the consignor does not have and cannot obtain, and they may without injustice or inconvenience charge the loss to the agent responsible for the negligence.

2 Am. & Eng. Enc. Law, p. 860.

A state statute which, without discriminating, operates uniformly in aid of domestic and interstate trade alike, is valid, and should be enforced, when the Federal Congress has not acted, or has no power to afford so complete a relief for the existing evil as the state legislature.

Bagg v. Wilmington, C. & A. R. Co. 109 N. C. 279, 14 L. R. A. 596, 3 Inters. Com. Rep. 803.

Keith, P., delivered the opinion of the court:

The Patterson Tobacco Company filed its petition in the chancery causes styled "Terrell and Bocock, Trustees, v. Richmond and Alleghany Railroad Company and Others," and "Alexander and Ellyson, Trustees, v. Same," pending in the circuit court for the city of Richmond, from which it appears that on August 1, 1888, the tobacco company delivered to the receivers of the Richmond & Alleghany Railroad Company, at Richmond, a lot of tobacco, consigned to Mann & Levy, at Bayou Sara, Louisiana, to be transported in accordance with the bill of lading filed with the petition. The bill of lading is in the usual form, and acknowledges the receipt of the several boxes and packages shipped, their weight and classification. Among other provisions it sets out that it "is mutually agreed that if the ultimate destination of the packages received be beyond the point for which rates are named in the margin, they may, by the connecting carrier nearest to such ultimate destination, be delivered to any other carrier, to be transported to such ultimate point, and the carrier so selected shall be regarded exclusively as the agent of the owner or consignee. . . . It is mutually agreed that the liability of each carrier as to goods destined beyond its own route shall be terminated by proper delivery of them to the next succeeding carrier." From the agreed facts it appears "that the bill of lading is not signed by the shippers or their agent; that the tobacco in question was an interstate shipment; that it was delivered by the Richmond & Alleghany Railroad Company to the next succeeding carrier, and was lost after it had left the possession of the Richmond & Alleghany Railroad Company; that the sole question submitted to the court for decision was whether § 1295 of the Code was in conflict with article 1, § 8, cl. 3, of the Constitution of the United States, it being agreed that, if said section was constitutional, the Richmond & Alleghany Railroad

Company was responsible to the petitioner for the loss of the tobacco; but, if it was in conflict with the aforesaid clause of the Constitution, then under the terms of the bill of lading filed with the petition, the railroad company was not responsible." By its decree the circuit court held that § 1295 was not in conflict with the Constitution of the United States, and the prayer of the petition was granted, and a decree entered in favor of the petitioner for the sum of \$299.71; and thereupon the railroad company obtained an appeal and supersedeas from this court.

Section 1295, above referred to, is as follows: "When a common carrier accepts for transportation anything to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent; and, although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge." That Congress has, under the Constitution of the United States, the power to regulate commerce, is, of course, uncontroverted. That this power is, when exercised, exclusive in its character, and that the omission on the part of Congress to exercise the power over commerce with which it is clothed, is, in those respects in which the subject is capable of being dealt with by general regulations, equivalent to a declaration of the will of Congress that it shall remain free and uncontrolled, are propositions which seem to be thoroughly settled by the decisions of the Supreme Court of the United States. We need, therefore, only to inquire whether the statute just quoted is a regulation of commerce. If it be, we must declare it unconstitutional, as trenching upon a province beyond the domain of state authority, and over which Congress is given exclusive jurisdiction. The supreme court has construed clause 3 of § 8 of article 1 in many cases. It has held that the power to regulate commerce among the states embraces the power to regulate all the various agencies by which that commerce is conducted. From these decisions it may be said that state laws which undertake to enforce a tax upon interstate or foreign commerce in any form, or any law of a state which imposes a burden or hindrance upon commerce, or which tends to embarrass commercial intercourse and transactions, or which under any disguise or in any manner seeks to give the citizens of one state any advantage over the citizens of other states engaged in interstate commerce, are regulations of commerce repugnant to the Constitution, and void. But that court, with its accustomed conservatism, content to watch over and guard our system of government as time and occasion may render its intervention necessary, has wisely refrained from all effort at generalization, or any attempt at enumeration of subjects as being within or without the one jurisdiction or the other which will furnish a safe guide in determining cases

which have not come under its criticism. It is, indeed, somewhat difficult to classify the adjudged cases, and from them deduce harmonious rules of interpretation. Having given them, however, diligent investigation, and our best consideration, we find that there is no reported decision which can be held directly to control the case before us. Now, it is entirely clear that, if there were no such statute law as that embodied in § 1295, there would be no liability upon the appellant, for it appears from the agreed facts that, in accordance with the provisions of the bill of lading, the packages intrusted to its care were duly delivered to the next succeeding carrier, and then its liability under the bill of lading terminated. At the first blush it would seem that the statute did regulate and control the bill of lading, which is conceded to be one of the instrumentalities of commerce. Upon a closer inspection of it, however, it is apparent that the law is careful to avoid any interference with the utmost freedom in the making of contracts, and does not in any way attempt to control the legal effect of the contract when made. It, in effect, establishes a rule of evidence. The common law measure of liability being considered onerous and oppressive, the carrier is permitted to stipulate with the shipper so as to limit his responsibility by the insertion of any just and reasonable ground of exemption. It has therefore come to pass that bills of lading, like policies of insurance, have been expanded into cumbrous documents, in which the liability of the carrier is hedged about by almost innumerable exceptions, conditions and exemptions, to which no one ought to be bound until they have been brought to his knowledge and attention, and have received his intelligent approval. The statute does not say a certain exception, condition, or stipulation shall be void, though embraced in the contract between the shipper and the carrier, but it declares what shall be the implied liability upon the carrier who receives goods for shipment in the absence of a special contract; and, in order to protect shippers from imposition, it further declares that a contract relied upon to reduce the measure of the implied liability must be in writing, and signed by the shipper. For the protection of the insured it has been found necessary in this and other states to declare by statute that certain provisions in policies of insurance shall be void unless printed in type of a certain size, and the "statute of frauds" is, in some form, it is believed, a part of the jurisprudence of every state in the Union. The statute under consideration was doubtless conceived in a like spirit, as a necessary and salutary precaution and safeguard against the dangers to which experience had shown that shippers were exposed. Such contracts are not without precedent. There was such a contract signed by the shipper in *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 29 L. ed. 717.

State laws have been upheld which declare "all contracts, receipts, rules, and regulations . . . void" which exempt a railroad company, or other person, from full liability as a common carrier. See *Talbot v. Merchants' Despatch Transp. Co.* 41 Iowa, 249, 20 Am. Rep. 539. It is true, the constitutionality of the

statute was not in terms passed upon, this case having been decided in favor of the contract, upon the ground that it was made in Connecticut; but the court distinctly asserts the validity of the Iowa law, which had been upon the statute book for many years, and was expressly upheld in the case of *McDaniel v. Chicago & N. W. R. Co.* 24 Iowa, 412, and a liability under it enforced; the contract of the parties being overridden by the law. In Maryland, a law which makes bills of lading in all respects negotiable was upheld, though no one need be told that it changed very materially the rights and liabilities of the parties, and was attended with far more serious and important consequences to shippers, consignees, and carriers than a law which only declares how a contract shall be evidenced. See *Tiedeman v. Know*, 53 Md. 618. In same connection, see *Shaw v. North Pennsylvania R. Co.* 101 U. S. 557, 25 L. ed. 892, where Mr. Justice Strong, delivering the opinion, discusses at great length the interpretation and effect of the statutes passed by the states of Missouri and Pennsylvania, and shows very satisfactorily that those acts did not make bills of lading in all respects negotiable, while there is not one word to show that he at all questioned the power of the states so to make them, though a denial of the power would have gone to the very root of the subject under discussion. So, too, statutes which render the principal responsible for the act of his agent in issuing bills of exchange have been upheld, and others of a like nature, which need not be mentioned.

Viewed, therefore, as a law which levies no tax, prescribes no duty, imposes no burden upon, and in no way interferes with or regulates commerce, and which in no manner diminishes the power to contract, but which merely requires certain contracts to be in writing, and signed by the shipper, the party with respect to whom the duties and liabilities of the common carrier are by such special contracts to be limited, it seems to us that § 1295 of the Code, or rather the first branch thereof (the remainder of the section having no bearing upon the question before us), which reads as follows: "When a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent,"—is not in conflict with the Constitution of the United States. As was said by Judge Lewis in *Western U. Tel. Co. v. Tyler*, 90 Va. 800, 4 Inters. Com. Rep. 481, where § 1292, which imposes a penalty upon telegraph companies for failure to deliver messages, was called in question as being a regulation of commerce: "If it can be said to affect commerce at all, it does so only remotely or incidentally." Mr. Justice Matthews, in *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, states the law with his usual force and accuracy as follows: "It is among these laws

of the states, therefore, that we find provisions concerning the rights and duties of common carriers of persons and merchandise, whether by land or by water, and the means authorized by which injuries resulting from the failure properly to perform their obligations may be either prevented or redressed. A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable according to the laws of the state, for acts of nonfeasance or misfeasance committed within its limits. If he fail to deliver goods to the proper consignee at the right time or place, he is liable in an action for damages under the laws of the state in its courts; or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, a right of action for the consequent damage is given by the local law. In neither case would it be a defense that the law giving the right to redress was void as being an unconstitutional regulation of commerce by the state. This, indeed, was the very point decided in *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819. If it is competent for the state thus to administer justice according to its own laws for wrongs done and injuries suffered, when committed and inflicted by defendants while engaged in the business of interstate or foreign commerce, notwithstanding the power over those subjects conferred upon Congress by the Constitution, what is there to forbid the state, in the further exercise of the same jurisdiction, to prescribe the precautions and safeguards foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, it is admitted the state has power to redress and punish? . . . But for the provisions on the subject found in the local law of each state, there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto* to those who employ him; or if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by Congress or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public or to individuals. In other words, if the law of the particular state does not govern that relation, and prescribe the rights and duties which it implies, then there is, and can be, no law that does until Congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the state law, which, until displaced, covers the subject."

To the luminous exposition of the law contained in the above quotation we feel that we can add nothing. Therefore, without prolonging this discussion, we are, for the foregoing reasons, of opinion that § 1295 is a valid and constitutional law, and the decree of the Circuit Court is affirmed.

WASHINGTON SUPREME COURT.

STATE of Washington, *ex rel.* W. S. GRINSFELDER, *Respt.*,

v.

SPOKANE STREET RAILWAY COMPANY, *App't.*

(..... Wash.)

1. A prior demand for the operation of a street railway is not absolutely necessary to sustain a proceeding for mandamus to compel its operation.
2. One who lives adjacent to a street railway, and owns considerable property there which he has improved, relying upon the facilities afforded by the line, has a material individual interest which entitles him to be a relator in mandamus to enforce the operation of the line.
3. A street-railway company, which has received from the state and entered upon the enjoyment of a franchise for its business, cannot cease to operate the line without the consent of the granting power.
4. The operation of a street railway can be enforced by mandamus where a company which has acquired the right and commenced to perform the service attempts to discontinue it.
5. The absence of any grant or privilege or franchise to operate a street railway will not relieve a company which has occupied the streets for such purpose for several years without objection, from the duty to continue the service.

(June 20, 1898.)

A PPEAL by defendant from a judgment of the Superior Court for Spokane County in favor of relator in a mandamus proceeding to compel defendant to operate its railway on certain streets. *Affirmed.*

The facts are stated in the opinion.

Mr. Thomas C. Griffith for appellant.*Messrs. Graves, Wolf, & Graves*, for respondent:

A corporation formed for the purpose of constructing and operating lines of railway upon the public highways, for the purpose of transporting passengers for hire, is a quasi-public corporation. When, in pursuance of the powers granted it by the state, it engages in this business, it may not at its pleasure discontinue the operation of its lines; but, on the contrary, it owes to the public generally the duty of carrying on this business until it be relieved from its obligation to do so by the state—the authority which conferred its powers and imposed its liabilities.

Re Loader, 14 Misc. 208.

Where the duty sought to be enforced is one which is imposed by law and owing to the public at large, there is no necessity for a demand and refusal. The duty imposed by law, and the omission to perform it, stand in the place of a demand and refusal.

High, *Extr. Legal Rem.* 2d ed. §§ 18-41;

NOTE.—For mandamus to compel the operation of a railroad or street railway, see *State*, *Little*, v. *Dodge City, M. & T. R. Co.* (Kan.) 24 L. R. A. 564, and *note*; also *Chicago & A. R. Co. v. People*, *Hunt* 41 L. R. A.

State, Rice, v. *Marshall County Judge*, 7 Iowa, 203; *Virginia v. Rives*, 100 U. S. 830, 25 L. ed. 678; *Atty. Gen. v. Boston*, 123 Mass. 477; *State, Byers*, v. *Bailey*, 7 Iowa, 895.

The relator is entitled to use the name of the state in bringing this action because the duty sought to be enforced is one imposed by law.

Union P. R. Co. v. Hall, 91 U. S. 354, 23 L. ed. 432.

Where the duty sought to be enforced is one owing to the public generally, private parties may sue out the writ without showing that they suffer a special injury.

Union P. R. Co. v. Hall, 91 U. S. 354, 23 L. ed. 432; *Re Loader*, 14 Misc. 208; *Savannah & O. Canal Co. v. Shuman*, 91 Ga. 400.

The franchise granted to a railroad company, or to a street-railway company, by the state, is not granted to it alone for the profit that may be made therefrom by the incorporators. The franchise is granted in a large measure for the public good. Peculiar privileges are conferred upon them on the consideration that they will provide facilities for the communication and intercourse of the public. They are common carriers.

New York & M. Line R. Co. v. Winans, 17 How. 39, 15 L. ed. 29; *Booth, Street Railways*, § 1; *Talcott v. Pine Grove Twp.* 1 Flipp. 120.

It is only when such tracks are intended to be used for the public good that the power may be granted them.

Mikesell v. Durkee, 34 Kan. 509; *Glaesner v. Anheuser-Busch Brewing Assn.* 100 Mo. 508.

Therefore, such corporations may not, by any act of their own, without the consent of the state, disable themselves from performing the functions, the undertaking of which was the consideration for the public grant.

Thomas v. West Jersey R. Co. 101 U. S. 83, 25 L. ed. 952; *Talcott v. Pine Grove Twp.* 1 Flipp. 120; *Gates v. Boston & N. Y. Air Line R. Co.* 53 Conn. 342; *King v. Severn & W. R. Co.* 2 Barn. & Ald. 646; *State v. Hartford & N. H. R. Co.* 29 Conn. 538; *Railroad Comrs. v. Portland & O. Cent. R. Co.* 63 Me. 269, 18 Am. Rep. 208; *Union P. R. Co. v. Hall*, 91 U. S. 343, 23 L. ed. 428; *Farmers' Loan & T. Co. v. Henning*, Fed. Cas. 4,666; *People v. Albany & Vt. R. Co.* 24 N. Y. 269, 82 Am. Dec. 295; *Potwin Place v. Topeka R. Co.* 51 Kan. 609; *Re Loader*, 14 Misc. 208; *San Antonio Street R. Co. v. State*, *Elmendorf* (Tex. Civ. App.) 38 S. W. 55; *Savannah & O. Canal Co. v. Shuman*, 91 Ga. 400; *Haugen v. Albina Light & W. Co.* 21 Or. 411, 14 L. R. A. 424; *Spokane Street R. Co. v. Spokane Falls*, 6 Wash. 524; *Ohio & M. R. Co. v. People*, *Lyman*, 121 Ill. 483; *Riggs v. Johnson County Comrs.* 6 Wall. 188, 18 L. ed. 774.

Reavis, J., delivered the opinion of the court:

Application by relator for a writ of mandamus to compel the defendant, a street-railway

(Ill.) 28 L. R. A. 224; *People*, *Cantrell*, v. *St. Louis, A. & T. H. R. Co.* (Ill.) 35 L. R. A. 666; and *San Antonio Street R. Co. v. State*, *Elmendorf* (Tex.) 35 L. R. A. 662.

company, to operate a line of street railway to Bell Park addition, in the city of Spokane. The alternative writ founded on the affidavit of relator was demurred to by the defendant, and, upon the overruling of the demurrer by the superior court, defendant answered denying some of the facts stated in the affidavit, and setting up new matter, to which reply was made by relator. Upon the issues raised a trial was had before the court without the intervention of a jury and findings of fact made by the court. Defendant excepted to a number of findings because not sustained by the evidence, but we find substantial evidence to sustain each finding of the court, and as this is a law action, the findings of fact by the court have the same force and effect as a verdict of the jury, and this court cannot, therefore, weigh conflicting testimony in the case.

The material facts found by the court are substantially that about the 17th of April, 1888, the Ross Park Street Railway Company was incorporated under the laws of the state, for the purpose of constructing, equipping, operating, and maintaining a system of street railways in the city and county of Spokane, for the transportation of freight and passengers, such railways to be operated by steam, horses, or electricity, and likewise to borrow money, and to secure the payment of the same by mortgage on its property and franchises. That subsequent to the incorporation, and from time to time until the spring of 1892, the Ross Park Street Railway Company, by building, leasing, and purchasing, operated a line of street railway commencing at the corner of Howard and Riverside avenues, in the city of Spokane; running thence along Howard street to Front street; thence on Front street to Olive street; thence east on Olive street to Hamilton street; thence north upon Hamilton street to Illinois avenue; thence east and northeasterly on Illinois avenue to C street; thence north on C street to Diamond street; and thence east on Diamond street to the northeast corner of block 1 of Bell Park addition to Spokane. That all of the streets mentioned were within the corporate limits of Spokane, to and including C street and the remainder of the streets were in platted additions to the city. The line of railway extends to the intersection of Illinois avenue and Hamilton street near a point known as Martha avenue, to the town of Hillyard. The Hillyard line was built by a separate corporation known as the "Arlington Heights Street Railway Company." Subsequently, in the year 1894, the defendant, through a corporation known as the "Washington Water-Power Company," acquired control of all the lines of Ross Park Street Railway Company and of the Arlington Heights Street Railway Company, and operated the same thereafter, until May, 1897, as one system. At that date a sale was made of all the lines of the Ross Park Street Railway Company by foreclosure of a mortgage executed to the Franklin Trust Company to secure payment of bonds, at which sale the Franklin Trust Company became a purchaser, buying all the property rights and franchises along the lines and appertaining thereto. On the same day a lease was executed by the Franklin Trust Company to defendant, by which the defendant covenanted to operate the

said lines, and pay, as rent therefor, 100 per cent of the gross earnings to the Washington Water Power Company, the line of street railway running from Illinois avenue to the northeast corner of block 1, of Bell Park addition, being expressly mentioned and described in the lease, and being a portion of the line covenanted by the defendant in the lease to be by it run and operated. Thereupon defendant entered upon and continued under the lease to operate all the said lines of street railway until a few days before the commencement of this action, in December, 1897, when it discontinued that portion of the line from Illinois avenue to Bell Park addition. That at all times during the operation of these lines they were operated as one system, under one management, and passengers paid but one fare for the entire trip. In December, 1897, a short time before the commencement of this action, the defendant ceased to operate that portion of the railway line extending from the intersection of Illinois avenue and Hamilton street, at Martha street, to Bell Park, which in the findings of fact is designated as the "Minnehaha Park Line." Its poles, wires, and tracks were, however, left in the street, and have been left there ever since, and the defendant has declared no intention to remove the same or not to recommence the operation of the line at some future date. There are about forty families living reasonably adjacent to the Minnehaha Park Line who are in the habit of using the same for street-car facilities. There were daily carried over this line from 80 to 120 people. A large number of these people have built houses there, improved their lands and yards, and taken up their residence there, because of the street car facilities afforded by said line. The relator lives adjacent to this line, and several years ago commenced to reside there, and owns considerable property, which he has improved, relying upon the facilities afforded by this street railway line. No franchise was ever granted by the authorities of the city or county of Spokane to the defendant, or any of its predecessors in interest, for the occupation of Hamilton street, C street, or Diamond street. At the time the line along Hamilton street was built Hamilton street was not within the city limits. In 1891 the addition within which lies Hamilton street was included within the limits of the city. C street and Diamond street have not yet been included in the corporate limits, but all the streets mentioned are within platted additions to the city of Spokane. Hamilton street was dedicated by the persons along the northeast addition to Ross Park addition, and in the dedication of the streets in that addition the dedicators reserved the exclusive right to lay street railways along the streets, and prior to the building of the line, the defendant, or its predecessors in interest, received permission from the dedicators and owners of the property along the street to lay the same. Since Hamilton street has come within the city limits, the corporate authorities have not interfered with the occupation of the street by the railway company, and it has been in the undisputed use and occupation thereof. Along C street and Diamond street a like reservation was contained in the dedication of the additions through and along which these streets ran, but no permis-

sion has been obtained from the dedicators or the adjacent property owners by the street-railway company or its predecessors in interest to occupy said streets. It has, however, continuously occupied the same since 1892, and no objection has ever been made, so far as appears, by the county authorities, and at the time of ceasing to operate said line it was in undisturbed use and occupation of said streets. All of the Minnehaha Park line and all of the Ross Park line run along and upon public streets of the city of Spokane, and public streets of additions thereto, dedicated according to statute as public highways. The system operated by the defendant includes the major portion of the street-railway mileage in the city of Spokane. It is not found what is the actual cost of operating the Minnehaha Park line. The court found that a half-hour service on the Minnehaha Park line, run in connection with the Ross Park line, is a reasonable operation of the road and is such an operation as the company has maintained for a period of over five years. No demand was made by any person upon the defendant to continue or resume the operation of the line. Upon the findings of fact the superior court entered judgment awarding a peremptory writ of mandamus commanding the defendant to run and operate an electric car or cars on that portion of this road in the city of Spokane and additions mentioned and described in the findings of fact as the Minnehaha Park line.

1. It is urged by the defendant, appellant here, that, no demand having been made upon it to resume the operation of its line, the action cannot be maintained. It is true that, upon the necessity of a previous demand and refusal to perform the act which it is sought to coerce by mandamus, the authorities are not altogether reconcilable. Mr. High says: "The better doctrine, however, seems to be that which recognizes a distinction between duties of a public nature, or those which affect the public at large, and duties of a merely private nature, affecting only the rights of individuals. And while in the latter class of cases, where the person aggrieved claims the immediate and personal benefit of the act or duty whose performance is sought, demand and refusal are held to be necessary as a condition precedent to relief by mandamus, in the former class, the duty being strictly of a public nature, not affecting individual interests, and there being no one specially empowered to demand its performance, there is no necessity for a literal demand and refusal. In such cases the law itself stands in lieu of a demand, and the omission to perform the required duty in place of a refusal." High, *Extr. Legal Rem.* 2d ed. § 13. See also *Id.* § 41. In *Union P. R. Co. v. Hall*, 91 U. S. 343, 23 L. ed. 4-8, there was under consideration an application by private parties to compel the Union Pacific Railroad Company to operate its line as one continuous system into the town of Council Bluffs, Iowa. It was urged that these parties could not lawfully be relators in the suit, but it should have been brought by the attorney general of the United States, or the district attorney of the district of Iowa, because the object of the suit was to compel the performance of a public

lic duty. The court concludes: "There is, we think, a decided preponderance of American authority in favor of the doctrine that private persons may move for a mandamus to enforce a public duty, not due to the government as such, without the intervention of the government law officer." In consonance with these views may be mentioned *State, v. Marshall County Judge*, 7 Iowa, 186; *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667; *Atty. Gen. v. Boston*, 123 Mass. 460. In *Northern P. R. Co. v. Territory*, 3 Wash. Terr. 303, it was said by the court: "No demand for the facilities required was ever made upon the company. That a demand would be necessary, as a foundation of proceedings of this nature to establish a mere private right, is conceded; but it is claimed by appellee that this was a question of public right, and that the company was neglecting to perform a duty which it owed to the public, and that in such a case a demand was not necessary. We think this claim is established by the facts and law of this case." It may be noted that appellant did not deny that it had discontinued the operation of its street railway line indefinitely. The rule which requires a demand to be made before application to the court for a writ of mandamus is founded upon reason; that is, it is unjust that defendant should be subjected to the payment of costs for a failure of some duty which it was willing to perform had it been requested to do so. In *Atty. Gen. v. Boston*, 123 Mass. 460, the supreme court of Massachusetts said: "But where a municipal corporation or board has distinctly manifested its intention not to perform a definite public duty, clearly required of it by law, no demand is necessary before applying for the writ." The appellant's duty is a public one, due to the public, if due at all, and therefore falls within the rule announced by the best authority. Upon the facts found, it was not absolutely necessary for the relator to make a demand for the operation of the line.

2. It is also suggested that the relator has not such interest in the subject matter of the action as will enable him to maintain the action. It is shown, however, he has a material individual interest in enforcing the performance of a duty to the public. *Union P. R. Co. v. Hall*, 91 U. S. 343, 23 L. ed. 428; *Re Loader*, 14 Misc. 208; *Savannah & O. Canal Co. v. Shuman*, 91 Ga. 400.

3. It is maintained by appellant that the facts failed to show any legal duty which it as a corporation is bound, either by law or its charter, to do or perform. The statute regulating mandamus in this state (*Ballinger's Codes & Stat.* § 5755) is as follows: "It may be issued by any court, except a justice's or a police court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person." High, *Extr. Legal Rem.* § 1, defines the writ as follows: "The modern writ of mandamus may be defined as a command issuing from a

common-law court of competent jurisdiction, in the name of the state or sovereign, directed to some corporation, officer, or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law." The controversy is whether, under the principles of the common law, a corporation authorized to transact the business which appellant is authorized to do, and which it has actually transacted, in the acquisition and operation of its street-railway lines, owes a duty to the public to continue the operation. The franchise was granted to appellant by the state, not for its profit alone or that of its stockholders, but in a large measure for the public benefit. Peculiar privileges were conferred upon it in consideration that it would provide facilities for communication and intercourse for the public. It is a common carrier. *New York & M. Line R. Co. v. Winans*, 17 How. 80, 15 L. ed. 27; *Booth, Street Railways*, § 1; *Talcott v. Pine Grove Twp.* 1 Flipp. 120. It was granted the power of eminent domain, a part of the sovereignty of the state, and, with the consent of the municipalities, it may lay its tracks over the public streets and highways. Such corporations, then, may not, by their own acts, disable themselves from performing the functions which were the consideration for the public grant. *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950. The opening of a highway or ferry, and the common carriage of persons or property over them, was at common law a franchise and a matter of governmental concern. It was a part of the subjects in immediate possession of the sovereign power, and to exercise which demanded a special grant or charter from the sovereign. Such avocations, in their nature and history, are unlike the private avocations of milling, hotel keeping, and traffic, which all may be pursued at pleasure, unless restrained by the exercise of police power. Judge Kent says in 8 Kent, Com. p. 458, that there are certain franchises which are understood to be royal privileges in the hands of a subject. The right to set up a ferry or road, and the taking of tolls, is one of them, and in this the public has an interest. In 2 Bl. Com. p. 37, it is said that a franchise is a branch of the royal prerogative in the hands of the subject, such as the right of taking toll for a bridge, way, or wharf. In *Prosser v. Wapello County*, 18 Iowa, 327, it was held by Judge Dillon that a public ferry franchise could only be conferred by the government, and must be founded on grant, license, or prescription. Ownership of the soil on each side of a stream does not confer the right to establish thereon without a grant a public ferry at which tolls are charged. These rights, then, are held by the grantee, the holder of the franchise, as the agent and trustee for the sovereign power, and are in no sense private, but continue after as well as before, the grant to be but a portion of the public interests. The absolute commercial and business necessity for permanence when established forbade, from the earliest years, the manifest impolicy of leaving this interest to the laws of supply and demand, which thus far have sufficiently supplied the community with hotels, mills, etc.

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And it is not in degree only that these franchises differ from mills and inns. The one is private property; the other is a public function, which originally resided in the government, and, when delegated to either persons or corporations, still retains the public use. In *Gates v. Boston & N. Y. Air Line R. Co.* 53 Conn. 838, it was said: "One public right consists in the continuous uses of the railroad. Its franchises and corporate property, in the manner and for the purposes contemplated by the terms of the charter. All these corporate franchises and this property are held subject to, and charged with, this obligation." In an early case, that of *King v. Seavern & W. R. Co.* 2 Barn. & Ald. 646, a writ of mandamus was issued to compel the restoration of a tram road and the relaying of the track which the company had worn out. In *State v. Hartford & N. H. R. Co.* 29 Conn. 538, a railroad company was incorporated to construct and operate a railroad for the transportation of passengers and freight between certain main points. The road was constructed, and thereafter it discontinued operating its trains to one of its termini. The court said: "We hardly know what doubtful principles of law are thought to be involved in the case. . . . All jurists and judges will at once agree that chartered companies are obliged fairly and fully to carry out the objects for which they are created, and that they can be compelled by mandamus to do it; and it will not be questioned that in the case of public highways, whether turnpikes or railroads, they are bound to keep them fit for use, and, in the case of railroads, to keep them furnished with suitable cars, engines, and attendants, without which they cannot be used at all." The supreme court of Maine, in *Railroad Comrs. v. Portland & O. Cent. R. Co.* 63 Me. 269, 18 Am. Rep. 208, compelled the erection and maintenance of a depot for freight and passengers upon a line of railroad. The Supreme Court of the United States in *Union P. R. Co. v. Hall*, 91 U. S. 343, 23 L. ed. 428, upon the relation of private parties by mandamus, compelled the Union Pacific Railroad Company to operate its road as a continuous line from Council Bluffs westward. In *Potwin Place v. Topeka R. Co.* 51 Kan. 609, it was held that the performance of the duties which a street-railway company owes to the public may be enforced by mandamus. There lines of street railway were operated in connection with a system of railways in the city of Topeka, and then discontinued, when the law was invoked. In *San Antonio Street R. Co. v. State*, 81 Mem. Tex. Civ. App. 38 S. W. 54, the supreme court of Texas held that, where a street railway company had undertaken the operation of its line upon certain streets, the public acquired a right to the operation of the lines which could be enforced by mandamus. It was also held that it was no defense to a writ of mandamus that a city might forfeit its franchise for failure to continue to operate its cars over a portion of the line; and it was further determined that an answer which set up that the operation of the line was a continual loss to defendant, that the revenues received were not sufficient to pay the actual expenses of its operation, and that if it continued the operation of the line the value

of its whole property would be consumed and it would become bankrupt, was no defense, for the reason that, so long as it retained its franchise, it would not be allowed to urge, as an excuse for failure to perform the duties imposed by it, that it was nonproftable. A similar principle is sustained with regard to a canal company in *Savannah & O. Canal Co. v. Shuman*, 91 Ga. 400, where a peremptory writ of mandamus was issued against a canal company requiring it to keep its canal in a navigable condition. It was also held that the answer of the defendant, that the operation of the canal was unprofitable, was no defense; that it could not retain its franchises and refuse to perform its duty. In *Haugen v. Albina Light & W. Co.* 21 Or. 411, 14 L. R. A. 424, it was determined that a corporation formed for the purpose of supplying a city and its inhabitants with water, and which had laid its pipes in the streets of the city for that purpose, could be compelled by mandamus to supply persons living along the streets with water.

Counsel for appellant has called our attention to two cases to support the position that mandamus cannot be maintained here: One, *People v. Rome, W. & O. R. Co.* 103 N. Y. 95. But the statute of New York provided that a peremptory writ of mandamus is only authorized, in the first instance, "where the applicant's right to a mandamus depends only upon questions of law." In that case the material averments of the petition of the attorney general were put in issue, and the facts were that a short line of road was abandoned where there was another line, only 2 miles longer, that accommodated the same public. The court said: "The present line [in operation] is a little longer than the one originally adopted and slightly varying therefrom, but it accommodates the people of the state and the people of the locality substantially as well as the line originally adopted. Suppose two roads were consolidated, and the lines of the two between two places were parallel and near to each other, could the consolidated road be compelled by mandamus to operate both lines, or could it discharge its duty to the public by using only one line?" And the court concluded that one only was sufficient in that case. The conclusion in no wise negatives the established principle of the public duty owed by the railroad company. The other authority is *State, Scully, v. Canal & C. Streets R. Co.* 23 La. Ann. 838, which was an application for a writ of mandamus to compel the officers of a street railway company to collect from subscribers to the capital stock of the corporation their delinquent subscriptions. The relators were stockholders. The defense was that the amounts to be paid and the times of payment were, by the charter and agreement signed by the relators, left to the discretion of the board of directors, and the provision was that "five per cent of each subscription shall be payable at the signing of these articles, and the balance shall be paid at such times and in such amounts or installments as the board of directors may order." The court there held that, as a general rule, a writ of mandamus would not lie to compel an

officer or a company to do an act coming within the range of their duties, where the law or the charter under which they act has vested in them a discretion to do or not to do it. The case is clearly not in point here, for no discretion is vested by our laws in the charter of a street-railway company that would authorize its discontinuance of a street-railway line which it had already established and operated. Permanency in the service of the public in a reasonable manner is an essential duty in all such avocations.

4. But it is also urged by counsel for appellant that it had no grant or privilege or franchise from the city or county to operate its tracks upon the public streets, and was simply a licensee from the owners of the additions through which these streets ran. But it has continuously occupied these streets, since 1892, with its lines, and no objection has been made by the city or county authorities to such occupation, and it is in undisturbed use and occupation of these streets. The city could not object now. *Spokane Street R. Co. v. Spokane Falls*, 6 Wash. 521. We do not think it can urge this objection so long as it is undisturbed in its use of the streets. We conclude that a corporation of the nature of appellant, receiving its franchises from the state and entering upon the enjoyment of them, cannot cease to perform the functions which were the consideration for the grant of such franchises without the consent of the granting power. The question of the public convenience is one which appeals to the discretion of the court. The distinction between a franchise granted by the state of the right to exist and engage in peculiarly favored operations, and upon which special and peculiar burdens are imposed, and the license granted by a municipality to such corporations to transact their business within its limits, was discussed by this court in a recent case. *Commercial Electric Light & P. Co. v. Tacoma*, 17 Wash. 661. It was there stated that an electrical company was a quasi-public corporation, and might not, without the consent of the state, disable itself from the performance of its public duties by transferring its corporate privileges and franchises, but that it might transfer to others the privilege granted by the municipal corporation to perform its business in the public streets within the limits of the city. See also *Bella-ville v. Citizens' Horse R. Co.* 152 Ill. 171, 26 L. R. A. 681.

In plated additions to a town, when streets are laid out thereon, the fee belongs to the public. 1 Ballinger's Codes & Statutes (Wash.) § 1276; Elliott, Roads & Streets, p. 87; *Des Moines v. Hall*, 24 Iowa, 294. If any condition is annexed to such dedication, the condition falls, but the grant stands. Elliott, Roads & Streets, pp. 88, 109, 110; *Des Moines v. Hall*, 24 Iowa, 241; *Richards v. Cincinnati*, 31 Ohio St. 506.

The judgment of the Superior Court is affirmed.

Anders and Dunbar, JJ., concur.

DISTRICT OF COLUMBIA COURT OF APPEALS

John J. JOHNSON, Trustee of the Estate of
Samuel Blodgett, Jr., Deceased, *Appt.*,

v.

Kate VAN WYCK.

(..... D. C.)

1. An agreement by an attorney to prosecute a suit entirely at his own expense in consideration of one half of the recovery is champertous.
2. Champerty is illegal, independent of statute, and the English statutes of Edw. I. and III. and 32 Hen. VIII. on this subject were merely declaratory of the common law.
3. The fact that a champertous trust is in part for the benefit of one who conveyed land in consideration of a share of the prospective recovery in champertous litigation will not make the trustee's title valid for any part of the property.
4. The rule that champerty in an incidental contract will not defeat title does not apply so as to allow a recovery of land by a trustee whose title is derived through champertous conveyances which have a merely nominal consideration aside from champertous agreements to prosecute suits for the property at the expense of the various grantees.

(November 5, 1894.)*

APPEAL by plaintiff from a judgment of the Supreme Court for the District of Columbia in favor of defendant in an action brought to recover the possession of certain real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. J. Johnson and W. H. Armstrong for appellant.

Mr. William F. Mattingly, for appellee:

When a contract is clearly champertous it is still held void and will not be enforced.

Stanton v. Haskin, 1 MacArth. 558, 29 Am. Rep. 612; 8 Am. & Eng. Enc. Law, p. 86; *Matthews v. Hennen*, 2 App. D. C. 349; *Brown v. Bigne*, 21 Or. 260, 14 L. R. A. 745; *Gilbert v. Holmes*, 64 Ill. 548; *The Mohawk*, 8 Wall. 153, 19 L. ed. 406; *Boardman v. Thompson*, 25 Iowa, 487.

This ejectment is based upon the deed to the plaintiff, and to maintain the action it is essential that the deed should be free from taint and one that a court could enforce.

Hilton v. Woods, L. R. 4 Eq. 432; *Elborough v. Ayres*, L. R. 10 Eq. 873; *Stanley v. Jones*, 7 Bing. 869; *Duke v. Harper*, 46 Mo. 51, 37 Am. Rep. 314.

Shepard, J., delivered the opinion of the court:

This is an action of ejectment brought by J. J. Johnson, trustee, to recover a square of land in the city of Washington. This square is a part of the original tract of 494 acres of land known as "Jamaica" before the laying out

of the city of Washington, and is, with the exception of about 50 acres, included in the original plan and survey thereof. Samuel Blodgett purchased the tract subject to a contract with the commissioners made by his grantors, and in the allotment thereunder took a title in fee simple to about one half of the squares and lots as designated on the original map of the city.

The plaintiff claiming under grant from the heirs of said Samuel Blodgett and certain grantees and agents of theirs, proved heirship properly, and then offered in evidence the conveyance under which he claimed, together with certain other instruments referred to therein and made parts of it. The deed was excluded upon the objection of defendant "that it was void as champertous and against public policy." As this objection is founded on the recitals of the papers excluded they are fully described and stated in the order of their execution, as follows: 1. June 27, 1873, the heirs of Samuel Blodgett, deceased, entered into an agreement with one Lorin Blodgett, authorizing and empowering him to institute suits at law and in equity to recover all real estate of Samuel Blodgett in the city of Washington, including claims against buildings and property of the United States and claims against the commissioners charged with laying out the city, and certain personal claims, and so forth, excepting only "French spoliation claims." The said Lorin Blodgett was fully empowered to bind the grantors "in contracts for conveyances, acquittals, and releases of title to all or any part of said estates and claims, and to settle and adjust them in his discretion, and to execute final and absolute deeds and other conveyances, and to hold and lease such properties when in his judgment their interests rendered it desirable to do so, and to sign in final release on proper settlement for any and all of said claims." The said Lorin Blodgett promised to prosecute the claims with diligence, "and to pay all expenses and costs of such proof and prosecution." It was also stipulated that in consideration of said Lorin Blodgett's contract to "prosecute, recover, and collect the said estates and claims at his own proper costs and expenses, he shall be entitled to and shall have the one half of all the proceeds thereof." The said Lorin Blodgett further agreed to file an account annually as trustee in the proper court in the city of Philadelphia, if requested by any of the parties of the first part, in which he shall set forth all his transactions and settlements. It was admitted on the trial that the said Lorin Blodgett was neither an heir of said Samuel Blodgett, nor a kinsman of an heir. 2. May 28, 1884, an indenture was made between the said heirs and the said Lorin Blodgett, as parties of the first part, and one Robert Morrison as party of the second part, which recites the aforesaid agreement of June 27, 1873, and makes it a part thereof, and declares a desire to make said trust and agreement "effectual to the fullest

*Appeal to Supreme Court of United States dismissed March 5, 1895.

NOTE.—For champertous contracts between attorneys and clients, see also *notes* to *Manning v. Sprague* (Mass.) 1 L. R. A. 516; *Gilman v. Jones* 41 L. R. A.

(Ala.) 4 L. R. A. 113; *Burnham v. Heseltun* (Me.) 9 L. R. A. 92; and the case of *Reece v. Kyle* (Ohio) 16 L. R. A. 723.

extent." Then, reciting a consideration of the premises, and the further consideration of \$10, it conveys to the party of the second part (Morrison) "all the right, title, interest, and estate in and to all the estate, real and personal, of which Samuel Blodgett, deceased, died seised and possessed; consisting of certain claims and rights in law and equity against certain of the buildings and property of the United States in the district of Columbia, and of claims upon the commissioners of Washington," and so forth, "... and also consisting of and being certain tracts, squares, lots, and parcels of ground in said District of Columbia, being all that piece of land known as and commonly designated as 'Jamaica.'" The land is then described by its ancient boundaries and again also by numbers of the many squares into which it was divided, as shown on the city map. This conveyance is made "in trust for the sole use, benefit, and behoof of the said parties of the first part and the said party of the second part as declared in the trust to the said Lorin Blodgett of record as aforesaid—and upon this further trust, from time to time, and at all times to dispose of, convey, acquit, and release the same or any part thereof, to such person or persons, to such use and purposes and in such quantity and quality of estate or estates as in the judgment of the said party of the third part shall seem meet and proper, in the best interests of all concerned, and upon this further trust, to prosecute, sue for, recover, and collect said estates and claims and any and every part thereof, and to convert the same into money, keeping an exact account of all his transactions and of all moneys recovered by him, which account shall be open and accessible to the inspection of any and all of the parties hereto, their agents or attorneys; and upon this further trust, to account for and pay over unto the said Lorin Blodgett, trustee, party of the second part, all moneys that shall or may come into his hands in the execution of his trust as provided for and intended by the hereinbefore recited deed, agreement, and trust to said party of the second part, for distribution by the said party of the second part according to the provisions of said deed, agreement, and trust." 3. January 22, 1887, Lorin Blodgett executed a power of attorney to the Union Trust Company of Philadelphia, reciting the two foregoing instruments and empowering it to collect and enforce collections of the property under his right as administrator of Samuel Blodgett, Jr., deceased, as trustee, and as "a party in interest therein." 4. On February 8, 1887, agreement was made by and between said Robert Morrison, trustee, and one William F. Boogher, as follows:

"Whereas, Wm. F. Boogher, of Washington City, D. C., has furnished to D. R. Patterson, Esq., of Philadelphia, Penna., share certificates Nos. 51, 52, 53, 54, and 55 each for \$1,000, and share certificate No. 56, for \$5,000 (the total par thereof being \$10,000) of the estate of Samuel Blodgett, Jr., deceased, for sale as instructed and in such quantities as he may be able to dispose of the same, the proceeds derived therefrom to be deposited with the Union Trust Company of Philadelphia, Penna., and to be applied under the direction of said company to the prosecution of certain suits

now pending and to be instituted for and about the property and concerns of the said Samuel Blodgett, Jr., deceased, which are solely and only located in the District of Columbia, to wit, only the real estate concerns of said deceased, and in and about which properties the said Boogher has certain rights and interests; and is to provide means wherewith to conduct and prosecute the suits now instituted and to be instituted, and to effect which he has as aforesaid placed the said shares in the hands of said Patterson for negotiation and sale.

"And whereas Robert Morrison of said city of Washington is under and by virtue of a certain deed, dated May 29, 1884, made and executed by the heirs of said Blodgett and also Lorin Blodgett of Philadelphia, Penna., to him the said Morrison and his successors, duly constituted the trustees for said heirs and said Lorin Blodgett and as such trustee holds for said parties the title to said properties located in the District of Columbia, and as such trustee has instituted certain suits and proceedings for and about the said properties in the supreme court for the District of Columbia, looking toward the recovery thereof and enforcing the rights of said heirs thereto, which suits, etc., are now pending, and said trustee is about to bring other actions or proceedings in the same court for the said heirs, and for the same purposes and promises, and agrees to press the rights of said heirs and the said causes to as speedy a determination and settlement as possible and in good faith.

"And whereas the said Lorin Blodgett has on the 22d day of January, 1887, in his own right and also as trustee and attorney in fact for the heirs of said Samuel Blodgett, deceased, and also as administrator for said deceased, appointed the said Union Trust Company his true and lawful attorney to ask, demand, sue for, levy, recover and receive all moneys, debts, rents, goods, wares, dues, accounts, and other demands of every sort, which are or shall be due, owing, payable, and belonging to or detained from him the said Lorin Blodgett, in or by any way, manner, or means on account of his interest under his contract, agreement, and indenture, made with the heirs at law of Samuel Blodgett, deceased, dated June 27, 1873, and under the said deed to said Morrison as trustee, dated May 29, 1884, and also as administrator as aforesaid, and also by said power of attorney dated January 22, 1887, gives to said Union Trust Company full power and authority to collect and enforce the collection of whatever property, effects, and sums of money may be or become due, owing, payable, or deliverable to said Lorin Blodgett, as such administrator, also as trustee for the parties in interest, and also as a party in interest therein, also the said Union Trust Company, under said power of attorney is as such attorney to account to and pay over to the several parties in interest in said estate whether as heirs at law or otherwise, said property, effects, and moneys in such proportions and amounts as shall be designated and awarded by the tribunals or courts having jurisdiction of the accounts of said Lorin Blodgett as administrator and trustee aforesaid, also giving to said Union Trust Company full and entire power in all the said matters, also to sign all receipts, dues, papers, and ac-

quittances necessary for said administrator to do in, to, or about any or all such matters or pertaining thereto in any way, with power to appoint agents or attorneys to carry out the same, and to revoke any such appointments, and ratifying and holding for firm and effect all that the said Union Trust Company may do under and by virtue of said power of attorney, and by special promise and contract making the same irrevocable and taking considerations and services thereunder.

"And whereas it is the desire of each and all the parties hereto to have the purposes and conditions of said arrangement of said Wm. F. Boogher with said Union Trust Company and said D. R. Patterson, as well also as the purposes and conditions of said power of attorney made by said Lorin Blodgett as administrator, trustee, etc., etc., fully, thoroughly, and completely carry out in all parts and intendments of both and all, and also it is the desire and intent to secure the services of the said Union Trust Company, in and about all singular and several matters touching or concerning the said matters involved in or concerning said estate; and matters referred to herein.

"Now, therefore, the said William F. Boogher in consideration of this agreement and its advantages by him recognized, for himself, his heirs and assigns, agrees to and with all the parties hereto and with the said Union Trust Company that the funds and proceeds derived from the sale of the said share certificates shall be deposited with the said Union Trust Company, and from time to time, as occasion may, in the judgment of the Union Trust Company require, be applied to the payment of costs and expenses necessary to the conducting of the several suits and proceedings touching and concerning said matters involved in the matters, concerns, and estate of which said Morrison is trustee as aforesaid. Except that it is understood that out of said proceeds said Boogher is to have for his own use and expense \$125 per month. But the expense of pressing said suits is to be first considered, and no allowance to said Boogher is to interfere with the enforcing the rights and claims of said heirs by every legal method and process. And the said Boogher recognizes, consents to, and affirms the said power of attorney made by said Blodgett to said Union Trust Company on January 22, 1887, and accepts for his guidance and governance all the conditions and provisions and intendments thereof, and agrees that he will at all times and places be governed, controlled, and directed in all affairs connected with or about said estate and concerns herein in any way alluded to by the said Union Trust Company and its proper officers and agents.

"And the said Morrison as such trustee, for the consideration aforesaid and the recognized advantages hereof, for his successors and assigns as well as for his heirs, executors, and assigns, agrees that he will faithfully carry out and perform his said trust under the direction of the said Union Trust Company, and also all the parts and conditions of this agreement he will faithfully perform and keep; and further, that the Union Trust Company shall be his successor in the event that any transfer of the trust or powers that he has or may have under said deed from said heirs is made at any time

or in case at any time, a succession from any cause is necessary; and that he recognizes, consents to, and affirms the said power of attorney made by said Blodgett to said Union Trust Company on January 22, 1887, and accepts for his guidance and governance all the conditions, provisions, and intendments thereof, and agrees that he will at all times and places be governed, controlled, and directed in all affairs connected with or about said estate and his said trust, in every part and particular, by the said Union Trust Company and its proper officers and agents, and this includes all matters whether of expense or otherwise, and make and render accounts to said company at least monthly, on the first day of each and every month of all his actions, doings, and transactions as such trustee or in any way or manner concerning said trust, with vouchers for all moneys had and expended, if any such at any time there be, and also at any time to employ such attorneys, counsel, or agents in the said matters of his said trust or any of them or concerning the same as the said Union Trust Company or its officers shall request, desire, select, or deem expedient to engage or employ, and which may be deemed necessary by said trustee. And further the said Morrison, as trustee, etc., and for himself, etc., agrees that no property covered by his said deed of trust shall be conveyed by him or any other person by deed or otherwise to any person for any purpose without the written approval and consent of the said Union Trust Company as to the amount of purchase money to be paid and the terms and conditions of such sale, or of any mortgage or encumbrance placed or put upon said property or any thereof to secure purchase money.

"And the said Morrison as such trustee, and for his successors and assigns, and for himself, his heirs and assigns, does empower and appoint the said Union Trust Company his true and lawful attorney to the same extent and as fully as the said Lorin Blodgett has done in and by his power of attorney dated January 22, 1887, reference to which is hereby specially had, to carry out the purposes, uses, and conditions of his said trust as stated and intended by said deed made to said Morrison by said heirs, dated May 29, 1884, and agrees that he will deposit all funds and moneys arising out of and from his said trust with said company, for the use and benefit of the estate of which said Lorin Blodgett is administrator. And for the consideration herein this is made irrevocable.

"And for its trouble and concern, and for full compensation in all these matters, the said Morrison agrees that the said Union Trust Company shall retain to itself a sum of money equal to one half of all the fees, commissions, and allowances made by him as said trustee by any court or tribunal, and he agrees so far as he may that if no allowance is made then the said Union Trust Company may return to itself in and for full compensation a sum of money equal to 2 per cent of the total amounts which may or shall come into the hands of said trust company through or by reason of the said trust or any of the matters concerned therein, provided the court allows said 2 per cent to be taken out of said estate, but in no

event is said Morrison to become personally liable to said trust company for said amount."

Indorsed upon this is an acceptance of the "obligations and duties imposed upon said company by the foregoing agreement and letter of attorney," duly signed by the Union Trust Company.

5. An indenture made by and between the said heirs of Samuel Blodgett, deceased, and William F. Boogher, as parties of the first part, and Lorin Blodgett, trustee, and Robert Morrison, trustee, parties of the second part, and John J. Johnson (plaintiff in this suit), party of the third part. This deed recites first the agreement between the heirs and Lorin Blodgett of June 27, 1878, and then says:

"Whereas, it is the desire of the said parties of the first part, as well as the parties of the second part, to make said deed, agreement, and trust to the said Lorin Blodgett operative and effectual to the fullest extent for the purpose therein specified and intended, and to which the said deed, agreement, and trust to said Blodgett is made a part thereof."

Among other recitals occur the following:

"Whereas by a certain trust deed, bearing date in the 29th day of May, 1884, made by the next of kin and heirs at law of Samuel Blodgett, Jr., and also by Lorin Blodgett, of Philadelphia, Pennsylvania, for himself and as attorney in fact and trustee for the heirs at law and next of kin of Samuel Blodgett, Jr., deceased, to Robert Morrison of the city of Washington, D. C.; the said parties by said deed conveying for a valuable consideration, to said Robert Morrison, all their rights, titles, and interests whatever, in and to the several tracts of land, lots, and property in said deed described. The land and lots in said deed described, being genetically known as "Jamaica tract" and in the said city of Washington, which said deed is executed, witnessed and acknowledged, and recorded.

"Whereas on the 8th day of February, 1887, William F. Boogher, and the said Robert Morrison, for himself and as trustee for the heirs and estate of Samuel Blodgett, Jr., deceased, entered into a certain agreement with the Union Trust Company, a corporation duly organized under the laws of Pennsylvania, and which said agreement is duly recorded and made a part of this conveyance.

"And whereas, the said Robert Morrison has expressed a wish to retire from the trusteeship aforesaid and to relinquish all estate, rights, and authority whatsoever vested in him by virtue of the said deed of trust, dated the 29th day of May, A. D. 1884, unto any new trustee whom all parties desire shall be placed in his stead.

"And whereas the said John J. Johnson, upon the solicitation of all parties in interest, has consented to accept the said trusteeship, upon the retirement of the said Robert Morrison, and carry out the objects, purposes, and conditions of the trust as hereafter declared and provided.

"And whereas it is agreed by the said Morrison, for himself and also in his capacity as trustee for all the parties named in and covered by each and all of the several deeds of trust, conveyances, instruments, decrees, or other things hereinbefore mentioned, or al-

luded to, and is by him made a part of the consideration, for this deed of conveyance. And further that he will fully carry out the object and purposes of this deed, and to fully convey all his interest in the deed aforesaid as trustee or otherwise, he, the said Morrison, therefore, joins in the deed and executes the same."

Then, upon "a consideration of the premises and the further sum of \$10," the parties of the first and second parts convey to the party of the third part (the plaintiff) all the estate, properties, etc., mentioned in the foregoing instruments, with specifications of the character of the same; the boundaries of the land and the immense number of the squares and lots into which it has been divided.

"In and upon these trusts, nevertheless, that is to say in trust for the sole use, benefit, and behoof of the said parties of the first part and the said parties of the second part as declared in the trust to said Lorin Blodgett of record aforesaid, and upon this further trust from time to time, and at all times to dispose of, convey, acquit, and release the same or any part thereof to such person or persons, to such use and purposes and in such quantities and quality of estate or estates, as in the judgment of the said party of the third part shall seem meet and proper in the best interest of all concerned; and upon this further trust to prosecute, sue for, recover, and collect said estate and claims and every part thereof, and to convert the same into money, keeping an exact account of all his transactions and of all moneys recovered by him, which account shall be open and accessible to the inspection of any and all the parties hereto, their agents or attorneys; and upon this further trust to account for and pay over unto the Union Trust Company or its successors, as per their contract with Lorin Blodgett, trustee, bearing date the 22d day of January, A. D. 1887, and duly recorded in the land records of the District of Columbia, which for greater certainty reference is here had and made a part hereof, all moneys that may or shall come into his hands in the execution of his trust as provided for and intended by the hereinbefore-recited deed, agreement, and trust, as soon as the same is received according to the provisions of the said deed, agreement, and trust, which said moneys shall be immediately distributed and paid by said company to the several parties entitled thereto; the heirs receiving one half of the gross amount undiminished by any cost or charge; and upon this further trust if at any time it should become necessary for the proper management of the estate, or in the event of a vacancy in the trust either by death or otherwise, power is hereby given to the judge holding the equity court for the District of Columbia, upon the application or petition of anyone in interest, the trust company herein named concurring therein, or its successors, to appoint a new trustee and the trustee so appointed is to hold under the same trust and power as his predecessor, and none other, and with the like responsibility.

"And the said parties of the first part, and the said Lorin Blodgett, trustee, aforesaid, for themselves and each of them their and each of their heirs, executors, and administrators, do

hereby covenant, promise, and agree to and with the said party of the third part, his successors, and assigns that they the said parties of the second part and their and each of their heirs and assigns shall and will warrant and forever defend the said pieces, parcels, lots, squares and tracts of land, claims, rights, and properties and premises and appurtenances, unto the said party of the third part, his heirs and assigns from and against the claims of all persons claiming or to claim the same or any part thereof, by, from, under, or through them or any of them."

The Union Trust Company also indorsed on said deed its approval of the retirement of Morrison and his relinquishment of the trust to plaintiff.

6. On January 10, 1888, an indenture was made and executed between Lorin Blodgett and William F. Boogher as parties of the first part, and John J. Johnson, trustee, as party of the second part as follows:

"Whereas Julia A. Britton and others, heirs at law of Samuel Blodgett, Junior, late of the city of Philadelphia, aforesaid deceased, by agreement bearing date of 27th day of June, A. D. 1873, and recorded at Washington aforesaid, in liber No. 781, folio 448, of land records, constituted and appointed the said Lorin Blodgett their attorney in fact for the prosecution, recovery, and collection of their claims as heirs at law of the said Samuel Blodgett, Jr., deceased, as aforesaid, and did contract and agree that he the said Lorin Blodgett, should be entitled to and have the one half of all the proceeds of all property real and personal, which he, the said Lorin Blodgett, should recover under said agreement. And whereas, the said Lorin Blodgett afterwards made and entered into an agreement with the said William F. Boogher, bearing date on the 23d day of March, A. D. 1882, and recorded at Washington aforesaid in liber No. 1057, folio 453, and in liber No. 1230, folio 153, whereby he contracted and agreed in consideration of the services contemplated by said agreement to be rendered by the said William F. Boogher, in and about the recovery of said claims to pay to him the said William F. Boogher, the one fourth of the amount, which might be collected of said claims, being one half part of his, the said Lorin Blodgett's, half of such collection or collections.

"And whereas, the said heirs at law and parties in interest in the said estate of Samuel Blodgett, Junior, deceased, did by indenture bearing date the 29th day of May, A. D. 1894, duly recorded at Washington aforesaid, in liber No. 1147, folio 295, of land records, grant and convey unto Robert Morrison of the said city of Washington his heirs and assigns all their and each of their right, title, and interest of, in, and to the said estate, real and personal, as therein recited in trust for the purpose of the recovery and collection thereof as therein stated.

"And whereas the said heirs at law and parties in interest in said estate together with the said Robert Morrison, trustee, as aforesaid, afterwards by indenture bearing date the 10th day of June, A. D. 1887, and intended to be forthwith duly recorded at Washington aforesaid, did grant and convey all their said right,

title, and interest of, in, and to said estate of the said Samuel Blodgett, Junior, deceased, unto the said John J. Johnson, as trustee, to succeed the said Robert Morrison in said trust as by reference to said indenture will more fully and at large appear.

"And whereas, the said Lorin Blodgett, and William F. Boogher, have executed and issued under even date herewith 240 certificates to represent their joint one half interest in the said estate, real and personal, of the said Samuel Blodgett, Junior, deceased, at an estimated total value of \$240,000, for said one-half interest, each certificate being of the par or face value of \$1,000, and said certificates being numbered from 1 to 240, both inclusive respectively, and each certificate being in the following form countersigned by the said John J. Johnson, trustee, to wit:

(No.—)

(\$1,000)

This is to certify that the bearer hereof is entitled to one share in one half of the estate, real and personal, of Samuel Blodgett, Junior, late of the city of Philadelphia, deceased, which estate is located in the city of Washington, and is now in the course of recovery and collection under the terms of a contract made by the heirs at law of the said Samuel Blodgett, Junior, deceased, and Lorin Blodgett of the city of Philadelphia, dated June 27th, A. D. 1873, and recorded at Washington aforesaid, in liber No. 781, folio 448, etc., of land records, and also under an agreement made by the said Lorin Blodgett with William F. Boogher, of Washington, aforesaid, dated March 23d A. D. 1882, and recorded in liber No. 1057, folio 453 and No. 1230, folio 153, of said land records, by which said contract and agreement, the said Lorin Blodgett, and said William F. Boogher, became, and are entitled to said one half interest in said estate, real and personal, and have divided the said one half into 240 shares of the par value of \$1,000 each, of which said division this certificate represents one share and the holder hereof is entitled to a one equal two hundred and fortieth part of said one half of said estate, real and personal, of the said Samuel Blodgett, Junior, deceased, or the proceeds thereof. This certificate is one of a series of 240, and is secured upon a one-half interest in the real estate of the said Samuel Blodgett, Junior, deceased, or the proceeds thereof by an agreement of even date herewith, and intended to be forthwith duly recorded at Washington aforesaid, made by and between the said Lorin Blodgett and William F. Boogher, of the first part and John J. Johnson, of Washington, aforesaid, trustee holding the legal title to said real estate, and is also entitled to its *pro rata* division of the said one half of said personal estate, under the terms of said agreement, intended to be forthwith duly recorded as aforesaid.

In testimony whereof, we have hereunto set out hands and seals, this 10th day of January, A. D. 1888.

Lorin Blodgett. (seal)

William F. Boogher (seal)

Countersigned:

John J. Johnson, Trustee. (seal)

"The payment of which certificates accord-

ing to their *pro rata* share in the said one half of the estate, real and personal, of the said Samuel Blodgett, Junior, deceased, is intended to be hereby secured.

"Now this indenture witnesseth, that the said parties, of the first part, in consideration of the premises and of the sum of \$1, lawful money of the United States, unto them in hand well and truly paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, conveyed, assigned, transferred, and set over unto him, the said party of the second part, his heirs, executors, administrators, and assigns, all their and each of their right, title, interest, property, claim, and demand, of, in, and to the said estate, real and personal of the said Samuel Blodgett, Junior, deceased, being the one equal moiety or half part thereof as aforesaid, to hold the same to the said party of the second part, his heirs, executors, administrators, and assigns, to and for the only proper use, benefit, and behoof of the said party of the second part, his heirs, executors, administrators, and assigns forever, in trust nevertheless for the uses and upon the following trusts and conditions, that is to say:

"First. For the uses and purposes set forth in the said deed of conveyance made by the said parties in interest as aforesaid, to the said party of the second part, his heirs and assigns bearing date the 10th day of June, 1887, as aforesaid, and

"Second. To hold, distribute, divide, and pay over, or cause to be paid over, the said one half part of said estate, real and personal, and the proceeds thereof from time to time, to and among the respective owners of said 240 certificates *pro rata* and according to their respective holdings, each share or certificate as aforesaid, representing a one equal 240th part of such divisions and payments.

"And the said party of the second part, for himself, his heirs, executors, administrators, and assigns, does hereby covenant and agree that he will faithfully carry out the provisions of this trust, and pay over, or cause to be paid over, said proceeds of said estate, real and personal, from time to time to the holders for the time being of said 240 certificates according to their respective holdings as aforesaid."

7. September 6, 1888, Lorin Blodgett, Boogher, and Johnson, trustee, entered into another agreement reciting that the terms of the foregoing instrument do not in one respect express the true intention of the parties, and that this is made to correct it. It expressly provides that the \$240,000 of certificates shall not be a lien on any of the real estate, but only on the proceeds to be paid to the Union Trust Company for distribution by it to the holders of said certificates. Johnson covenants to pay over all proceeds of sales, settlements, and recoveries to the said trust company. The instrument also provides that "In all other respects the said agreement is reaffirmed"—the reference is to the next preceding one—and that the heirs are to receive "one half of the gross amounts undiminished by any costs or charges."

The plaintiff's deed and accompanying papers having been excluded, he declined to take a nonsuit, and the jury found for the defendant. Motion for new trial was overruled, and judg-

ment entered upon the verdict, from which this appeal has been formally prosecuted.

1. The first question to be considered is: Do the recitals of the deed, contracts, and trusts which make up plaintiff's claim of title, show forth the existence of champerty? "Champerty is the unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute." 1 Hawk. P. C. 545; Co. Litt. 368. It has also been defined to be "a bargain to divide the land or thing in dispute on condition of his carrying it on at his own expense." *Stanley v. Jones*, 7 Bing. 869. These definitions have been very generally approved. *Roberts v. Cooper*, 20 How. 467, 15 L. ed. 969; *Brown v. Beauchamp*, 5 T. B. Mon. 415, 17 Am. Dec. 81.

The offenses of maintenance and champerty, and the doctrine of the invalidity of contracts on account thereof, did not have their origin solely in the statutes of Edward I. and III. which provided special penalties therefor. Lord Ellenborough is authority for saying that maintenance was always considered *malum in se*. *Wallis v. Portland*, 8 Ves. Jr. 494. See also *Brown v. Beauchamp*, 5 T. B. Mon. 415, 17 Am. Dec. 81, cited 2 Inst. 208-212. And it has generally been held that these statutes were declaratory only of the common law. *Pechell v. Watson*, 8 Mees. & W. 691; 4 Bl. Com. 135; *Thurston v. Percival*, 1 Pick. 415; *Backus v. Byron*, 4 Mich. 535; *Arden v. Patterson*, 5 Johns. Ch. 44; *Boardman v. Thompson*, 25 Iowa, 487; *Thompson v. Reynolds*, 73 Ill. 11; *Gilbert v. Holmes*, 64 Ill. 548; *Barker v. Barker*, 14 Wis. 142; *Wenky v. Hall*, 13 Ohio, 167, 42 Am. Dec. 194; 2 Story, Eq. Jur. § 148.

The same may be said of the statute of 32 Hen. VIII., prohibiting conveyances and agreements with respect to the lands between parties neither of whom have had possession for a limited period, and providing severe penalties therefor, in a further effort to correct the evils of maintenance and champerty. Lord Chancellor Eldon declared this to be the object and effect of that act in his advisory opinion to the House of Lords in the famous case of *Cholmondeley v. Clinton*, 4 Bligh, 1, in the course of which he quoted with approval this passage from a case reported in 1 Plowd. 88 [*Partridge v. Strange*]: "This statute was made in affirmance of the common law and not in alteration of it, and all that the statute has done is, it has added a greater penalty to that which was contrary to the common law."

We are of opinion that the contracts and combinations exposed in the recitals of the instruments under consideration are not only clearly within the provisions of those old statutes, but also as clearly within the policy of the older common law, to which they only added sanction with increasing penalties.

The original contractor with the heirs, Lorin Blodgett, whose contract is retained and carefully guarded throughout the whole chain of instruments, not only undertook to secure a one-half interest in the things to be recovered by suit, but also covenanted to institute the necessary suits and to maintain them diligently entirely at his own cost and expense. He then brought in others to assist in his scheme, and later on organized a trust or syndicate or lottery (whichever it may appropriately be called),

the sole asset of which consists of his prospective share of the results of the proposed litigation, capitalized in the sum of \$240,000, and represented by certificates of the face value of \$1,000 each, which are to be issued and disposed of to raise funds for the prosecution. The original contract necessarily implied the institution of the suits in the names of the contracting heirs at law of Samuel Blodgett. But to facilitate the institution and conduct of suits and the management of the business generally, and, no doubt, to guard the interests of each and every one of the shareholders, as well as to provide a speedy, inexpensive, and thorough mode of conversion and distribution of all recoveries, the conveyance to the common trustee was devised. Thus a permanent executive officer was created, to whom all titles were passed, and in whose name all proceedings are to be taken; a permanent and responsible treasurer—the Union Trust Company—was provided for to hold and disburse the moneys received. The corporation idea was completely developed. Lorin Blodgett and the contracting heirs may die or part with their remaining interests, certificate holders may die or assign, but the trust will go on unchanged and unending until the last claim of the estate of Samuel Blodgett shall be reduced, converted into cash, and distributed.

It may now be considered to what extent, if any, the statutes of Edward I. and III. and of 32 Hen. VIII. and the policy of the common law against champerty and maintenance may prevail in this jurisdiction. It may be admitted that all of these statutes became obsolete in Maryland before the cession of the District of Columbia; they certainly had become so later, as was held in *Schaferman v. O'Brien*, 28 Md. 565, 92 Am. Dec. 708, decided in 1868. That case has been followed by us in one where the naked question was presented whether a deed made by one out of possession, both actual and constructive, is void by reason of the prohibition of the statute of 32 Hen. VIII. *Mattheus v. Henner*, 2 App. D. C. 349. But Mr. Justice Morris, who delivered the opinion of the court, was careful to limit the decision to the question as presented, and in doing so he took occasion to say: "We do not desire to be understood, however, as holding that champerty and maintenance are no longer reprehensible or criminal under our laws, or, as was intimated in the case of *Schaferman v. O'Brien*, 28 Md. 565, 92 Am. Dec. 708, that there may not be cases where the purpose of the parties to stir up litigation is so plain that their acts should be regarded as void."

In *Stanton v. Haskin*, 1 MacArth. 559, 29 Am. Rep. 612, decided in 1874, the general term of the supreme court of the District refused specific performance of a contract between attorney and client for a one third interest in land to be (and which was) recovered in litigation maintained in accordance therewith. The court also expressed the opinion that "with some other modifications, the common law with regard to champerty, which is supposed to be founded on the statute of 28 Edw. I., is generally recognized." This seems to be the only case in which the question has ever been discussed or alluded to in the courts of this District.

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It must be admitted, though not to the extent claimed on behalf of appellant, that the conditions prevailing in our country and in our times are so different from those existing in the days when the doctrine of champerty had its origin and was rigidly enforced, that the chief reasons for the existence of the rule have passed away entirely, whilst others have lost or largely spent their force. Modifications and exceptions to the rule were early recognized in England, and have grown and increased there, and generally in greater degree, in this country. Acts of assistance and upholding of litigation were gradually recognized as justifiable when prompted solely by charity to the poor and unfortunate who might else be unable to right a wrong; by the ties and obligations of consanguinity, affinity, or common interest; by the relations of landlord and tenant, master and servant, neighbor and neighbor, and attorney and client. The recognized relations of attorney and client have resulted in the complete recognition of the legality of contingent fees. *Wylie v. Cox*, 15 How. 415, 14 L. ed. 753; *Wright v. Tebbitts*, 91 U. S. 252, 23 L. ed. 320; *Stanton v. Embrey*, 93 U. S. 548, 23 L. ed. 983; *Taylor v. Bemiss*, 110 U. S. 42, 28 L. ed. 64. We have heard of no case, however, where such contracts have been enforced when they contained a covenant by the attorney to prosecute the cause at his own cost. In the foregoing cases no such covenant appeared, and in no one of them was proof made that they were obtained unfairly or an undue advantage taken of the relation of attorney and client. Notwithstanding the changed conditions that have begotten certain changes in public policy, we (as intimated above) cannot admit that all the reasons which formerly operated against the recognition and toleration of champertous contracts have ceased to exist.

Unnecessary and speculative litigation, the promotion of inexcusable strife, the vexation of landholders, and the laying of embargoes on the free alienation of their holders, are as pernicious now as they ever were, and as needful of redress. Contracts which tend to promote these evils are as much opposed to sound public policy as they ever were, and therefore ought not to be enforced. The distinction between contracts in aid of litigation which ought to be enforced, and those which ought not, is well drawn in the case of *Brown v. Bigne*, 21 Or. 260, 14 L. R. A. 745. This was a suit on a contract made between Bigne who was engaged in a necessary and meritorious suit, and had no means with which to further prosecute it, and Brown who furnished the necessary funds upon Bigne's agreement to give him one half of the proceeds. The court found that the contract was fairly and freely made, and had been performed by Brown in good faith, and upheld it as untainted by champerty, but at the same time said: "When such contracts are made for the purpose of stirring up strife and litigation, harassing others, inducing suits to be begun which otherwise would not be commenced, or for speculation, they come within the analogy and principles of that doctrine, and should not be enforced." There is a clear analogy between contracts of this nature, and those for the purchase of a naked right to bring an action at law or in equity, which have gen-

erally, if not universally, been held void, as against public policy. In the case of *De Hoghton v. Money*, L. R. 2 Ch. 164, it was held that "such a transaction, if not in strictness amounting to maintenance, savors of it too much for this court to give its aid to enforce the agreement." *Traer v. Clews*, 115 U. S. 528, 29 L. ed. 467. In this case the court drew the distinction clearly between the assignment of the mere right to file a bill in equity for a fraud that had been committed, which it was declared would be void "as contrary to public policy and savoring of maintenance," and the conveyance of the property itself where "the fact that the grantee may be compelled to bring a suit to enforce his right to the property, does not render his conveyance void."

We would not pursue this discussion further on this line, but for the earnest contention of the appellants that in the absence of an express statute these contracts, or the cause of action based thereon, if really involved, cannot be affected or refused enforcement on grounds of public policy alone. The grounds of this contention are without merit. As we have seen above, champerty was regarded as an offense at common law before the statutes were adopted, and as a thing *malum in se*. From the earliest times courts have declared contracts void because opposed to public policy. Why should there be exceptions to the rule? "All contracts or agreements which have for their object anything which is repugnant to justice, or against the general policy of the common law, or contrary to the provisions of any statute, are void, and whenever a contract or agreement is entered into with a view to contravene any of those general principles, there is no form of words, however artfully introduced or omitted, which can prevent courts of law and equity from investigating the truth of the transaction; for *ex turpi contractu non oritur actio* is a rule both in law and equity. Comyn, Contr. p. 30. See *Boardman v. Thompson*, 25 Iowa, 487; *Kennett v. Chambers*, 14 How. 38, 14 L. ed. 316." This last case was a suit to enforce a contract for the sale of lands in Texas between Chambers, the owner, who was an officer in the service of the Republic of Texas, and complainants who were citizens of Ohio. The moneys advanced on the contract were to be used in aid of the war for Texan independence. The contract was made and the money paid in Ohio before the independence of Texas was recognized by the government of the United States. The bill was filed in the United States circuit court for the district of Texas some years after the admission of that state into the Union, which dismissed it, and that decree was affirmed on appeal therefrom. The decision was not made to rest upon any statute or treaty of the United States. As said by Chief Justice Taney: "The decision stands on broader and firmer ground, and this agreement cannot be sustained either at law or in equity. The question is not whether the parties to this contract violated the neutrality laws of the United States or subjected themselves to a criminal prosecution, but whether such a contract, made at that time, within the United States, for the purposes stated in the contract and the bill of complaint, was a legal and valid contract and such as to entitle either party to the aid of the courts 41 L. R. A.

of justice of the United States to enforce its execution." See also *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225.

If this suit were for the express purpose of testing the validity of these contracts and obligations, there could be no doubt of the result. In England the rule denying the enforcement of such contracts has been uniformly adhered to. In *Powell v. Knowler*, 2 Atk. 224, decided in 1741, enforcement was denied a contract which the court said was evidently artfully drawn to keep it out of the statutes of champerty. In *Wood v. Downes*, 18 Ves. Jr. 120, a contract with an attorney was set aside on a bill for that purpose. In his opinion therein, Lord Eldon quoted with express approval a declaration of Lord Northington in *Strachan v. Brander*, 1 Eden, 303, to this effect: "The transaction [by which a fund had been raised to carry on legislation] though not strictly champerty, was so near it that it could not be permitted to prevail; it savors of champerty, and is therefore dangerous to public justice." See also *Stevens v. Bagwell*, 15 Ves. Jr. 139; *De Hoghton v. Money*, L. R. 2 Ch. 164; *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, L. R. 2 App. Cas. 186. This last case was an action for damages and costs incurred in a suit vexatiously carried on against plaintiff through a contract between defendant and another, and came before the house of lords on appeal from India. It was held that the law against maintenance and champerty did not prevail in India wherefore fair agreements to furnish funds to carry on litigation in consideration of a share of the property are not *per se* void. But it was said in connection therewith (p. 209): "It seems clear . . . that contracts of this character ought, under certain circumstances, to be held invalid, as being against public policy." *Stanton v. Hoskin*, 1 MacArth. 559, 29 Am. Rep. 612, and some other American cases have been heretofore cited, and others will be referred to later.

Without undertaking to define limits or specify all exceptions that may be recognized, we hold that a purely champertous contract, or one which savors as strongly of champerty and public mischief as the one under consideration, is against sound public policy, and ought not to be enforced in the District of Columbia. Contracts for the prosecution of harassing litigation, which would not otherwise be instituted, and upon speculation in a spirit of gambling, shares in which may be thrown upon the market to be disposed of to chance buyers, like tickets in a lottery, ought to receive the condemnation of the courts of this District when brought to their attention in a proper manner. To encourage the formation of syndicates or trusts for the purpose of maintaining litigation like this—for this is but one of a series that may be instituted at any time for the recovery of lots throughout the boundaries of the old "Jamaica" tract of 494 acres—could have none but a mischievous effect. Once legalize them or give them the slightest approval, and in these times of feverish speculation and marked propensity for gambling enterprises which promise great returns for small investments, we may, not unreason-

ably, expect to see similar joint-stock associations formed for the express purpose of maintaining lawsuits throughout the land, thereby vexing the people, crippling their enterprises, interfering with the growth and development of country and cities, and producing other and great mischiefs.

It does not follow, however, that every champertous contract, incidentally connected with the title or thing in controversy, can be brought within the grasp of the court therein. There may be other distinct and controlling considerations. It is now generally held that where a party has a right or title he cannot be debarred from its prosecution by reason of an incidental contract concerning the same which may be unlawful or against public policy, because this would be equivalent to a forfeiture of title. The practical effect would be to deplete the title of the true owner and vest it in his disseisor. *Brumley v. Whiting*, 5 Pick. 342; *Robison v. Beall*, 26 Ga. 17; *Allison v. Chicago & N. W. R. Co.* 42 Iowa, 214; *McMullen v. Guest*, 6 Tex. 275; *Hilton v. Woods*, L. R. 4 Eq. 432. It is true that a contrary rule prevails in some states (*Barker v. Barker*, 14 Wis. 142; *Allard v. Lamirande*, 29 Wis. 502; *Cardwell v. Spriggs*, 7 Dana, 36; *Harman v. Brewster*, 7 Bush. 355); but the question may be regarded as firmly settled as far as we are concerned by the Supreme Court of the United States. *Boone v. Childs*, 10 Pet. 177, 9 L. ed. 388; *Burnes v. Scott*, 117 U. S. 582, 29 L. ed. 901.

The difficulty in this case is that it does not present that aspect entirely. The suit is not by and in the names of the heirs of Samuel Blodgett. If this were the case we would be constrained to hold that collateral contracts, though tainted with champerty, could not be brought to the attention of the court by plea or otherwise, so as to bar the right of action.

It becomes necessary now to notice the contention of appellant, that, granting the existence of champerty, the deed to Johnson is good as a conveyance by the heirs of the legal title, notwithstanding all other provisions thereof may be rejected. The proposition is that "when there are several stipulations in a particular agreement, and one is illegal, it does not defeat the others when they are divisible, and the consideration as a whole is not illegal." Without pausing to affirm or deny the soundness of this proposition, quoted from Wharton on Contracts, we deny its application to papers offered in evidence, in this case. The stipulations and provisions of these contracts are not divisible; they are and were clearly meant to be inseparable. The "consideration as a whole" is illegal. It is the maintenance of this and other contemplated suits for the benefit of all, but at the expense and through the efforts exclusively of Lorin Blodgett and his assignees. The recited additional consideration of "ten dollars" is purely nominal, and cannot be regarded as a consideration to support the contract or deed separated from the real and main one. It was not intended to confer a shadow of title upon the grantee save for the purposes of the trust. These are the moving considerations, and it is in their conditions that the illegality lies. They cover in their recitals each and every

instrument or contract in the series. They cannot be rejected without destroying the whole scheme, and every purpose of the conveyance, and vesting in Johnson a title which it cannot be pretended was within the contemplation of anyone who executed it or is interested in its operation. The deed must therefore be taken as a whole and in connection with each instrument referred to and made a part of it. The heirs of Samuel Blodgett have mingled and bound up their claim, if a just one, with the interests of Lorin Blodgett and the certificate holders in the champertous trust organized by him. These rights and interests are inseparable in the action as brought. The trustee's recovery inures to the benefit of all alike. If we hold them barred out of their right to recover in this action the heirs of Samuel Blodgett have themselves alone to blame. It may be added also that dismissing this action will not bar any action they may see proper to maintain when they shall have withdrawn from the illegal contract with Lorin Blodgett and his associates. If they suffer it will be the consequence of mingling a just and legal claim with a bad one so that they cannot be separated. This would be in strict accord with the doctrine of *Trist v. Child*, 21 Wall. 441, 22 L. ed. 623, where a suit was brought upon a claim for legal services mingled with "lobby" services in prosecuting a claim before Congress. In denying a recovery Mr. Justice Swayne said: "We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and confused with those which are forbidden, the whole is a unit and indivisible." That which is bad destroys that which is good, and they perish together."

This suit cannot be maintained without we give our approval to the unlawful contracts which enter into and form a part of the plaintiff's claim of title. These are not collateral matters sought to be forced on our attention by plea or motion or affidavit; they inhere in the title itself, and must be given effect if plaintiff be permitted to recover thereon. While the point is not without grave and serious difficulty in the absence of direct and binding authority, we nevertheless think that upon principle it should be resolved against the appellants, and this conclusion has support in decisions of courts of high authority made in cases which are analogous. *Hilton v. Woods*, L. R. 4 Eq. 432; *Elborough v. Ayres*, L. R. 10 Eq. 367; *Harrington v. Long*, 2 Myl. & K. 590; *Bayly v. Tyrrell*, 2 Ball & B. 353; *Chalmers v. Clinton*, 4 Bligh, 1; *Saylor v. Stewart*, 3 Heisk. 510.

In *Hilton v. Woods* the plaintiff enjoined defendant from mining coal in land belonging to him, and asked for an account for that which had been before taken out. Plaintiff had been in ignorance of his rights in the premises until informed by a solicitor named Wright. He made a contract with Wright by which the latter guaranteed plaintiff against all costs, and in consideration was to share the proceeds of the recovery. The champertous contract was brought to the attention of the court by affidavit. The vice chancellor held that the champertous contract could not be introduced for the purpose of depriving plaintiff of his

action, but said: "I have carefully examined all the authorities which were referred to in support of this argument, and they clearly establish that whenever the right of the plaintiff in respect of which he sues, is derived under a title founded on champerty and maintenance, his suit will on that account necessarily fail. But no authority was cited, nor have I met with any, which goes the length of deciding that where a plaintiff has an original and good title to property he becomes disqualified to sue for it by having entered into an improper bargain with his solicitor as to the mode of remunerating him for his professional services in the suit or otherwise. It is clear that the bargain between plaintiff and Mr. Wright amounted to maintenance, and if the latter had been the plaintiff suing by virtue of a title derived under that contract, it would have been my duty to dismiss his bill." As it was, however, costs were denied plaintiff, because as under the contract they were payable by Wright, recovery thereof would inure to his benefit.

Elborough v. Ayres is not itself in point, but in the opinion, James, V. C., relates a case tried before V. C. Willes, of *Etans v. Prothero* (not reported), in which the plaintiff suing upon a title acquired through champerty had been turned out of court. In *Harrington v. Long*, 2 Myl. & K. 590, one Milligan had obtained a decree on a bill filed as a creditor of Long, the deceased testator. A supplemental bill was filed by Harrington and the original plaintiff, Milligan, against Sarah Long, executrix, alleging that she had proved the will of testator since said decree, and asking to set aside a certain deed made to her by the testator five days before his death when in a state of mental incapacity, as fraudulent and void as to creditors. The bill alleges that Milligan after proving his debt before the master, under the decree, had assigned the same to Harrington, with whom he joined as co-plaintiff in the supplemental proceeding. The master of the rolls (Sir John Leach) held that the mere assignment of the debt was not maintenance; but upon inspection of the contract between the parties and discovery that the assignee had given the assignor an indemnity against all costs, for the purpose of prosecuting the suit, he dismissed the bill for the champerty. This decree was affirmed by the Lord Chancellor.

Bayly v. Tyrrell is a case of this kind. Joseph Tyrrell was the owner of an interest in land, the possession of which was withheld from him by his brother William for a claim charged thereon in his favor in partition proceedings, but under no claim of adverse title. In 1790 Joseph executed a lease of the premises to Bayly, who was an attorney. In 1791 he filed a bill against William praying a decree for possession, and, becoming embarrassed, he agreed with Bayly for a material abatement in

the rent in consideration of the latter's advance of £50 to bring the case to a hearing. Joseph died pending the suit, and his heir at law refused to continue it. Bayly then filed his bill to recover possession, and for an account for rent from the commencement of his lease. Because the transaction was against public policy the bill was dismissed without prejudice to his right to sue at law for the non-performance of the agreement.

The case of *Cholmondeley v. Clinton* was very much argued and finally concluded in the House of Lords. The two plaintiffs, Lord Cholmondeley and Mrs. Dames, joined in the bill, though their claims were adverse to each other, for one claimed the whole as heir at law of Horatio, Earl of Oxford, while the other claimed the whole as devisee of the same. The bill contained this recital: "Some questions had arisen between them [plaintiffs] respecting the will and codicil of Horatio, Earl of Oxford, so far as regards the equity of redemption of the said mortgaged hereditaments, and that in order to put an end to such questions, they had agreed to share the same between them." Lord Eldon said: "This agreement was one that a court could not overlook even if the parties so wished." In his opinion to the Lords, Lord Redesdale denounced the agreement, and referring to the inconsistency of the claims of the plaintiffs, said: "To avoid that inconsistency, they state this agreement, which is contrary to law, and which you are bound to destroy." 4 Bligh, 123, 124. *Saylor v. Stewart* is a case directly in point, though it is evidently based upon a statute of Tennessee, relating to maintenance and champerty, which is not recited in the report of the case. It would not seem, however, to affect the principle. The action to recover land was brought in both the names of the grantor and grantee in a champertous deed. The court said that had the grantor brought the suit alone, or had there been a separate count for recovery in his name alone, the champertous deed to his grantor, being void therefor, could not have been relied on to defeat his recovery. "But seeking in a single count to recover in the joint names of the grantor and grantee, the champertous contract made by one of the parties affects the interest of both, and is fatal to the whole suit."

We are not unmindful of the injury which may be suffered by the heirs of Samuel Blodgett through our judgment, if indeed they have a good title to their lands, which may be affected only by adverse possession. But the injury is the result of their own deliberate conduct. Public policy looks beyond and far higher than the mere interests or inconvenience of parties.

It follows that *the judgment must be affirmed; and it is so ordered, with costs to the appellee.*

SOUTH DAKOTA SUPREME COURT.

STATE of South Dakota

v.

Joseph THORNTON, *Plff. in Err.*

(.....S. D.....)

1. Reference by the court to the "crime charged" in its instructions will not be regarded as having misled the jury from the fact that a witness incidentally stated that accused had been arrested upon another charge than that for which he was on trial.
2. The use by the court of the expression "where the state makes out such a case as would sustain a verdict of guilty" will not justify an understanding by the jury that guilt may be found upon a preponderance of evidence, if they are expressly told that to

convict they must be satisfied of guilt beyond a reasonable doubt.

3. The burden of proving an alibi is upon defendant after the state has made out a prima facie case, to the extent, at least of raising a reasonable doubt of guilt.

(Fuller, J., dissents.)

(December 8, 1897.)

ERROR to the Circuit Court for Miner County to review a judgment convicting defendant of burglary. *Affirmed.*

The facts are stated in the opinion.

Mr A. E. Chamberlain for plaintiff in error.

Mr. L. J. Martin, for defendant in error:
An alibi is an affirmative or extrinsic de-

NOTE.—Burden and measure of proof of an alibi.

- I. Proof by defendant beyond a reasonable doubt.
- II. Proof by defendant by a preponderance of evidence.
 - a. General rules.
 - b. As affected by reasonable doubt on whole case.
- III. Proof by defendant to raise a reasonable doubt.
- IV. Proof by prosecution beyond a reasonable doubt.
 - a. General rule as to burden of proof.
 - b. Measure of proof.
 - c. Consideration of all the evidence.
 - d. How jury should be instructed.
- V. Time covered by proof.
- I. Proof by defendant beyond a reasonable doubt.

The question as to who is called upon to assume the burden of proof in a criminal prosecution in which an alibi is sought to be established, as well as with reference to the measure of proof by which it is to be established or disestablished, has given rise to a great contrariety of opinion. But while it has been frequently claimed that the accused should be required to establish his alibi by the same measure of proof as that by which the prosecution is required to show guilt, it has been uniformly held, whenever the question has arisen, that the accused need not prove an alibi beyond a reasonable doubt.

This was held in *People v. Fong Ah Sing*, 64 Cal. 253; *Miles v. State*, 93 Ga. 117; *Harrison v. State*, 83 Ga. 129; *Landis v. State*, 70 Ga. 652, 48 Am. Rep. 588; *Ackerson v. People*, 124 Ill. 563; *Mullins v. People*, 110 Ill. 42; *State v. Fry*, 67 Iowa, 478; *State v. Reed*, 62 Iowa, 40; *State v. Kline*, 54 Iowa, 183; *State v. Fenlason*, 78 Me. 495; *People v. Stone*, 117 N. Y. 480; *State v. Watson*, 7 S. C. 63; *Chappel v. State*, 7 Coldw. 92; *Gallaher v. State*, 28 Tex. App. 247; *State v. Ward*, 61 Vt. 163.

And an instruction that the proof necessary to establish an alibi must produce as much certainty as would be required of the state to establish guilt, is erroneous. *Chappel v. State*, 7 Coldw. 92.

To establish an alibi the jury need not be fully satisfied of its truth. *State v. Henry*, 48 Iowa, 403.

But an instruction in a criminal prosecution that proof of an alibi must be clear and convincing, and must satisfy the jury by a preponderance of the evidence that the accused

was at the time of the killing at the place where the killing is said to have occurred, is not objectionable because of the use of the words "clear" and "convincing,"—especially where the jury were told in that connection, as well as in other portions of the charge, that it was not necessary that the alibi should be proved beyond a reasonable doubt. *State v. Jackson*, 38 S. C. 487.

- II. Proof by defendant by a preponderance of evidence.

a. General rules.

The doctrine has been adopted to some extent that a plea of alibi in a prosecution for crime is an extrinsic defense not arising out of the *res gesta*. *People v. Lee Sare Bo*, 72 Cal. 622; *State v. Krewsen*, 57 Iowa, 588; *State v. Ward*, 61 Vt. 163.

Under this theory the burden of proof of an alibi is held to rest with the defendant. *Pate v. State*, 94 Ala. 14; *Pellum v. State*, 89 Ala. 28; *People v. Lee Sare Bo*, 72 Cal. 623; *Harrison v. State*, 83 Ga. 129; *Garrity v. People*, 107 Ill. 162; *State v. Bensley*, 84 Iowa, 83; *State v. Maher*, 74 Iowa, 77; *State v. Rowland*, 72 Iowa, 327; *State v. Rivers*, 68 Iowa, 611; *State v. Hamilton*, 57 Iowa, 596; *State v. Krewsen*, 57 Iowa, 588; *State v. Red*, 53 Iowa, 69; *Trujillo v. Territory*, 7 N. M. 43; *Walker v. State*, 37 Tex. 367.

And it must be proved by a preponderance of the evidence. *People v. Lee Sare Bo*, 72 Cal. 623; *State v. Hamilton*, 57 Iowa, 596; *State v. Rowland*, 72 Iowa, 327; *State v. Red*, 53 Iowa, 69; *State v. Reed*, 62 Iowa, 40; *State v. Kline*, 54 Iowa, 183.

Or, as it is put in some cases, to the reasonable satisfaction of the jury. *Pate v. State*, 94 Ala. 14; *Harrison v. State*, 83 Ga. 129; *Miles v. State*, 93 Ga. 117; *Trujillo v. Territory*, 7 N. M. 43; *Walker v. State*, 37 Tex. 367.

Or, it must be clearly and satisfactorily established before it can avail, where the evidence otherwise makes out a clear case against the accused. *Garrity v. People*, 107 Ill. 162.

The defense of alibi in a criminal prosecution rests upon extraneous facts not arising out of the *res gesta*, and the onus of proving it rests with the respondent who alleges it, and it must be established, not beyond a reasonable doubt, but by evidence which preponderates or outweighs that of the state. *State v. Ward*, 61 Vt. 163; *State v. Krewsen*, 57 Iowa, 588; *Com. v. Webster*, 5 Cush. 324, 52 Am. Dec. 711.

If the evidence in a criminal prosecution introduced on the part of the state, taken alone,

fense. By it the defendant seeks to prove matters which make it utterly impossible that the crime could have been committed by him.

Perry v. Dubuque S. W. R. Co. 36 Iowa, 106; *Schloss v. His Creditors*, 81 Cal. 208; Cal. Code Civ. Proc. § 1824.

There is a long line of cases, commencing with the instructions of Chief Justice Shaw in *Com. v. Webster*, 5 Cush. 324, 52 Am. Dec. 711, where the jury are instructed to look with suspicion upon the defense of an alibi, as a defense which is often attempted by contrivance, subornation, and perjury.

Then there is a line of cases which hold that an instruction as follows is correct, to wit: Where defendant sets up an alibi, the burden of proof is upon him to establish that defense by a preponderance of the evidence.

Under the instructions in this case the defendant was not required to introduce evidence

which overbalanced the evidence introduced by the state; it was sufficient if he introduced evidence which was equal to that introduced by the state, or if he introduced evidence which raised a reasonable doubt in the minds of the jury as to his guilt.

A verdict of guilty can never be sustained unless there is sufficient evidence introduced by the state to satisfy the jury beyond a reasonable doubt of the guilt of the defendant.

Ackerson v. People, 124 Ill. 563.

Corson, P. J., delivered the opinion of the court:

The defendant was tried upon an information, and convicted of the crime of burglary, in the circuit court of Miner county. A writ of error was sued out of this court to that court, and the case is now before us for review. Only three errors assigned need be con-

is sufficient to establish the defendant's guilt beyond a reasonable doubt, it is then incumbent on the defendant to establish an alibi or other defense which may be done by a preponderance of the evidence. *State v. Hemrick*, 62 Iowa, 414.

A preponderance of the evidence is the lowest degree of proof upon which the issues of fact are determined, and the defendant in a criminal prosecution must therefore prove a defense of alibi by a preponderance of the evidence, even as the basis of a reasonable doubt. *State v. Beasley*, 84 Iowa, 83.

And a charge in a criminal prosecution, asserting the proposition that the defendant was not required to establish the defense of an alibi to the reasonable satisfaction of the jury, is erroneous, and properly refused. *Holley v. State*, 105 Ala. 100.

By a preponderance of evidence by which the defendant in a criminal prosecution may establish an alibi is meant, not a greater number of witnesses, but the greater weight of the testimony; and if the circumstances in evidence, taken together, in the judgment of the jury outweigh the testimony of any number of witnesses, they will be authorized to render their verdict accordingly. *State v. Kline*, 54 Iowa, 183.

And a verdict in a criminal prosecution in which an alibi was sought to be established will not be disturbed on appeal unless it is against the clear weight of the evidence. *State v. Beasley*, 84 Iowa, 83.

An alibi established by a preponderance of the evidence, however, entitles the accused to an acquittal, and an instruction proceeding upon the theory that an alibi would be a fact to be considered in connection with other facts and circumstances is erroneous as calculated to confuse and mislead. *State v. McCracken*, 66 Iowa, 569.

And an instruction in a criminal prosecution that the burden of proof rests with the defendant to establish an alibi, and that it must be done to the satisfaction of the jury, is erroneous as requiring too high a degree of proof, reasonable satisfaction being sufficient. *Prince v. State*, 100 Ala. 144.

To establish an alibi in a criminal prosecution a bare preponderance of the evidence is sufficient, and an instruction that the accused must fully satisfy the jury by a preponderance of the evidence is erroneous. *State v. Hardin*, 46 Iowa, 623, 26 Am. Rep. 174.

In that case *Com. v. Webster*, 5 Cush. 324, 52 Am. Dec. 711, *infra*, was distinguished upon the ground that the alibi sought to be established

in that case was of the person alleged to have been killed, and not of the prisoner.

But an instruction in a criminal prosecution that the defense of an alibi must be established by the accused by a fair preponderance of the evidence to warrant an acquittal is not rendered erroneous by the use of the qualifying word "fair." *State v. Johnson*, 72 Iowa, 393.

And an instruction that it is the duty of the defendant in proving an alibi to reasonably satisfy the jury that he was elsewhere at the time of the commission of the offense is not subject to objection, on appeal, that the statement tended to mislead the jury in that they might not understand that the words "it is the duty of the defendant," etc., merely impose on him the *onus probandi* on the issue, where he failed to ask for an explanatory instruction in the court below. *Pellum v. State*, 89 Ala. 23.

And objection that the court should have instructed the jury that, as the defendant relied upon an alibi, he should establish it by a preponderance of the evidence, cannot be taken by the defendant, where there was nothing in the instructions directing the attention of the jury to the alibi except the general direction that they should consider all the facts in the case in determining the guilt or innocence of the defendant, as the omission so to instruct was favorable, rather than prejudicial, to him. *State v. Sutton*, 70 Iowa, 268.

So, evidence in a prosecution for murder that the person alleged to have been killed was seen elsewhere after the time he was supposed to have been killed, is similar to a case of alibi, in that it proposes to prove a fact which is repugnant to and inconsistent with the facts constituting the evidence on the other side, so as to control the conclusion, or, at least, render it doubtful, and thus lay a ground for an acquittal; and such evidence is material; and such fact must be made out by satisfactory proof. *Com. v. Webster*, 5 Cush. 324, 52 Am. Dec. 711.

And the burden of proof in a prosecution for murder, that the person alleged to have been killed still lives, as well as of an alibi, rests with the accused, and must be sustained by proof sufficient to outweigh the proof tending to establish the contrary hypothesis. *State v. Vincent*, 24 Iowa, 570, 95 Am. Dec. 753.

And in *State v. Cruise*, 19 Iowa, 312, the rule of law with reference to an alibi laid down in *Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711, *supra*, was approved and adopted.

b. As affected by reasonable doubt on whole case.

The failure of a person accused of crime to

sidered. They are, in effect, as follows: (1) The court erred in allowing the state to add to the information the names of witnesses sworn on the part of the state; (2) the court erred in instructing the jury upon the credibility and weight to be given to the evidence of the defendant as a witness in his behalf; (3) that the court erred in instructing the jury as to the question of alibi, upon which defendant introduced evidence.

The question presented by the first assignment of error is ruled by the decision in *State v. King*, 9 S. D. 628, and need not be further considered.

The question raised by the second assignment of error was substantially disposed of in

State v. Smith, 8 S. D. 547. The contention of counsel for the plaintiff in error that the jury might have understood the court, in speaking of the crime charged, as referring to some crime other than that for which he was then being tried, is not tenable. The fact that a witness had incidentally spoken of the defendant as having been arrested upon another charge would hardly be sufficient to warrant us in believing that the jury could have been misled by the charge of the court when speaking of the crime with which the "defendant is charged." We think this court must assume that the jury understood the court as referring to the crime for which defendant was being tried.

prove an alibi does not relieve the prosecution from the duty of proving that he was the perpetrator of the crime. *Briceland v. Com.* 74 Pa. 463.

And while the burden of proving an alibi in a criminal prosecution rests with the accused, and if he fails to do so to the satisfaction of the jury the alibi as a substantive defense is valueless, an alibi is as much a traverse of the crime charged as any other defense, and the proof tending to establish it, though not clear, may, with other facts of the case, raise a reasonable doubt of his guilt to the benefit of which he is entitled, and therefore it must not be excluded from the cause. *Rudy v. Com.* 128 Pa. 500; *Watson v. Com.* 95 Pa. 418; *Ledford v. State*, 75 Ga. 856; *State v. Ward*, 61 Vt. 103.

And if, upon the whole evidence, including that in relation to the alibi, there is reasonable doubt of the guilt of the accused, he is entitled to an acquittal. *State v. Ward*, 61 Vt. 103; *Ledford v. State*, 75 Ga. 856.

A conviction cannot stand where the evidence not only fails to show affirmatively that the accused committed or participated in the crime, but leaves it uncertain by whom it was committed. *Ward v. State* (Ga.) 28 S. E. 982.

Where a person accused of crime sets up the defense of alibi the burden rests with him to establish it to the satisfaction of the jury; but, though they are not satisfied of the truth of the alibi, they are still required to say whether they are satisfied beyond a reasonable doubt, from the evidence, that the crime was committed as alleged. *State v. Freeman*, 100 N. C. 429.

Though the evidence offered to establish an alibi falls short of the weight of moral certainty as to its existence, if it leaves in the minds of the jury such a doubt or uncertainty that, taken by itself, they could not find for or against the alibi, they are bound to carry such doubt into the case of the prosecution, and array it there as an element of the reasonable doubt beyond which the prosecution must establish guilt. *People v. Fong Ah Sing*, 64 Cal. 253.

While an alibi must be proved to the reasonable satisfaction of the jury, the evidence adduced to support it should be weighed and considered by the jury with the other evidence in the case, and as other facts are weighed and considered; and if, upon the whole evidence, there should be a reasonable doubt of the defendant's guilt, he should be acquitted. *Pate v. State*, 94 Ala. 14; *State v. Maher*, 74 Iowa, 77.

And before a conviction can be had the jury must be satisfied beyond a reasonable doubt that the accused was there at the time of the commission of the crime. *People v. Lee Sare* Ro. 72 Cal. 623.

41 L. R. A.

And a charge in a criminal prosecution excluding all the evidence as to an alibi from being weighed by the jury on the subject of reasonable doubt of the defendant's guilt on the issue of guilty or not guilty is erroneous. *Ledford v. State*, 75 Ga. 856.

But whether evidence as to an alibi was sufficient to create a reasonable doubt in the minds of the jury as to the defendant's guilt is a question of fact exclusively for the consideration of the jury, and where there is evidence to sustain a verdict against him it will not be set aside and a new trial ordered on the ground that there was sufficient evidence of an alibi to create a reasonable doubt as to the guilt of the defendant. *Arnold v. State*, 53 Ga. 325.

And an instruction in a criminal prosecution that an alibi relied upon as a defense must be established by a preponderance of the evidence, and another that if upon the whole evidence, including that tending to establish the alibi, the jury entertains a reasonable doubt, they should acquit, are not contradictory and misleading, but harmonize with each other and accord with the law. *State v. Maher*, 74 Iowa, 77.

And an instruction requiring the jury to give the prisoner the benefit of any and all reasonable doubt upon summing up the entire evidence, including that relating to an alibi, is sufficient. *Harrison v. State*, 83 Ga. 129.

But the burden of establishing an alibi rests with the accused, and should be made out to the satisfaction of the jury; and an instruction to that effect is not erroneous where the jury were also instructed that if on the whole case they have a reasonable doubt they should acquit. *State v. Jennings*, 81 Mo. 185, 51 Am. Rep. 236. But see *State v. Howell*, 100 Mo. 628, *supra*, III. for present Missouri rule.

And an instruction in a criminal prosecution that the defense of alibi admits all the prosecution alleges to be true will be taken to refer to the defense of alibi alone, and not as a direction that all other facts are to be taken as admitted, and is therefore good, where the jury were also told that the law exacts a conviction whenever there is legal evidence to show the prisoner's guilt beyond a reasonable doubt. *Fife v. Com.* 29 Pa. 429.

So, an instruction in a criminal prosecution in which there is evidence of an alibi, that if the jury believe that the evidence clearly sustained it or raised in their minds a reasonable doubt as to the guilt of the defendant they must acquit him, gives him the benefit of all his legal rights. *Trujillo v. Territory*, 7 N. M. 43.

And an instruction that if there is any reasonable doubt of the defendant's guilt of the crime charged against him on the whole evidence he is entitled to an acquittal, where an alibi had

The third assignment of error presents an important question, not heretofore determined by this court. Upon the question of alibi, the court charged the jury as follows: "The defendant claims as one of his defenses what is known in law as an 'alibi,' that is, that, at the time the crime with which he is charged was committed, he was at a different place, so that he could not have participated in its commission. Such a defense is proper and legitimate; and upon this question the court instructs you that where the state makes out such a case as would sustain a verdict of guilty, and the defendant offers evidence, the burden is upon the defendant to make out his defense as to an alibi; and when the proof

is all in, both that given for the defendant and for the state, then the primary question is (the whole evidence being considered), Is the defendant guilty beyond a reasonable doubt?—? the law being that if, after you have considered all the evidence, as well that touching the question of alibi as the criminating evidence introduced by the state, you have a reasonable doubt of the guilt of the accused, you should acquit; if you have not, you should convict."

The contention of the counsel for plaintiff in error is that the court erred in instructing the jury that "where the state makes out such a case as would sustain a verdict of guilty," for the reason that the jury might

been claimed, furnishes the accused with no reasonable ground for complaint. *State v. Reed*, 62 Iowa, 40.

And an instruction in a criminal prosecution that the burden of establishing an alibi rests with the defendant, and the evidence introduced to sustain it should outweigh the proof introduced by the state tending to show the defendant's participation in the crime, but that they are not bound to establish such defense beyond a reasonable doubt; and if, upon the whole case, the testimony raises in the minds of the jury a reasonable doubt that the defendants were present at the place where the crime was committed, that would create a reasonable doubt as to guilt and entitle them to an acquittal,—is fully as favorable to the defendants as they have any right to demand. *State v. Fry*, 67 Iowa, 178.

So, a reversal will not be had in a criminal prosecution in which an alibi is set up on an instruction that it is incumbent on the accused to establish it by a preponderance of the evidence, but not beyond a reasonable doubt, on the ground that it requires the accused to establish the alibi, where it is followed by another instruction that, after consideration of all the evidence in the case, as well that in relation to the alibi as that offered by the prosecution, the jury has reasonable doubt as to whether the accused was at the place where the crime was committed, they should give him the benefit of that doubt, as by this he is relieved from the responsibility of establishing his absence by a preponderance of the evidence. *Borrego v. Territory*, 8 N. M. 446; *People v. Tarm Pol*, 86 Cal. 225.

An instruction in a criminal prosecution that the burden of proof is on the defendant to establish his alibi, and that it must be done to the reasonable satisfaction of the jury, however, without any direction for acquittal in case of reasonable doubt as to guilt, upon all the evidence, is incorrect as tending to lead the jury to believe that a defendant relying on an alibi must prove it as a party in a civil case must prove a fact on which he relies, by a preponderance of the evidence, but will not be deemed a ground for reversal unless it is plain that the jury have been misled thereby. *Towns v. State*, 111 Ala. 1.

And an instruction in a prosecution for larceny that the burden of proof is on the state to show beyond a reasonable doubt that the larceny charged was in fact committed, but if the state has made this proof then the burden is on the defendant to establish by the weight, or preponderance, of the evidence his defense of alibi, but if the entire evidence upon the whole case raises a reasonable doubt as to the defendant's guilt he should be acquitted,—is not subject to the objection that it relieves the state

from the burden of proving that the defendant committed the larceny, and made it incumbent on him to prove that he did not do so. *State v. Van Winkle*, 80 Iowa, 15.

And an instruction in a criminal prosecution that if the alibi was proved the prisoner should be acquitted, is not rendered improper by the failure of the court, on request, to charge that unless the jury found beyond a reasonable doubt that the person was not at the place of the crime at the time in question they should acquit, where the jury were told that to convict the prosecution must establish their whole case beyond a reasonable doubt. *State v. Cameron*, 40 Vt. 555.

So, an instruction in a criminal prosecution against two persons, that the defense of alibi, to be entitled to consideration, must be such as to show that at the very time of the commission of the crime charged the accused were at another place so far away, or under such circumstances, that they could not, with ordinary exertion, have reached the place where the crime was committed so as to have participated in it, and that if the proof of alibi fails as to either defendant on trial the jury will not consider it as to him, but if it does not fail as to either they are to give it full consideration as to the defendant of whom it was shown,—is not subject to the objection that the jury are thereby directed that they are not to consider the evidence pertaining to the alibi on the question of reasonable doubt of guilt. *State v. Maher*, 74 Iowa, 77.

III. Proof by defendant to raise a reasonable doubt.

In some of the cases holding the reasonable doubt doctrine, the burden of proof after the establishment of a prima facie case by the prosecution is deemed to shift to the defendant, claiming an alibi, so as to require him to raise a reasonable doubt, either of presence, or of guilt generally. See *STATE V. THORNTON*.

Thus, where the people in a criminal prosecution have made out a prima facie case, and the defendant relies on the defense of alibi, the burden rests with him to prove it, not beyond a reasonable doubt, nor by a preponderance of the evidence, but by such evidence, and to such a degree of certainty, as will, when the whole evidence is considered, create in the minds of the jury a reasonable doubt of his guilt. *Ackerson v. People*, 124 Ill. 563; *Mullins v. People*, 110 Ill. 42.

The presence of the accused being necessary to the commission of an offense, the burden of proving presence in the first instance is upon the state, and if it fails to prove presence, or if the evidence as a whole leaves a reasonable doubt in the minds of the jury, it must acquit; but the burden of proving an alibi is upon the

have understood by that expression that the evidence should preponderate in favor of the prosecution, and not that the prosecution should prove such a state of facts as would warrant the jury in believing the defendant guilty beyond a reasonable doubt. But we think this view cannot be sustained, for the reason that the court, in its charge, had, in at least two instances before it came to this part of the charge, instructed the jury that they could not convict the defendant, unless the evidence satisfied them beyond a reasonable doubt of his guilt. Such being the case, no reasonable jury could have possibly understood that the court was speaking of any other state of facts as sustaining a verdict of guilty.

The statement itself also necessarily implies that the evidence of the prosecution must be such as to satisfy the jury beyond a reasonable doubt of the guilt of the defendant. No other state of facts would sustain a verdict. Hence, in either view, the charge, in the respect mentioned, is not subject to criticism.

Counsel for the plaintiff in error further contends that the court erred in instructing the jury that "the burden was upon him [the defendant] to make out his defense as to an alibi;" and he relies confidently upon this alleged error for a reversal of the judgment. There is in the earlier cases an irreconcilable conflict in the authorities as to the nature and effect of evidence tending to prove an alibi,

prisoner, and if the evidence tends to prove the same, and to show that he could not have been guilty of the offense charged because of absence, then it would be proper for the court to instruct the jury that if there was reasonable doubt whether the prisoner was at the place where the offense was committed at the time of its commission they should acquit him. *State v. Lowry*, 42 W. Va. 205.

A reasonable doubt upon the part of the jury as to the presence of the accused at the time and place of the commission of the offense is the same as a reasonable doubt as to his committing the offense. *State v. Lowry*, 42 W. Va. 205.

And where the prosecution in a criminal case presents sufficient evidence to secure a verdict of conviction the burden is on the defendant to prove his defense, but when his proof is in, the final question is, Are the essential averments of the indictment proved beyond a reasonable doubt? and among these essential averments is the defendant's participation in the act charged, proof of an alibi being as much of a traverse of the crime charged, as any other defense. *State v. Howell*, 100 Mo. 628.

In *State v. Howell*, 100 Mo. 628, *supra*, *State v. Jennings*, 81 Mo. 185, 51 Am. Rep. 236, *supra* II. b, was overruled.

The burden of establishing an alibi in a criminal prosecution rests with the accused, and in order to maintain it he is bound to establish in its support such facts and circumstances as are sufficient, when considered with all the other evidence in the case, to create in the minds of the jury a reasonable doubt of the truth of the charge against him. *Carlton v. People*, 150 Ill. 181; *Ackerson v. People*, 124 Ill. 563; *Ware v. State*, 59 Ark. 379.

And when the evidence for the state establishes beyond a reasonable doubt that the accused was present and participated in the commission of the offense, and is guilty as charged, he may rebut the case made by the state by proof of an alibi; but unless he makes such proof, or proves some other matter which will exculpate him or raise in the minds of the jury a reasonable doubt of his guilt, his conviction must follow. *Gallaher v. State*, 28 Tex. App. 247.

A person accused of crime, who attempts to establish an alibi, which, if established, would show the impossibility of his connection with it, takes on himself the affirmative of the proof; but it is not necessary that he should establish his defense by preponderating evidence; it is sufficient if the evidence is such as to raise a reasonable doubt whether he was present at the place where the offense was committed. *State v. Waterman*, 1 Nev. 543.

And an instruction in a criminal prosecution that if the defendant seeks to establish the fact

that he was at a particular place at the time of the alleged commission of the offense, other than the place at which it was committed, the burden of proof rests with him, and that, if the evidence tending to prove an alibi was such that, when taken together with the other evidence, the jury were left in reasonable doubt as to whether he was present at the scene of the crime they should acquit him, is not subject to objection by the accused, as it leaves the evidence tending to prove an alibi, even if it fails to establish it, to have its full effect in bringing into doubt the evidence tending to prove his presence at the scene of the crime. *Com. v. Choate*, 105 Mass. 451.

And an instruction that, as a matter of law, where the people make out a case which will sustain a verdict of guilty, and the defendant offers evidence, the burden is on him to make out his defense, and as to an alibi and all other like defenses that tend merely to cast a reasonable doubt on the case made by the people, the primary question is whether the defendant is guilty beyond a reasonable doubt, upon a consideration of the whole evidence, the law being that when the jury has considered all the evidence, as well that touching the question of the alibi as the criminalizing evidence introduced by the prosecution, then, if they have any reasonable doubt of guilt they should acquit, is not subject to the objection that it casts discredit on the defense of alibi, and that its effect is to impress the jury that in the opinion of the court the state had made out a case that would sustain a verdict of guilty. *Ackerson v. People*, 124 Ill. 563.

IV. Proof by prosecution beyond a reasonable doubt.

a. General rule as to burden of proof.

Upon the other hand, the rule is laid down by a large number of cases that an allegation of an alibi is not an affirmative proposition made by the defendant with the burden of proof resting on him. *Humphries v. State*, 18 Tex. App. 302.

And that alleging an alibi does not throw the burden of proof upon the accused, or admit the truth of the allegations of the prosecution. *Fife v. Com.* 29 Pa. 429; *Toiler v. State*, 16 Ohio St. 583; *State v. Jaynes*, 78 N. C. 504.

And that the rule requiring the defendant to establish an alibi by a preponderance of proof is contrary to the presumption of innocence to which every accused person is entitled, and to the rule requiring the state to establish his guilt beyond a reasonable doubt. *State v. Taylor*, 118 Mo. 153; *Schultz v. Territory (Ariz.)* 52 Pac. 352.

And that a failure to prove an alibi does not afford any presumption that the accused was

and to what extent the defendant must sustain such a defense by his evidence, when the state's evidence prima facie establishes the guilt of the defendant beyond a reasonable doubt; some courts holding that such evidence must be sufficient to prove the defense beyond a reasonable doubt. In others it was held that the evidence to prove the alibi must be such as to preponderate over the evidence of the prosecution. In the later, and we think the better considered, cases, the doctrine seems to prevail that, if the evidence upon the defense of alibi is sufficient to raise a reasonable doubt as to the guilt of defendant when considered in connection with all the evidence in the case, he should be acquitted; but that the

burden of making such proof is upon the accused seems to be quite generally recognized.

We shall not attempt in this opinion to do more than to call attention to a few of the later cases and text-writers, as the cases seem to be fully collated in 2 Am. & Eng. Enc. Law, 2d ed. under the title *Alibi*. The learned author of that article, on page 56, states his conclusions as follows: "The true doctrine seems to be that where the state has established a prima facie case, and the defendant relies upon the defense of alibi, the burden is upon him to prove it, not beyond a reasonable doubt, nor by a preponderance of the evidence, but by such evidence, and to such a degree of certainty, as will, when the whole evidence is

present at the time and place when the crime was committed, or affect the burden of proof resting with the state to prove him guilty beyond a reasonable doubt otherwise than by disclosing falsehood and fabrication, and thus affording general evidence of guilt. *Toler v. State*, 16 Ohio St. 583.

Within this rule proof tending to establish an alibi is an attack upon the evidence which tends to prove guilt, disproving, or weakening, or questioning it, and imposing no burden of proof upon the accused. *Humphries v. State*, 18 Tex. App. 302; *Johnson v. State*, 21 Tex. App. 368.

And resort to that kind of evidence neither changes the burden of proof on the other questions in the cause, nor in any manner entitles the commonwealth to a verdict against the prisoner without proof of guilt beyond a reasonable doubt. *Elfe v. Com.* 29 Pa. 429.

And the accused in a criminal prosecution is not required to prove an alibi, but is entitled to an acquittal whenever the jury, from a consideration of all the evidence adduced, entertain a reasonable doubt of his presence at the time and place where the crime is shown to have been committed. *Casey v. State*, 49 Neb. 403; *Peyton v. State* (Neb.) 74 N. W. 597; *McLain v. State*, 18 Neb. 154; *Schultz v. Territory* (Ariz.) 52 Pac. 352.

The burden remains with the state to satisfy the jury, upon the whole evidence, of the guilt of the accused. *State v. Jaynes*, 78 N. C. 504; *Johnson v. State*, 21 Tex. App. 368.

In every criminal prosecution the state assumes to show the presence of the defendant at the commission of a crime as an essential element of his guilt beyond a reasonable doubt. *State v. Taylor*, 118 Mo. 153; *State v. Tatlow*, 136 Mo. 678; *Bennett v. State*, 30 Tex. App. 341; *McLain v. State*, 18 Neb. 154.

And an instruction placing the burden upon the accused of establishing an alibi is erroneous. *State v. Tatlow*, 136 Mo. 678; *Bennett v. State*, 30 Tex. App. 341.

An alibi is not a defense within any accurate meaning of that word, but a mere fact shown in rebuttal of the state's evidence. *State v. Ardoin*, 49 La. Ann. 1145.

And an instruction in a criminal prosecution that the burden of proof rests with the accused to establish an alibi by a preponderance of the evidence is erroneous. *Beck v. State*, 51 Neb. 106; *Peyton v. State* (Neb.) 74 N. W. 597; *State v. Ardoin*, 49 La. Ann. 1145.

And so is an instruction that the burden of proving an alibi devolves upon the accused, and it must be clearly and satisfactorily established before it can avail. *Hoge v. People*, 117 Ill. 35.

And an instruction in a criminal prosecution requiring the accused to establish his defense of alibi by a preponderance of the evidence, 41 I. R. A.

but that he is entitled to an acquittal if the evidence adduced raises a reasonable doubt in the minds of the jury as to his guilt, injuriously affects the rights of the defendant, and may be availed of on motion for new trial, though it was not excepted to. *Ayres v. State*, 21 Tex. App. 399.

And an instruction in a prosecution for murder, that evidence which tends to establish the defendant's guilt also tends in an equal degree to prove that he was present at the time when and place where the deed was committed, and if he seeks to prove an alibi he must do it by evidence which outweighs that given by the state tending to fix his presence at the time and place of the crime, is erroneous. *French v. State*, 12 Ind. 670, 74 Am. Dec. 229.

So, an instruction in a criminal prosecution that if the jury believe from the evidence that the defendant was not present at the time and place where the crime was committed they must find him not guilty is erroneous as casting the burden upon the defendant to establish his alibi. *State v. Harvey*, 131 Mo. 339.

And an instruction that if the jury shall find, and believe from the evidence, that at the time the offense charged was committed the defendant was at a place other than the place where it was committed they will find him not guilty, is erroneous as requiring that the jury shall find as a fact that he was at such other place, when he is entitled to an acquittal in case of reasonable doubt as to his presence. *State v. Taylor*, 118 Mo. 153.

So, to require the defendant in a prosecution for larceny to satisfactorily explain his recent possession of the stolen property, and to satisfactorily establish an alibi, is error, as the burden rests with the people to establish his guilt; and if, after considering the evidence introduced by him as to either or both of these questions, in connection with all the other evidence in the case, and giving due consideration to the entire evidence, the jury shall have a reasonable doubt of his guilt, he cannot be convicted. *Hoge v. People*, 117 Ill. 35.

And an instruction in a criminal prosecution with relation to an alibi, that the jury must be satisfied of the defendant's guilt by proof beyond a reasonable doubt, but, as proof of the alibi was in conflict with the direct proof offered by the prosecution, they should weigh it in connection with the other testimony in the case, and consider it as met or explained by that of the defense, and determine whether, in view of all the testimony, the witnesses to the alibi were mistaken, or that they were able to say from the testimony of the prosecution, as explained by that of the defense, that there was no reasonable doubt that he was guilty,—is objectionable on the ground that the jury might have been misled thereby into thinking that the

considered, create and leave in the mind of the jury a reasonable doubt of the guilt of the accused. The distinctions which the courts have attempted to make with reference to the burden of proof are apparently of little practical value, as it is universally held that if the evidence introduced to prove an alibi, when considered by itself, or in connection with all the evidence in the case, raises a reasonable doubt in the minds of the jury as to the guilt of the accused, he must be acquitted." This is substantially the language used by the supreme court of Illinois in *Ackerson v. People*, 124 Ill. 568. In that case the court says: "The law undoubtedly is, where the people have made a prima facie case, and the defendant

relies on the defense of alibi, the burden is upon him to prove it,—not beyond a reasonable doubt, nor by a preponderance of the evidence, but by such evidence, and to such degree of certainty, as will, when the whole evidence is considered, create and leave in the minds of the jury a reasonable doubt of his guilt of the crime charged. *Hoge v. People*, 117 Ill. 44; *Hopps v. People*, 81 Ill. 892, 88 Am. Dec. 231, and authorities *supra*." The instruction given by the court below, and sustained by the supreme court, in that case, was as follows: "The court instructs the jury, as a matter of law, that where the people make out such a case as would sustain a verdict of guilty, and the defendant offers evidence, the

alibi must be affirmatively shown, and that a reasonable doubt of the person's presence would not warrant his acquittal. *People v. Pearsall*, 60 Mich. 233.

But an instruction that an alibi is a good defense if proved to the satisfaction of the jury is not objectionable as intimating that the failure of the effort to prove an alibi is to be taken as affirmative evidence tending to show guilt, or that the burden of proving it rested with the accused. *State v. Starnes*, 94 N. C. 973.

Under this rule, the burden of proof in a criminal case never shifts, but rests with the prosecution throughout the case. *Turner v. Com.* 86 Pa. 54, 27 Am. Rep. 683; *Watson v. Com.* 95 Pa. 418; *State v. Taylor*, 118 Mo. 153; *State v. Harvey*, 131 Mo. 339; *State v. Ardoin*, 49 La. Ann. 1145; *McLain v. State*, 18 Neb. 150; *Walters v. State*, 39 Ohio St. 215; *State v. Chee Gong*, 16 Or. 534; *Schultz v. Territory (Ariz.)* 52 Pac. 352.

And where, upon all the evidence, including that for and against the alibi, there is reasonable doubt of guilt, the accused must be acquitted. *McLain v. State*, 18 Neb. 159; *State v. Ardoin*, 49 La. Ann. 1145; *Turner v. Com.* 86 Pa. 54, 27 Am. Rep. 683.

And if, by reason of the evidence in relation to such alibi, the jury should doubt the defendant's guilt, he would be entitled to an acquittal, though they might not be able to see that the alibi was fully proved. *Walters v. State*, 39 Ohio St. 215; *Schultz v. Territory (Ariz.)* 52 Pac. 352; *McLain v. State*, 18 Neb. 154.

Proof of an alibi is as much a traverse of the crime charged as any other defense, and though not clear it may nevertheless, with other facts of the case, raise doubt enough to produce an acquittal. *Turner v. Com.* 86 Pa. 54, 27 Am. Rep. 683.

And it devolves upon the state to show beyond a reasonable doubt that the person accused of the crime was present at the time of its commission, and not elsewhere, and the court must so instruct. *State v. Harvey*, 131 Mo. 339.

The establishment by the prosecution of a prima facie case does not change the burden of proof; that remains with the prosecution to the end, which undertakes to prove the accused guilty beyond a reasonable doubt, not in view alone of the direct testimony adduced by it, but in view of rebutting testimony as well, and the burden of proof of an alibi does not rest with the accused. *State v. Chee Gong*, 16 Or. 534.

Nor does an offer of evidence of an alibi by the accused change the burden of proof and shift it to the accused, and an instruction that the burden rests with him to show an alibi by a preponderance of the evidence is erroneous, and a ground for reversal, though the court also instructed in the same connection that, all the

evidence being considered, as well that with relation to alibi as that with relation to guilt or innocence, if the jury entertain a reasonable doubt of guilt they should acquit. *Shoemaker v. Territory*, 4 Okla. 118.

And an instruction that the burden of proof to show guilt of the prisoner is upon the state, but when the state has made out a prima facie case, and the prisoner attempts to set up an alibi, the burden of proof is shifted, and if the defense fails to establish the alibi to the satisfaction of the jury they must find the prisoner guilty, is erroneous, as they are bound to acquit where, from the evidence, a reasonable doubt of his presence at the time and place of the crime is raised. *State v. Josey*, 64 N. C. 56.

And an instruction that the burden of proving that the accused was elsewhere than at the place where the crime was committed, at the time of its commission, is cast upon him, and that to warrant an acquittal he must maintain an alibi to the satisfaction of the jury, is erroneous as treating an alibi as a defense in the nature of a plea of confession and avoidance, whereas it is not a defense at all in any other sense than as rebutting evidence tending to disprove the fact alleged in the indictment, the burden of proving which rests with the state throughout the trial. *Walker v. State*, 42 Tex. 360.

But though an instruction in a criminal prosecution, to the effect that when an alibi is relied on as a defense the burden of proof to establish it is shifted to the accused, is not sanctioned, it is rendered of no effect, and is not ground for reversal, when followed by an instruction that the state must prove the crime and its perpetration by the accused beyond a reasonable doubt. *State v. Freeman*, 100 N. C. 420.

And an instruction that the defendant is not required to prove an alibi beyond a reasonable doubt, or even by a preponderance of the testimony, but that the state must prove to the satisfaction of the jury, beyond a reasonable doubt, that he was present and participated in the alleged crime, and unless the state does this the defendant should be acquitted, is not erroneous as implying that the defendant was bound to do something more than stand upon the presumption of innocence throughout the trial. *State v. Conway*, 56 Kan. 682.

Where the prosecution rests with positive and undoubted proof of the guilt of the accused, it should not be overcome with less than full, clear, and satisfactory evidence of an alleged alibi, but the evidence tending to establish it, though not of itself sufficient to work an acquittal, should not be excluded from the case, as the burden of proof never shifts, but rests with the prosecution throughout upon all the evidence given in the case, taken together

burden is on him to make out that defense; and as to an alibi and all other like defenses that tend merely to cast a reasonable doubt on the case made by the people, when the proof is in, then the primary question is (the whole evidence being considered, both that given for the defendant and for the people). Is the defendant guilty beyond a reasonable doubt?—the law being that when the jury have considered all the evidence, as well that touching the question of alibi as the criminating evidence introduced by the prosecution, then, if they have any reasonable doubt of the guilt of the accused of the offense with which he stands charged, then they shall acquit; otherwise not." It will be observed that the in-

structions in the case at bar follow very closely the language of the court in that case. In fact, the instructions as to the case of the prosecution being "such a case as would sustain a verdict of guilty," and as to the burden of proof, are identically the same. This case is cited with approval in *Carlton v. People*, 150 Ill. 181.

This question was also very fully considered by the supreme court of Missouri in a homicide case (*State v. Howell*, 100 Mo. 628), and that court quotes with approval Wharton, *Crim. Ev.* 8th ed. § 383. The part material to the question we are now considering reads as follows: "Undoubtedly, if the prosecution makes out a case sufficient to secure a verdict

upon the question of reasonable doubt of guilt. *Watson v. Com.* 95 Pa. 418.

But see *Rudy v. Com.* 128 Pa. 500, and other Pennsylvania cases, *supra*, II. b.

b. Measure of proof.

Under this rule where alibi is set up the accused must be acquitted in case of a reasonable doubt that he was present at the time and place of the crime. *People v. Chun Heong*, 86 Cal. 329; *Adams v. State*, 28 Fla. 512; *Bacon v. State*, 22 Fla. 51; *Boothe v. State*, 4 Tex. App. 202.

It is only necessary for him to produce such an amount of evidence, whether by testimony tending to show an alibi or otherwise, as to produce in the minds of the jury a reasonable doubt of his guilt. *State v. Jaynes*, 78 N. C. 504; *State v. Child*, 40 Kan. 482; *State v. Waterman*, 1 Nev. 543.

His presence at the time and place of the crime must be shown as an essential to its commission. *State v. Woolard*, 111 Mo. 248.

And evidence of an alibi, given by the accused, need only be of such weight as to produce in the minds of the jury a reasonable doubt of the fact affirmed by the state, that the accused was the person who committed the crime. *Walker v. State*, 42 Tex. 360; *Ayres v. State*, 21 Tex. App. 399; *Howard v. State*, 50 Ind. 190.

The commission of a crime implies the presence of defendant at the necessary time and place, and evidence of his absence is always admitted as a defense, and if a reasonable doubt is created by such evidence it is the duty of the jury to acquit. *People v. Nelson*, 85 Cal. 421.

And wherever the evidence introduced in a criminal prosecution supports the defense of an alibi, and its effect is to create a reasonable doubt in the minds of the jury of the defendant's guilt, he is as much entitled to an acquittal as if the reasonable doubt had been created by any other legitimate evidence. *Prince v. State*, 100 Ala. 144.

An alibi asserted by way of defense is physically incompatible with guilt of the crime charged, and it is sufficient to warrant an acquittal, if the evidence in support of that fact raises a reasonable doubt of guilt. *State v. Waterman*, 1 Nev. 543.

In that case *Com. v. Webster*, 5 Cush. 324, 52 Am. Dec. 711, *supra*, II. a, was distinguished upon the ground that the court was not then speaking of the degree of doubt or certainty which was to be produced on the minds of the jury; it was only speaking of the manner in which contradictory evidence should be weighed and balanced in their minds.

The rule in criminal cases, that if the defendant produces evidence which raises a reasonable doubt of the truth of the charge against him he must be acquitted, applies where the defense

of an alibi is set up, as a reasonable doubt may arise from the whole evidence in the case. *French v. State*, 12 Ind. 670, 74 Am. Dec. 229.

In that case *Com. v. Webster*, 5 Cush. 320, 52 Am. Dec. 711, *supra*, II. a, was distinguished upon the ground that in that case the effort was not to prove an alibi as to the accused, but to prove that the person who was alleged to have been murdered was still alive.

So, in *McCoy v. State*, 46 Ark. 141, an instruction that if the proof of alibi raised in the minds of the jury a reasonable doubt as to the defendant's presence at the time and place of the commission of the crime it was their duty to acquit, was sustained, but the question considered was with relation to the multiplication of instructions.

The defense of an alibi is not a special one, or in the nature of an independent exculpatory fact, and need not be proved by the accused by a preponderance of the evidence. The state is bound to prove, in making its case, that the defendant was present at the commission of the crime, beyond a reasonable doubt. *State v. Child*, 40 Kan. 482; *Ayres v. State*, 21 Tex. App. 399.

Nor need the defense of an alibi be established by the accused to the satisfaction of the jury. *Dawson v. State*, 62 Miss. 241; *State v. Woolard*, 111 Mo. 248.

And an instruction which requires him to satisfy the minds of the jury is erroneous. *Howard v. State*, 50 Ind. 190.

And an instruction in a prosecution for murder, that if the evidence raises in the minds of the jury a reasonable doubt of the presence of the accused at the place where the deceased was killed, at the time of such killing, they should find him not guilty, is sufficient on the subject of alibi. *Walker v. State*, 6 Tex. App. 577; *Thornton v. State*, 20 Tex. App. 519.

So, where the only defense in a criminal prosecution is an alibi, the defendant ought to be acquitted if the evidence raises a reasonable doubt in the minds of the jury as to whether the accused was present at the doing of the act charged against him as a crime. *State v. Kelly*, 16 Mo. App. 213.

And an instruction that the burden rests with the accused to prove an alibi, by a preponderance of the evidence,—that is, by the greater and superior evidence,—is erroneous, and a sufficient ground for reversal. *Wright v. Territory*, 5 Okla. 78.

And so is an instruction that if the jury believe from the evidence that the defendants were at a certain place at the time a witness said he saw them there, they should be acquitted, as they may not have been there at such time, and yet may have been there at such time as to render it altogether improbable that they were at the scene of the crime at the

of conviction, then the burden is on the defendant to prove his defense. But, when his proof is in, then the final question is, Are the essential averments of the indictment proved beyond a reasonable doubt? And among these essential averments is the defendant's participation in the act charged." And that court adds that "the supreme courts of Indiana, Iowa, and Texas, in well considered cases, have also approved and announced, in express terms, the same doctrine," citing *Howard v. State*, 50 Ind. 190; *State v. Hardin*, 46 Iowa, 623, 26 Am. Rep. 174; *Walker v. State*, 42 Tex. 360. It will be noticed that Mr. Wharton uses the expression "then the burden is on the defendant to prove his defense."

In the late case of *Harrison v. State*, 88 Ga.

139, the supreme court of that state, in discussing the question of alibi, uses the following language: "Were our own minds not hedged in by authority, we should be inclined to adopt the view expressed by Judge Thompson (2 Thomp. Trials, § 2436), who, after recognizing that the burden of proof is upon the accused, adds: 'But, upon the most unshaken grounds, this burden is sustained, and an adequate quantum of proof produced by the defendant, when he succeeds in raising a reasonable doubt in the minds of the jurors as to whether or not he was at the place of the crime when it was committed.'" Mark the careful language used, "who, after recognizing that the burden of proof is upon the accused, adds."

time of its commission. *Bennett v. State*, 30 Tex. App. 341.

Evidence in support of an alibi need not be absolutely clear, and it need not make it absolutely impossible for the accused to have been present at the time of the commission of the criminal act. *Adams v. State*, 28 Fla. 512.

A reasonable doubt might arise in the minds of the jury, in a criminal prosecution, from evidence tending to prove an alibi, without their minds ever having arrived at a conviction to the degree of a moral certainty as to the truth of the alibi. *Ayres v. State*, 21 Tex. App. 399; *Walker v. State*, 42 Tex. 360.

And such evidence is available to rebut the affirmative evidence for the state, though the minds of the jury never arrived at such a conviction as to the truth of the alibi. *Walker v. State*, 42 Tex. 360.

Where an attempt to prove an alibi fails, the evidence offered in support of it may nevertheless be considered by the jury as otherwise affecting the case in its bearing upon the question of reasonable doubt of guilt. *Toler v. State*, 16 Ohio St. 583.

The weight of the evidence tending to prove an alibi is to be determined by the jury, and although it falls short of absolute conviction of its truth, if it raises in their minds a reasonable doubt of the defendant's presence at the time of the commission of the crime he is entitled to an acquittal, and it is not material whether this doubt arose from a defect in the evidence of the state or from the evidence of the defendant in rebuttal. *State v. Taylor*, 118 Mo. 153.

Proof of an alibi is as much a traverse of the crime charged as any other defense, and proof tending to establish it, though not clear, may nevertheless, with the other facts of the case, raise doubt enough to warrant an acquittal. *People v. Fong Ah Sing*, 64 Cal. 253.

So, a charge upon an alibi is incorrect where it requires the jury to believe the proof of alibi before they can acquit. *Bennett v. State*, 30 Tex. App. 341.

It is sufficient if it merely raises a reasonable doubt of guilt. *Bennett v. State*, 30 Tex. App. 341.

And an instruction in a prosecution for murder, which requires the jury to believe from the evidence that the accused was not present at the time and place where the deceased was killed to warrant an alibi, is incorrect and erroneous, and in violation of the rule that if the evidence raises in the minds of the jury a reasonable doubt as to the presence of the accused he should be acquitted. *Crook v. State*, 27 Tex. App. 198.

The doubt which will justify an acquittal in a criminal prosecution, however, must be a 41 L. R. A.

reasonable one, and an instruction that if the evidence of the alibi has introduced into the minds of the jury a doubt whether or not the accused was at or about the place where the crime is said to have been committed the jury should acquit him, is erroneous, and is properly refused. *Gibbs v. State*, 1 Tex. App. 12.

And evidence to make it appear that it was improbable that the deceased was at the place of the crime in question at the time of its commission, without anything to show that he was at a different place, is not sufficient to establish an alibi. *State v. Davis* (Idaho) 53 Pac. 678.

But a new trial will be granted in a criminal prosecution, on the ground that the verdict was against the evidence, where a credible witness, who was unimpeached, testified that the accused was elsewhere at the time of the commission of the crime, as such evidence at least raises a serious doubt in regard to the guilt. *Otmer v. People*, 76 Ill. 149.

So, the defense of alibi cannot be established in a case in which the evidence to show it is conflicting and unreliable in many important particulars. *Garrity v. People*, 107 Ill. 162.

And a verdict against an alibi will be sustained where the whereabouts of the defendant at the time of the crime were not shown, and it was only sought to make it appear improbable that he was at that place, and neither he nor a person who was with him had testified on the trial. *State v. Davis* (Idaho) 53 Pac. 678.

The rule in South Carolina is that where the state makes a prima facie case in a criminal prosecution, and a special defense, such as an alibi, is interposed, it need be established only by such a preponderance of evidence as will satisfy the jury that the charge in the indictment is not sustained beyond a reasonable doubt, and when such evidence is produced the accused should be acquitted. *State v. Paulk*, 18 S. C. 515; *State v. Nance*, 25 S. C. 168.

Evidence relied on to establish an alibi must be sufficiently clear and convincing to satisfy the jury that the preponderance of the evidence was in favor of the alibi, but it need not be sufficient to remove all reasonable doubt of the fact that the accused was not at the place where the crime was committed, at the time of its commission. *State v. Jackson*, 36 S. C. 487.

c. Consideration of all the evidence.

Under the theory that the state must prove presence, evidence of an alibi in a criminal prosecution should be considered by the jury in connection with the rest of the evidence, as a part of the whole, from which they are to determine their verdict. *Bacon v. State*, 22 Fla. 51; *Prince v. State*, 100 Ala. 144.

It is manifest that the term "burden of proof," as used in these decisions, by the text-writers, and in the instructions of the court in the case at bar, does not imply that the defendant must prove his defense by a preponderance of the evidence, or by such evidence as will satisfy a jury that his defense is true, but only that, after the state has made out its case, it devolves upon the accused to introduce evidence, if he has any, to prove his alibi, if he relies upon such a defense. In that sense the burden is upon the accused, and, in order to maintain it, he is bound to establish in its support such facts and circumstances as are sufficient, when considered in connection with all the other evidence in the case, to create in the minds of the jury a reasonable doubt of his

guilt. *Carlton v. People*, 150 Ill. 181. Certainly, no fairly intelligent jury could have understood the charge of the court in any other sense, when they were instructed by the court in the same connection "that, when the proof is all in, then the question is (the whole evidence being considered, both that of the defendant and for the state), Is the defendant guilty beyond a reasonable doubt?" We are aware that the expression "the burden of proof" is upon the defendant to make out his defense of an alibi has been criticised by a few courts and by one or more text-writers. 1 Bishop, Crim. Proc. § 1066. But, when these cases and the text of Mr. Bishop are carefully examined, it will be seen that the criticism has no application to the expression as used by the

A reasonable doubt of guilt which will acquit a prisoner, when his defense is an alibi, is a doubt which arises from a consideration by the jury of all the evidence, as well that touching the question of the alibi as the criminating evidence introduced by the prosecution. *Carlton v. People*, 150 Ill. 181.

And if, upon all the evidence in a criminal prosecution, the jury have a reasonable doubt as to whether the accused was present at the scene of the crime alleged, he is entitled to the benefit of such doubt, and should be acquitted. *Adams v. State*, 28 Fla. 512; *Binns v. State*, 46 Ind. 311; *Prince v. State*, 100 Ala. 144; *State v. Waterman*, 1 Nev. 543; *Gallaher v. State*, 25 Tex. App. 247.

And if, upon considering all the testimony, they have a reasonable doubt about the guilt of the accused, arising out of any part of the evidence, they should acquit. *Hurd v. State*, 94 Ala. 100.

An alibi is sufficiently established if the proof adduced in support of it, used in connection with all the testimony in the case, creates such a probability of its own truth as to engender a reasonable doubt of the truth of the charge upon which the defendant is arraigned. *Pollard v. State*, 53 Miss. 410, 24 Am. Rep. 703; *Blankenship v. State*, 55 Ark. 244; *Dawson v. State*, 62 Miss. 241.

Or, if considered in connection with all the testimony, it raises a reasonable doubt of the presence of the accused at the commission of the crime; and an instruction that it must be such as to satisfy the jury that the crime could not have been committed by him is erroneous. *Murphy v. State*, 31 Fla. 166.

And if the evidence is sufficient to raise a reasonable doubt, or if the state's evidence is so defective as to leave a reasonable doubt, or if, taking all the evidence on both sides, there is reasonable doubt of his guilt, he is entitled to an acquittal. *State v. Woolard*, 111 Mo. 248.

The defense of an alibi forms no exception to the general rule that if a doubt of guilt flows from the whole testimony the accused is entitled to its benefit. *State v. Watson*, 7 S. C. 63.

When the jury in a criminal prosecution have considered all the evidence, as well that touching the question of an alibi as the criminating evidence introduced by the prosecution, then, if they have a reasonable doubt of guilt, they should acquit, otherwise not; and it is not correct to instruct that when the jury have considered all the evidence as to the alibi, if they have a reasonable doubt as to whether the accused was in some other place when the offense was committed, they should acquit. *Mullins v. People*, 110 Ill. 42.

And an instruction that the defense of alibi

does not belong to the doctrine of doubts which entitled the accused to an acquittal, but must be proved by testimony of witnesses worthy of credit, is erroneous. *Binns v. State*, 46 Ind. 311.

But while an instruction that the defense of alibi tends merely to cast a reasonable doubt on the case of the people, and that when the jury have considered all the evidence, as well that touching the question of alibi as the criminating evidence introduced by the prosecution, if they have any reasonable doubt of the guilt of the accused of the offense charged they should acquit, otherwise not, is inaccurate so far as it says that the defense of alibi tends merely to cast a reasonable doubt on the case made by the people, the last part of the instruction places the proof of alibi in such a favorable light for the accused that, considering the whole instruction, it will not be deemed prejudicial to the accused. *Sheehan v. People*, 131 Ill. 22.

The proper charge in a criminal prosecution, where an alibi is the defense, is that the evidence in support of it should be considered in connection with all the other evidence in the case, and if, on the whole evidence, there is reasonable doubt of the defendant's guilt, he should be acquitted. *State v. Ardoin*, 49 La. Ann. 1145.

See also *infra*, II. b, III., and IV. b.

d. How jury should be instructed.

The defense of an alibi in a criminal prosecution is ordinarily sufficiently embraced in a general charge that the defendant is by law presumed innocent until his guilt is established by competent evidence beyond a reasonable doubt, and unless requested to do so the trial judge is not required to charge specially with reference thereto. *Ayres v. State*, 21 Tex. App. 399; *Davis v. State*, 14 Tex. App. 645; *State v. Shroyer*, 104 Mo. 448.

And failure to give instructions upon an alibi, considered separately and apart from the main question of guilt or innocence, is not error, though to give specific instructions would be the better practice. *State v. Ward*, 61 Vt. 163.

An instruction as to a particular fact, that if the jury has a reasonable doubt as to such fact it must acquit, need not be given; all that is required of the court is that it should instruct the jury that if upon the whole case they have a reasonable doubt of the guilt of the accused, or of his presence or identity, they should acquit him. *State v. Crawford*, 34 Mo. 200.

Evidence of an alibi is only ordinary evidence in rebuttal, and is to be treated by the court in

court in the case at bar. Mr. Bishop seems to be combating the doctrine laid down in some of the older cases, that, when the prosecution has made out a case that would sustain a verdict of guilty, then the burden shifts to the accused to establish his alibi by a preponderance of the evidence, which, in effect, requires the defendant to establish his innocence by a preponderance of the evidence; and he contends, as we hold, that the "question for the jury is whether or not, contemplating the evidence to the alibi, in connection with all the other evidence on both sides, the defendant is guilty beyond a reasonable doubt." He does not question the proposition that the proof of the facts and circumstances tending to establish the alibi must be made by the defendant.

the instructions in the same way as is other like evidence; and an instruction in respect to the alibi, followed by one given as to reasonable doubt, which covers the whole case and in terms applies to all the evidence in it, is sufficient, as it is not necessary to link the idea of reasonable doubt to every atom of evidence in the cause. *State v. Rockett*, 87 Mo. 668.

And while an instruction in a prosecution for murder, that if from all the evidence there arises in the mind of the jury a reasonable belief that the accused was at his own house at the time the deceased was shot, and was not at that time at the place of the killing, they will find him not guilty, is insufficient with relation to alibi, it would be sufficient when taken in connection with an instruction following it, that if the jury entertain a reasonable doubt of the guilt of the defendant, arising out of the evidence, they should find him not guilty. *Boothe v. State*, 4 Tex. App. 202.

So, an instruction in a criminal prosecution that unless the jury find, and believe, from all the facts and circumstances given in evidence, the presence of the accused at the time and place of the alleged commission of the crime, and that he is guilty beyond a reasonable doubt, they should acquit, sufficiently covers the defense of alibi, and renders an instruction that they should acquit if they have a reasonable doubt whether he was present or not, unnecessary. *State v. Sanders*, 106 Mo. 188.

And an instruction that if the jury believe and find from the evidence that the accused was not present at the place and time of the alleged crime, and that at that time he was elsewhere, then they should acquit, is not subject to the objection that it would be likely to convey to their minds the idea that it was a substantive, affirmative defense which must be made out by a preponderance of the evidence where a general instruction was given as to reasonable doubt, which covered the whole case, and in terms applied to all the evidence in it. *State v. Johnson*, 91 Mo. 439.

Nor is an instruction that the accused could establish any fact essential to his defense by a mere preponderance of the evidence objectionable as requiring the accused to prove an alibi upon which he relied as a defense by a preponderance of the evidence, where the court also charged that he must be acquitted in case of reasonable doubt as to his presence at the time and place of the crime. *People v. Chun Heong*, 86 Cal. 329.

So, an instruction in a criminal prosecution that the proof offered to sustain an alibi is to be subjected to rigid scrutiny, and is equally available, if satisfactorily established, to avoid the force of positive, as of circumstantial, evidence, is not subject to the objection that it

In fact, all the authorities agree upon this proposition. If this is so, is it not a mere distinction without a difference to contend that a court may say that the proof of such a defense must come from the defendant, but that it would be error for the court to say the burden of proving these facts is upon the defendant? We conclude, therefore, that the court below committed no error in his instructions; and, finding no error in the record, *the judgment of the court below is affirmed.*

Fuller, J., dissenting:

My views areso at variance with the reasoning by which my associates have reached the foregoing result that I am impelled to characterize as inconsistent, illogical, and dangerous the in-

required the defense of alibi to be made out by a preponderance of the evidence,—especially where the charge concludes that it is for the jury to decide where the truth lies, giving the defendant the benefit of every reasonable doubt. *People v. Levine*, 85 Cal. 41.

And an instruction in a prosecution for burning a sawmill, that if the jury are satisfied beyond a reasonable doubt that the accused was at a designated place other than the mill they should acquit, is not reversible error where the court immediately afterwards corrected the statement by charging that if they have, after looking over all the evidence, a reasonable doubt whether he was at the place of the fire until after it broke out, they should acquit. *People v. Pichette* (Mich.) 69 N. W. 739. And see also *Towns v. State*, 111 Ala. 1; *State v. Van Winkle*, 80 Iowa, 15, *supra*, II. b; *State v. Freeman*, 100 N. C. 429, *supra*, IV. a; and *Sullivan v. People*, 31 Mich. 1, *infra*, V.

Where an alibi is set up in a criminal prosecution as the sole defense, however, it is not only competent, but proper, for the court to explain to the jury its nature and character. *Deggs v. State*, 7 Tex. App. 359; *Granger v. State*, 11 Tex. App. 454.

And in such case failure to instruct the jury as to such a defense, except so far as an instruction with reference to reasonable doubt of guilt might embrace it, is reversible error. *McGrew v. State*, 10 Tex. App. 530.

And where an alibi is the only defense in a criminal prosecution it is error for the court to refuse, upon request, to instruct the jury to acquit if the evidence raises a reasonable doubt in the minds of the jury as to whether the accused was present at the doing of the act charged against him, where they have not been otherwise instructed as to alibi. *State v. Kelly*, 16 Mo. App. 213; *State v. Edwards*, 109 Mo. 315; *State v. Lewis*, 69 Mo. 92.

The refusal to give the instruction is improper as tending to mislead the jury into the belief that the court regarded the defense as frivolous and unfounded. *State v. Edwards*, 109 Mo. 315.

Especially where, from the instructions given, it could not be seen that there was any question with relation to the identity of the man who committed the deed. *State v. Lewis*, 69 Mo. 92.

And an instruction in a criminal prosecution to acquit in case of reasonable doubt of guilt from all the evidence, and another requiring the jury to acquit only if they found the defense of alibi to be true, where an alibi was the only defense, are inconsistent and irreconcilable, and furnish ground for a reversal, where the court refused to instruct that if the evidence as to alibi raises a reasonable doubt as to

struction which they have commended and approved. By the language used, the jury was required to determine, in the first instance, whether the evidence introduced in support of the charge was sufficient, as a matter of law, to sustain a verdict of guilty, and then to say whether the accused, handicapped by the burden of proof, had made out a defense, or, in other words, proved his innocence. Every student of the law fully understands the exact import of the phrase "burden of proof," and every juror knows that a defendant in a criminal case, upon whom it is imposed, must make out his defense by the introduction of preponderating testimony, not that which balances merely and would suffice in a civil action, but that which outweighs the evidence of guilt,

re-enforced by a presumption of guilt arising from a case made out by the state, sufficient to sustain a verdict of guilty.

The presumption being that plaintiff in error was not present, and is therefore innocent of the crime, it was error to charge that "the burden is upon him to make out his defense as to an alibi." Although the charge is sanctioned by some elementary writers, and sustained, perhaps, by the greater number of early cases, its tendency has ever been to devert the accused, at a most critical stage of the proceeding, of that humane and protecting principle, the presumption of innocence, with which, for every purpose of the trial, the law has clothed him; and its influence upon a jury is the same as an instruction that evidence sufficient to

guilt they should acquit. *State v. Taylor*, 118 Mo. 153.

So, it has been held, on the other hand, that a general instruction in a criminal prosecution upon the subject of reasonable doubt as it should affect jurors collectively and individually does not authorize the refusal of a specific instruction with reference to reasonable doubt arising from a consideration of the evidence with relation to alibi. *Fleming v. State*, 136 Ind. 149.

And that where an appropriate charge upon the subject of alibi has been requested and refused, or an exception has been taken to a charge for omission in this respect, such objection is sufficient ground for reversal, if the facts of the case make such a charge applicable. *Ayres v. State*, 21 Tex. App. 390.

And in *Ninnon v. State*, 17 Tex. App. 650, in which the defendant's father and sister and a third party testified as to the defendant's alibi, it was said that the facts of the case demanded a charge upon the law of alibi, but the decision was rendered upon another question. And see also *Ayres v. State*, 21 Tex. App. 390, *supra*, III.; *Shoemaker v. Territory*, 4 Okla. 118, *supra*, IV. a.

And it has been held that an erroneous instruction in a criminal prosecution requiring the accused to satisfy the minds of the jury on the question of an alibi, instead of raising a reasonable doubt, is not corrected by another instruction which states the law accurately, unless the erroneous instruction is plainly withdrawn. *Howard v. State*, 50 Ind. 100.

And that error in instructing that the burden of proof rests with the accused to establish an alibi by a preponderance of the evidence is not cured by another instruction that if, from all the evidence, including that relating to the alibi, there is reasonable doubt of guilt, the defendant should be acquitted. *Beck v. State*, 51 Neb. 106; *Henry v. State*, 51 Neb. 149.

And that an instruction that the burden of proof of an alibi rests with the defendant to show by a preponderance of the evidence the facts establishing it, and that if he has shown such facts as raise a reasonable doubt as to whether he could have been present at the commission of the offense or not he should be acquitted, is erroneous and a ground for a reversal, as containing propositions which are inconsistent and in direct conflict. *Johnson v. State*, 21 Tex. App. 368.

But where the court in a criminal prosecution has already charged that if there is reasonable doubt, upon the whole evidence, as to the guilt of the accused, it will be the duty of the jury to acquit, and if there is no reasonable doubt it will be their duty to convict, an instruction that an alibi need not be established beyond a reasonable doubt, but should be estab-

lished to the satisfaction of the jury, and the reply of the court to a request to charge that if, taking the whole case together, including the evidence for the prosecution and the evidence respecting the alibi, they have reasonable doubt of the guilt of the prisoner, they must acquit him, that it had so charged already, is not reversible error, as such reply is equivalent to saying that the intention of the whole charge was to so instruct the jury. *People v. Stone*, 117 N. Y. 480.

Evidence as to an alibi in a criminal prosecution requires the trial court, under Mo. Rev. Stat. 1889, § 4208, to instruct the jury on the defense thus raised, and if an erroneous instruction on the question is asked by the defendant, it is the duty of the court to give a correct one. *State v. Taylor*, 118 Mo. 153.

In that case, *State v. Shroyer*, 104 Mo. 443, *supra*, was distinguished upon the ground that in that case no instruction was asked by the defendant on the defense of an alibi. And *State v. Sanders*, 106 Mo. 188, *supra*, was distinguished upon the ground that that case simply holds that the instruction given was substantially a correct one on the subject of alibi.

V. Time covered by proof.

The rule has been laid down that where a defense in a criminal prosecution rests on proof of an alibi it must cover the time when the offense is shown to have been committed, so as to preclude the possibility of the accused's presence at that time and place. *Briceland v. Com.* 74 Pa. 463; *Com. v. Seybert*, 4 Kulp, 4.

And that, to establish an alibi in a criminal prosecution, the accused must not only show that he was at some other place about the time of the alleged crime, but also that he was there for such a length of time that it was impossible for him to have been at the place where the crime was committed, either before or after the time he was at the other place. *Klein v. People*, 113 Ill. 596.

And that an alibi is a defense which involves the impossibility of the person's presence at the scene of the offense at the time of its commission and the range of evidence with respect to time and place must be such as reasonably to exclude the possibility of presence. *Ware v. State*, 67 Ga. 349; *Johnson v. State*, 59 Ga. 142; *Wade v. State*, 65 Ga. 756; *Jackson v. State*, 64 Ga. 344; *Simpson v. State*, 78 Ga. 91.

And to warrant an acquittal on the ground of an alibi, under the Georgia doctrine, the evidence should satisfy the jury that the defendant was physically present at a locality so far distant from the scene of the crime that he could not have been present at its commission. *Goldsamith v. State*, 63 Ga. 85; *Ware v. State*, 67 Ga. 349; *Johnson v. State*, 59 Ga. 142.

And a charge on the defense of alibi in a

sustain a verdict of guilty converts such safeguard into a presumption of guilt, and shifts the burden of proof from the accuser to the accused. The subsequent formal, though wholly inconsistent, expression as to proof beyond a reasonable doubt, is not curative in character, and, as this case stood, might have suggested to the jury that, in the opinion of the court, the entire evidence in the case, viewed in the light of such instruction, was sufficient to justify a conviction, unless the defendant had shown by the greater weight of testimony that, at the time charged, he was absent from the place where the alleged crime was committed, and was in no manner connected therewith. As the state, in order to overcome the presumption of innocence, and justify a conviction, was bound to prove beyond a reasonable doubt, unaided by any presumption of guilt, that plaintiff in error was present at and participated in the commission of the offense, the burden never shifted; and if the testimony offered on behalf of the defendant, when considered with all the other evidence in the case, raised a reasonable doubt, he was entitled to a verdict of not guilty. 1 McClain, Crim. L. 399; Pollard v. State, 53 Miss. 410, 34 Am. Rep. 703; People v. Stone, 117 N. Y. 480; Turner v. Com. 86 Pa. 54, 27

Am. Rep. 688; State v. Child, 40 Kan. 483; French v. State, 12 Ind. 870, 74 Am. Dec. 229; People v. Nelson, 85 Cal. 421; State v. Ches Gong, 16 Or. 534; Howard v. State, 50 Ind. 180; Toler v. State, 16 Ohio St. 583. The phrase "burden of proof" is defined as that "obligation which the law imposes on a party who alleges the existence of a fact or thing necessary, in the prosecution or defense of an action, to establish it prima facie by proof." The burden of proof is fixed at the inception of the trial, and does not change at any later stage of the proceeding. Anderson, Law Dict.; Underhill, Ev. 247; Willett v. Rich, 142 Mass. 356, 56 Am. Rep. 694; Pease v. Cole, 53 Conn. 53, 55 Am. Rep. 53. "In criminal cases the true rule is that the burden of proof never shifts," says Mr. Justice Clifford in *Lisenthal's Tobacco v. United States*, 97 U. S. 266, 21 L. ed. 905; *Tiffany v. Com.* 121 Pa. 165; *State v. Wingo*, 66 Mo. 181, 27 Am. Rep. 329; *Phillips v. State*, 26 Tex. App. 228; *Conyers v. State*, 50 Ga. 103, 15 Am. Rep. 686; *People v. Elliott*, 80 Cal. 290; *Com. v. McKie*, 1 Gray, 61, 61 Am. Dec. 410.

The doctrine that persons accused of crime who rely upon an alibi are not entitled to any benefit from their evidence, unless it preponderates against that offered by the prosecution

criminal prosecution, that if it was shown that the defendant was at a place that rendered it impossible for him to have committed the alleged criminal act, then he could not be found guilty, but this should be shown in order to render this defense complete and perfect, is not erroneous when taken in connection with another charge, that when the testimony relied upon to convict is entirely circumstantial, it should be so strong as to exclude any reasonable hypothesis except that of guilt. Bryan v. State, 74 Ga. 393.

So, it is held in Maine that, to make mere distance a conclusive answer as an alibi, it must be shown to be so great as to render it impossible for the accused to have participated in the criminal act. State v. Fenlason, 78 Me. 495.

And in Massachusetts refusal to instruct on a prosecution for murder, that the accused was not bound to show where he was during the whole time that the murder might have been committed, and that no inference should be drawn from his failure to do so, ruling that the question was for the jury, and instructing that if the accused was shown to be in any connection with the transaction which seemed to them to put into his possession facts which, if innocent, he would use, which he could use without going upon the stand himself, the withholding of such means to explain the circumstances might be considered by the jury, in connection with the other testimony, in determining his responsibility,—is held to furnish the accused with no ground of exception. Com. v. Costley, 118 Mass. 1.

Upon the other hand, the rule has been adopted that to justify an acquittal in a criminal prosecution upon evidence of an alibi, though the witnesses supporting it are believed, it must have been proved that the period during which the accused was shown to have been absent from the scene of the crime covered the time of its commission, or so nearly did so as to raise in the minds of the jury a reasonable doubt as to his having passed from one point to the other. Pollard v. State, 53 Miss. 410, 24 Am. Rep. 703.

And that to establish an alibi it is not necessary for the accused to show that he was absent at the very time the offense is shown to have been committed, and his proof need not absolutely preclude the possibility of his being at both places. Stuart v. People, 42 Mich. 265; Henry v. State, 51 Neb. 149.

And that one who interposes the defense of an alibi is not required to reasonably satisfy the jury of his exact whereabouts every moment of the time necessary to cover the period when the offense was committed, but is required, under the one rule, to prove such a state of facts or circumstances as to reasonably satisfy the jury that he was elsewhere than at the place where the offense was committed at the moment of its commission. Pate v. State, 94 Ala. 14.

Or to raise a reasonable doubt as to presence under the other rule. Henry v. State, 51 Neb. 149.

Under this doctrine an instruction in a prosecution for murder, that if the jury find, from all the circumstances, that it was impossible for the accused to have left the place where he was shown to have been by the evidence as to an alibi, and gone to the place where the crime was committed, and committed the act, then the alibi is made out, and is a complete defense; but if they find that it was possible for him to have done so the evidence fails to establish an alibi,—is erroneous, the terms "possible" and "impossible" being too strong. Snell v. State, 50 Ind. 516; West v. State, 48 Ind. 483; Adams v. State, 42 Ind. 373.

And an instruction in a criminal prosecution that it is essential to the proof of an alibi that it should cover and account for the whole of the time of the transaction in question, or at least so much of it as to render it impossible that the accused could have committed the act, is erroneous and reversible error, as not being a correct proposition of law, and as depriving the defendant of the benefit of a reasonable doubt on all the evidence. Beavers v. State, 103 Ala. 36; Peyton v. State (Neb.) 74 N. W. 597.

So, an instruction in a criminal prosecution that an alibi must cover the time in which the

on that issue, abrogates the fixed theory as to the presumption of innocence, and does violence to the rule that proof beyond a reasonable doubt is essential to a conviction. Mr. Bishop, in his *New Criminal Procedure*, has collated numerous recent and well reasoned cases in support of his view that the presumption of innocence and burden of proof in no manner change on account of an alibi, and, with characteristic vigor, exemplifies the wisdom of the doctrine, and declares it to be the law of the books. In dismissing the subject, he observes that "some courts, if we follow their language, seem to look upon the alibi as though it were a special and separate defense under a distinct plea. And they appear to hold that the defendant has the burden to prove it; yet only by a preponderance of the evidence, not beyond a reasonable doubt. On the other hand, as the foregoing elucidations make plain, the true doctrine, supported equally by reason and the majority of the cases, is that the presumptions and burden of proof are not changed by the alibi." From page 53, 2 Am. & Eng. Enc. Law, 2d ed. I quote: "Alibi is regarded by some courts as a special affirmative defense, but the better doctrine seems to be that it is not a 'defense' in the accurate meaning of the term, but a

mere fact shown in rebuttal of the state's evidence; and, consequently, the evidence introduced to support it should be left to the jury, uninfluenced by any charge from the court tending to place it upon a different footing from other evidence in the case." The head-note fully accords with the opinion reversing the trial court in *Humphries v. State*, 18 Tex. App. 302, and is as follows: "In a trial for theft, one of the defenses was alibi; and, on the issue raised thereby, the trial court charged the jury as follows: 'If the jury believe that the alibi which has been set up as a defense in the case has been proved, or if they have a reasonable doubt as to the fact of whether said alibi has been proved, they will give the defendant the benefit of it, and acquit him. When an alibi is relied upon as a defense, it rests on the defendant to prove it to the extent of raising a reasonable doubt as to whether the accused is the person who committed the offense charged.' Held error. In no criminal trial is the burden of proof shifted from the state onto the defendant. Proof of alibi is not an affirmative proposition by the defendant, but is an attack upon the inculpatory evidence of the state. It may be such as affirmatively disproves the case made by the state, or it may only suffice to legitimately raise a reasonable

offense is shown to have been committed, so as to preclude the possibility of the person's presence at the place of its commission, and that its value consisted in his showing that he was absent from the place where the deed was done at the very time that the evidence tends to fix its commission upon him, and that it is valueless if it be possible that he could have been at both places,—casts a much heavier burden upon the accused than the law justifies. *Stuart v. People*, 42 Mich. 255.

Where the jury believes, in a criminal prosecution, from the evidence tending to establish an alibi, that the accused was at a place other than that of the commission of the crime at a time indicated by the evidence, and believes that it is improbable therefore that he was present at the time of the commission of the crime, the defense is for their consideration, as such improbability need not be so great as to amount to impossibility; but if it was so great, taking the evidence all together, as to raise a reasonable doubt of his guilt, he is entitled to the benefit of the doubt, and to an acquittal. *West v. State*, 48 Ind. 483; *Adams v. State*, 42 Ind. 373.

An alibi is a legitimate defense, and if the evidence touching it is sufficient to raise a reasonable doubt of the guilt of the accused in the minds of the jury, it should be considered, although it does not cover the whole time during which the crime might have been committed. *Kaufman v. State*, 49 Ind. 248.

Evidence of an alibi is proper for the jury in a criminal prosecution, whether sufficient to render the guilt of the defendant impossible or only improbable; and he is entitled to the benefit of any reasonable doubt which may be raised in the minds of the jury on this point. *Miller v. People*, 39 Ill. 457.

And while the value and effectiveness of the proof of an alibi largely depend upon the extent to which it embraces the period of the commission of the crime, and, in order to be conclusive the entire time must necessarily be covered, a charge that requires the defendant to affirmatively prove that it was impossible for him to have been present at the scene of the crime is 41 L. R. A.

reversible error, as it might be sufficient if it reasonably satisfies the minds of the jury that he was elsewhere, or, in connection with the other evidence, generates a reasonable doubt that the accused committed the act. *Albritton v. State*, 94 Ala. 76.

But a statement in an instruction in a criminal prosecution with reference to an alibi, that there must be no doubt about it, will not be deemed erroneous as requiring too high a degree of proof on the part of the accused, where it was followed by an instruction that if there should be in the minds of the jury a well-founded reasonable doubt as to the guilt of the accused they should give him the benefit of that doubt, the last portion of the charge, if applied to the question of the alibi, correcting the error of the previous statement. *Sullivan v. People*, 31 Mich. 1.

And an instruction in a criminal prosecution that when an alibi is not complete it cannot avail the defendant where the evidence against him was circumstantial and must have raised a strong presumption of his guilt, as in such case it would behoove him to make proof of his alibi to the full satisfaction of the jury, is not reversible error,—especially where the court qualified the expression by adding: "Whether an alibi is proved, is a question for the jury." *State v. Reitz*, 83 N. C. 634.

And an instruction that among the defenses interposed is what is known as an alibi,—that is, if the defendant was at the time of the alleged killing at another and different place from that at which such killing was done, and therefore was not, and could not have been the person who did the killing, if it was done; and if the evidence raises in the minds of the jury a reasonable doubt as to the presence of the defendant at the place where the deceased was killed at the time of such killing then they should acquit,—is not subject to the objection that it required it to be impossible for the defendant to have committed the murder, and it therefore shifted the burden of proof with reference to the alibi from the state to the defendant. *Gallagher v. State*, 28 Tex. App. 247.

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doubt of the guilt of the accused; and in either case he is entitled to an acquittal." To the same effect, *Ayres v. State*, 21 Tex. App. 399. In Kansas the following instruction was given below, and on appeal held sufficient to compel a reversal: "The burden is upon these defendants to show, by a preponderance of the evidence, that this 'alibi' is fairly made out; that is to say, that they have fairly satisfied you by a preponderance of the evidence that at the time when this offense was committed, and where this offense was committed, they were at another place at that particular time. But, while this is the law surrounding that particular branch of the case, you must at all times, gentlemen, bear in mind that you must

be satisfied from all the evidence in the case, beyond a reasonable doubt, as to the guilt of these defendants, or either of them, before you will be justified in convicting him." In *Howard v. State*, 50 Ind. 190, this language is used: "An erroneous instruction to the jury in a criminal action is not corrected by another which states the law correctly, unless the erroneous one is plainly withdrawn." And in *Cunningham v. State*, 56 Miss 269, 31 Am. Rep. 360, it was held that "the giving of conflicting instructions is erroneous."

The judgment of conviction should be reversed, and the case remanded, with the direction that the accused be tried according to law.

CALIFORNIA SUPREME COURT.

Helena SEYMOUR, *Rept.*,

Margaret McAVOY *et al.*, *Appls.*

(.....Cal.....)

1. **Other judgment creditors** who have not filed a creditors' bill are not necessary parties to such a bill.
2. **In ascertaining the rules of the common law** the court may look to the decisions of other states of the Union, as well as to those of the English courts.
3. **The interest of the beneficiary under a trust** may be made by the author of the trust unassignable and free from subjection to the claims of the beneficiary's creditors.
4. **No interest which can be subjected to the claims of other creditors is given** to a testator's widow and unmarried daughter while the widow lives and the daughter remains unmarried, by a will creating a trust under which the trustee is to pay for the widow's support during life and for the daughter's support until her marriage, where he is not directed to pay any money to either of them until the daughter's marriage, although the daughter is given an interest to one fourth of the property contingent upon her marriage, and a right to another fourth contingent upon her surviving her mother.

(*Temple, J., dissents.*)

(July 16, 1898.)

A PPEAL by defendants from a judgment of the Superior Court for the City and County of San Francisco in favor of plaintiff in an action brought to enforce payment of a judgment out of the equitable interest of defendants in a spendthrift trust. *Reversed.*

The facts are stated in the opinion.

Messrs. Sullivan & Sullivan, for appellants:

Neither Margaret McAvoy nor Emma M. McAvoy has any interest in the trust property or the rents thereof, which can be reached by execution or by creditor's bill.

NOTE.—As to spendthrift trusts, see also *Brown v. McGill* (Md.) 39 L. R. A. 808, and *note*; also *Schenck v. Barnes* (N. Y.) *ante*, 895. 41 L. R. A.

2 Pom. Eq. Jur. § 991; 2 Freeman, Executions, § 1363; 28 Am. & Eng. Enc. Law, p. 5; *Nichols v. Eaton*, 91 U. S. 716, 23 L. ed. 254; *Hyde v. Woods*, 94 U. S. 526, 24 L. ed. 266; *Spindle v. Shreve*, 9 Biss. 199; *Campbell v. Foster*, 85 N. Y. 361; *Steib v. Whitehead*, 111 Ill. 247; *Lampert v. Haydel*, 96 Mo. 439, 2 L. R. A. 113; *Jourlmon v. Massengill*, 86 Tenn. 81; *Pope v. Elliott*, 8 B. Mon. 56; *Garland v. Garland*, 87 Va. 758; *Fisher v. Taylor*, 2 Rawle. 38; *Oberman's Appeal*, 88 Pa. 283; *White v. White*, 30 Vt. 338; *Barnes v. Dow*, 59 Vt. 530; *Wales v. Bowdiah*, 61 Vt. 27, 4 L. R. A. 819; *Roberts v. Stevens*, 84 Me. 325, 17 L. R. A. 266; *Smith v. Toucers*, 69 Md. 77; *Maryland Grange Agency v. Lee*, 72 Md. 161; *Leavitt v. Beirne*, 21 Conn. 1; *Wallace v. Campbell*, 53 Tex. 234; *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504; *Baker v. Brown*, 146 Mass. 369; *Thackura v. Mintzer*, 100 Pa. 151; *Steib v. Whitehead*, 111 Ill. 247; *Lampert v. Haydel*, 20 Mo. App. 616; *Chambers v. Smith*, L. R. 8 App. Cas. 795; *Patten v. Herring*, 9 Tex. Civ. App. 640; *Wemyss v. White*, 159 Mass. 484; *Hanna v. Reynolds*, 16 U. S. App. 679, 59 Fed. Rep. 936, 8 C. C. A. 370; *Brubaker v. Huber*, 2 Pa. Dist. R. 703; *Lampert v. Haydel*, 96 Mo. 439, 2 L. R. A. 113.

The inviolability of a trust estate and its accumulations is respected, even in the case of the author of the trust, where no statutory restriction intervenes.

Johnston v. Zine, 11 Gratt. 552; *Scott v. Gibson*, 5 Munt. 91; *Markham v. Guerrant*, 4 Leigh, 279; *Roanes v. Archer*, 4 Leigh, 550.

The Code provisions on the subject of trusts neither divest the trustees of their estate, nor the beneficiaries of their residuary estate in the accumulations of the income.

It is not essential that the instrument creating the trust should in so many words, or in set phrase, say that the equitable estate hereby created shall not be assignable by the beneficiary, and that the same shall not be subject to the claims of creditors; it is enough that the language of the testator shows, in the light of surrounding circumstances, that it was his intention that the estate granted should be inalienable and beyond the reach of creditors.

Broadway Nat. Bank v. Adams, 133 Mass.

170, 43 Am. Rep. 504; *Roberts v. Stierens*, 84 Me. 325, 17 L. R. A. 266; *Wales v. Boudich*, 61 Vt. 27, 4 L. R. A. 819; *Fox v. Senter*, 83 Me. 295; *Baker v. Brown*, 146 Mass. 369; *Slattery v. Wason*, 151 Mass. 266, 7 L. R. A. 393; *Lippincott v. Mitchell*, 94 U. S. 770, 24 L. ed. 317; *Postlethwaite's Appeal*, 68 Pa. 477; *Stambrough's Estate*, 135 Pa. 585; *Perkins v. Dickinson*, 3 Gratt. 385.

The court erred in not requiring creditors other than plaintiff to be made parties to the action.

The question of fraudulent intent in a conveyance is one of fact, and not of law.

McFadden v. Mitchell, 54 Cal. 628; *Bull v. Bray*, 59 Cal. 286, 13 L. R. A. 576; *Threlkel v. Scott*, 89 Cal. 351; *Windhaus v. Bootz*, 92 Cal. 617.

If the Code provisions attempted to interfere with the rights of the trustees and the beneficiaries, as vested at the time of McAvoy's death and as declared by the decree of distribution, such attempted interference would be unconstitutional.

8 Am. & Eng. Enc. Law, pp. 758-760, and cases cited; *Norman v. Heist*, 5 Waits & S. 171, 40 Am. Dec. 198; *Toule v. Eastern R. Co.* 18 N. H. 547, 47 Am. Dec. 153.

In seeking to ascertain the common law of England, adopted by the statute of 1650, as the rule of decision in this state, we may look to the decision of English and American courts, rendered before and subsequently to the date of the statute.

Luz v. Haggin, 69 Cal. 394.

The body of American decisions affirming the existence of spendthrift trusts has been growing steadily in this country since the distinct announcement of the doctrine by Justice Miller in—

Nichols v. Eaton, 91 U. S. 716, 23 L. ed. 254; *Insigni v. Shaw*, 167 Mass. 328; *McClelland v. McClelland* (Tex. Civ. App.) 37 S. W. 359; *Menken v. Brinkley*, 94 Tenn. 721; *Tolland Mut. F. Ins. Co. v. Underwood*, 60 Conn. 493; *Spindle v. Shreve*, 111 U. S. 542, 28 L. ed. 512; *Durant v. Massachusetts Hospital L. Ins. Co.* 2 Low. Dec. 577; *Slattery v. Wason*, 151 Mass. 266, 7 L. R. A. 393.

In the absence of fraud the settlor may create a valid trust for himself.

Markham v. Guerrant, 4 Leigh, 279; *Perkins v. Dickinson*, 3 Gratt. 385; *Holmes v. Penny*, 3 Kay & J. 90; *Gray, Restraints on Alienation*, 2d ed. § 240, p. 224.

Where direction for accumulations embraces a number of persons, the interest of the beneficiaries not being separable, the accumulations cannot be reached by creditors.

Tolland Mut. F. Ins. Co. v. Underwood, 60 Conn. 493; *Slattery v. Wason*, 151 Mass. 266, 7 L. R. A. 393; *Markham v. Guerrant*, 4 Leigh, 279; *Bell v. Watkins*, 82 Ala. 512, 60 Am. Rep. 756; *Hanna v. Reynolds*, 16 U. S. App. 679, 59 Fed. Rep. 923, 8 C. C. A. 370; *Perkins v. Dickinson*, 3 Gratt. 385.

Messrs. Wickliffe Matthews and D. E. Alexander, for respondent:

Margaret McAvoy and Emma McAvoy each have an interest in the trust property, and the rents, issues, and profits thereof which can be reached by an action in equity in the 41 L. R. A.

form of the present action, that is, by a creditor's bill.

The common law is the basis of our jurisprudence, and must prevail where not modified by statute.

Stearns v. Aguirre, 6 Cal. 183; *Peralta v. Castro*, 6 Cal. 354; *Waters v. Moss*, 12 Cal. 535, 73 Am. Dec. 561; *Van Maren v. Johnson*, 15 Cal. 309; *Reed v. Eldredge*, 27 Cal. 347; *People v. Stratton*, 23 Cal. 57; *Hoyland v. Hadger*, 35 Cal. 414; *People v. Ah Sum*, 41 Cal. 653; *Cook v. Norman*, 50 Cal. 633; *Chandler v. Chandler*, 55 Cal. 267; *Moulton v. Holmes*, 57 Cal. 337; *Apple's Estate*, 66 Cal. 432.

The common law of England provided against spendthrift trusts generally.

28 Am. & Eng. Enc. Law, p. 10; *Re Sandersen*, 3 Kay & J. 497; *Nichol v. Levy*, 5 Wall. 441, 18 L. ed. 598.

When this equitable estate vested in the *cestui que trust*, the law of the state of California was that the whole of it was liable to the debts of the *cestui que trust* under a creditor's bill.

Tillinghast v. Bradford, 5 R. I. 205; *Bryan v. Knickerbocker*, 1 Barb. Ch. 409; *Green v. Spicer*, 1 Russ. & M. 395; *Piercy v. Roberts*, 1 Myl. & K. 4; *Huxens v. Healy*, 15 Barb. 296; *Bramhall v. Ferris*, 14 N. Y. 41, 67 Am. Dec. 113; *Blackstone Bank v. Davis*, 21 Pick. 42, 82 Am. Dec. 211; *Hallett v. Thompson*, 5 Paige, 583; *Graves v. Dolphin*, 1 Sim. 66; *Brandon v. Robinson*, 18 Ves. Jr. 429; *Rome Erch. Bank v. Eames*, 4 Abb. App. Dec. 88; *Dick v. Pitchford*, 21 N. C. (1 Dev. & B. Eq.) 490; *Pace v. Pace*, 73 N. C. 119; *Heath v. Bishop*, 4 Rich. Eq. 46, 55 Am. Dec. 654; *Kempton v. Hollowell*, 24 Ga. 52, 71 Am. Dec. 112; *Hailie v. McWhorter*, 56 Ga. 183; *Rugely v. Robinson*, 10 Ala. 702; *Robertson v. Johnston*, 38 Ala. 197; *Jones v. Reens*, 65 Ala. 134; *Smith v. Moore*, 37 Ala. 827; *Taylor v. Harvell*, 65 Ala. 1; *Johnson v. Hurley*, 3 Tenn. Ch. 258; *Staub v. Williams*, 5 Lea, 458; *Turley v. Massengill*, 7 Lea, 358; *Hooberry v. Harding*, 3 Tenn. Ch. 677; *Menken v. Brinkley*, 94 Tenn. 721; *Wallace v. Smith*, 2 Handy (Ohio) 79; *Leigh v. Harrison*, 69 Miss. 923, 18 L. R. A. 49.

The defendant, Margaret McAvoy, is estopped by her deed from denying or claiming that she did not create the trust by her own act.

Menken v. Brinkley, 94 Tenn. 721.

Section 859 of the Civil Code of the state of California provides as follows: "Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, is liable to the claims of the creditors of such person, in the same manner as personal property which cannot be reached by execution."

Scott v. Nevins, 6 Duer, 672; *Sillick v. Mason*, 2 Barb. Ch. 79; *Graff v. Bonnett*, 51 N. Y. 9; *Williams v. Thorn*, 70 N. Y. 270; *Rider v. Mason*, 4 Sandf. Ch. 351; *Tolles v. Wool*, 99 N. Y. 616; *Miller v. Sherry*, 2 Wall. 237, 17 L. ed. 827; *Edgell v. Haywood*, 3 Atk. 357; *Beck v. Furdett*, 1 Paige, 309, 19 Am. Dec. 436; *Corning v. White*, 2 Paige, 607.

The assignment of defendants, Margaret McAvoy and Emma Mary McAvoy, to John M. Byrne, by which a trust is attempted to be created, is void for the reason that a person cannot create a trust for his own benefit, and he cannot thereby avoid the payment of debts.

Menken v. Brinkley, 94 Tenn. 721; *Mackason's Appeal*, 42 Pa. 380, 82 Am. Dec. 517; *Glormley v. Smith*, 139 Pa. 584, 11 L. R. A. 565; *Pacific Nat. Bank v. Windram*, 133 Mass. 175.

On rehearing.

In eight states (Rhode Island, New York, North Carolina, South Carolina, Georgia, Alabama, Tennessee, and Ohio) there are decisions against the validity of restraints on the alienation of equitable life estates; in four states (New Jersey, Missouri, Arkansas, and Wisconsin) there are *dicta* to the same effect; in one other state (Connecticut) earlier *dicta* in favor of the validity are overruled by later *dicta* of a contrary import; in another state (Kentucky) the one decision in favor of the validity is proceeded and followed by cases the other way; and the *dictum* in another state (Vermont), sometimes supposed to favor the validity of such restrictions, has, in truth, no meaning. The only cases, therefore, to be found in the state courts in favor of the validity, which carry any weight with them, are in the reports of Pennsylvania and Massachusetts.

Tillinghast v. Bradford, 5 R. I. 205; *Bryan v. Knickerbocker*, 1 Barb. Ch. 409; *Green v. Spicer*, 1 Russ. & M. 895; *Piercy v. Roberts*, 1 Myl. & K. 4; *Havens v. Healy*, 15 Barb. 296; *Bramhall v. Ferris*, 14 N. Y. 41, 67 Am. Dec. 113; *Blackstone Bank v. Davis*, 21 Pick. 42, 82 Am. Dec. 241; *Hallett v. Thompson*, 5 Paige, 583; *Graves v. Dolphin*, 1 Sim. 66; *Rome Exch. Bank v. Eames*, 4 Abb. App. Dec. 83; *Degraw v. Clason*, 11 Paige, 186; *Graff v. Bonnett*, 31 N. Y. 9; *Brown v. Harris*, 25 Barb. 134; *Ireland v. Ireland*, 18 Hun, 362; *Dick v. Pitchford*, 21 N. C. (1 Dev. & B. Eq.) 480; *Pace v. Pace*, 73 N. C. 119; *Bank of the State v. Forney*, 37 N. C. (2 Ired. Eq.) 181; *Medane v. Mobane*, 89 N. C. (4 Ired. Eq.) 131; *Heath v. Bishop*, 4 Rich. Eq. 46, 55 Am. Dec. 654; *Kempton v. Halliwell*, 24 Ga. 52, 71 Am. Dec. 112; *Bailie v. McWhorter*, 56 Ga. 183; *Rugley v. Robinson*, 10 Ala. 702; *Robertson v. Johnston*, 36 Ala. 197; *Jones v. Reese*, 65 Ala. 184; *Smith v. Moore*, 37 Ala. 327; *Turley v. Massengill*, 7 Lea, 358; *Hooberry v. Harding*, 3 Tenn. Ch. 677; *Wallace v. Smith*, 2 Handy (Ohio) 79; *Hobbs v. Smith*, 15 Ohio St. 419; *Hardenburgh v. Blair*, 30 N. J. Eq. 42; *Wells v. Ely*, 11 N. J. Eq. 172; *Bolles v. State Trust Co.* 27 N. J. Eq. 308; *McIlwaine v. Smith*, 42 Mo. 45, 97 Am. Dec. 295; *Lackland v. Smith*, 5 Mo. App. 153; *Lindsay v. Harrison*, 8 Ark. 302; *Woodmeston v. Walker*, 2 Russ. & M. 197; *Massey v. Parker*, 2 Myl. & K. 173; *Brown v. Pocock*, 2 Russ. & M. 213; *Bridge v. Ward*, 35 Wis. 587; *McCleary v. Ellis*, 54 Iowa, 311, 37 Am. Rep. 205; *Donalds v. Plumb*, 8 Conn. 447; *Farmers' & M. Sav. Bank v. Brewer*, 27 Conn. 600; *Easterly v. Keney*, 36 Conn. 13; *Eastland v. Jordan*, 3 Bibb, 186; *Jones v. Langhorne*, 3 Bibb, 453; *Anderson v. Briscoe*, 12 Bush, 344; *Blanchard v. Taylor*, 7 B. Mon. 645; *Cosby v. Ferguson*, 8 J. J. Marsh. 264; *Flournoy v. 41 L. R. A.*

Johnson, 7 B. Mon. 698; *Samuel v. Satter*, 3 Met. 259; *Knefler v. Shreve*, 78 Ky. 297.

Van Fleet, J., delivered the opinion of the court:

On the 1st day of January, 1869, William McAvoy died, leaving surviving him, his widow, the defendant Margaret, and two minor children, the defendants, Emma and Delia. He left a will which was admitted to probate on the 23d day of January, 1869, by the probate court of the city and county of San Francisco, of which the material portions are as follows: "Item. I give, devise, and bequeath all my property, of every name, nature, and kind, to my executors aforesaid, in trust to manage and control the same, and to keep the same invested for the following purposes: (1) To provide out of the income thereof for the comfortable support and maintenance of my beloved wife (it being my desire and wish that she shall convey and release to said executors all her interest in my estate and in the community property, and, upon her doing so, she is to be provided with such support and maintenance) as one half of such income will provide. (2) To provide out of said income for the support and education of my two daughters. . . . (4) To accumulate such income until the death of my beloved wife, or until one or both of my said daughters shall marry. Upon the marriage of either daughter, to make over to her, as her separate estate, one fourth of the estate then in the hands of said trustees: and, upon the marriage of the other daughter, to make over a like proportion; and, upon the death of my beloved wife, to transfer and make over a like residue of the estate to my said daughters, share and share alike, or the children of the one which may die before her said mother's death." On January 11, 1869, the defendant, Margaret, in pursuance of the request expressed in the will, conveyed to the executors all her interest in the property in trust to carry out the provisions of said will. The court found, however, that William McAvoy died seized in fee of the property in question; and it follows that the defendant Margaret had no interest in the property except such, if any, as she may have derived under the will. On July 21, 1876, a decree of final distribution was entered, by which the property was distributed to the trustees named in the will (of whom the defendant Byrne is now the sole survivor), to have, hold, and dispose of in accordance with the terms and provisions of said will. On April 27, 1887, the defendant Delia married; and the trustee thereupon conveyed to her one undivided fourth of said property in accordance with the terms of the will. Both of said daughters were of full age at the time of the recovery of plaintiff's judgment, hereinafter mentioned, and their education had been completed. On September 27, 1893, the plaintiff recovered a judgment against the defendants Margaret and Emma for upward of \$3,000 on which an execution was issued and returned wholly unsatisfied. Thereupon the plaintiff brought this action against the trustee and the beneficiaries under the will, to subject the interest of the defendants Margaret and Emma in the trust property to the satisfaction of her judgment. The court found

that the sum of \$100 per month was sufficient for the support and maintenance of each of the defendants, Margaret and Emma, and gave judgment directing the trustee to pay to each of said defendants, out of three fourths of the net income of the property, the sum of \$100 per month, and to pay the whole of the residue of said three fourths to the plaintiff in satisfaction of her judgment. On the trial it was shown that certain third persons were creditors of said defendants Margaret and Emma, and that some of them had reduced their debts to judgment; and the defendant Byrne moved to have said persons brought in as parties to this action, which motion was denied by the court.

1. A judgment creditor, by filing a bill in equity to subject equitable assets to the payment of his judgment, acquires an equitable lien on such assets and a priority over any other creditor who has not already filed such a bill. Other judgment creditors who have not filed such a bill are therefore not necessary parties to the action, and their presence is not necessary for the protection of the defendants. The court therefore did not err in refusing to bring in as parties other judgment creditors who had not themselves commenced any such suit.

2. The only question of importance in the case is whether the defendants Margaret and Emma have any interest in the property or income in question, which can be subjected to the claims of their creditors. We think it clear that they have no such interest. It must be noticed at the outset that the provisions of the Civil Code cannot affect this case. The estate of the trustee and the rights of the beneficiaries vested on the death of the testator in 1869, and the Code is not and could not constitutionally be retroactive, so as to divest any of their rights. As there was not at the testator's death any statute in force in this state on the subject, this case must be decided in accordance with the rules of the common law; and, in ascertaining those rules, we may look as well to the decisions in other states of this Union possessing the common law, as to those of the English courts. *Lux v. Haggin*, 69 Cal. 384, 385.

By the great weight of authority in America, it is settled that the author of a trust to pay to or apply for the benefit of another the income of property, or a portion of such income, may lawfully provide that the interest of the beneficiary shall not be assignable or shall not be subject to the claims of his creditors. Out of the many decisions to this effect, we may refer to *Nichols v. Eaton*, 91 U. S. 716, 725, 38 L. ed. 254, 257; *Steib v. Whitehead*, 111 Ill. 247; *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504; *Roberts v. Stevens*, 84 Me. 325, 381, 17 L. R. A. 266; *Lampart v. Haydel*, 96 Mo. 439, 446, 2 L. R. A. 113; *Jourolmon v. Massengill*, 86 Tenn. 81, 100; *Garland v. Garland*, 87 Va. 758; *Oberman's Appeal*, 88 Pa. 278, 284; *Maryland Grange Agency v. Lee*, 72 Md. 161; *Wallace v. Campbell*, 53 Tex. 329; *Wales v. Bowdish*, 61 Vt. 27, 4 L. R. A. 819. It is also well settled in the jurisdictions where this doctrine prevails that such provisions need not be express, but may be implied from the general intention of the donor, to be gathered from the terms of the trust, in the light of all the circumstances, 41 L. R. A.

Baker v. Brown, 146 Mass. 369; *Pope v. Elliott*, 8 B. Mon. 56, and *Roberts v. Stevens*, 84 Me. 325, 17 L. R. A. 266, and *Wales v. Bowdish*, 61 Vt. 27, 4 L. R. A. 819. The decisions in England and in some of the American states limit this doctrine to cases where there is an express provision for a cesser or limitation of the estate upon any alienation, or upon bankruptcy, levy of execution, or the like. But we think that the rule established by the decisions we have cited is more consonant with the rules of law and with the principles of reason. Alienability is not an essential attribute of an equitable life estate in property; and there is nothing in the policy of the law prohibiting a donor from providing that his bounty shall be enjoyed only by those to whom he intends to extend it, and that property devoted by him to a trust otherwise valid shall not be diverted from its appointed destination.

The will in question does not, in terms, provide that the interest of the beneficiaries shall not be subject to the claims of their creditors, but its provisions lead to that result by an implication equally strong. By the legal effect of this instrument the entire property is devised to the executors in trust—First, to provide out of one half of the income thereof for the comfortable support and maintenance of the testator's widow, and to provide out of said income for the support and education of his two daughters; second, to accumulate the surplus of one half of said income after providing for the support and maintenance of the widow until her death, and to accumulate the remaining half thereof after providing for the support and education of the daughters (one half of said half until one of the daughters should marry, and the other half of said half until the other daughter should marry); third, to transfer to each of the daughters, upon her marriage, one fourth of the trust property, with one half of the accumulations of one half of the income; and, fourth, upon the death of the widow to transfer to each of the daughters, or to the children of either of them deceased at that time, one fourth of the trust property, with one half of the accumulations of the other half of the income. Under these provisions the only right of the widow is to have the trustee support her during her life out of one half of the income; and the only right of the defendant Emma, until her marriage, is to have a like support out of one fourth of the income. No sums whatever are directed to be paid to either of them during those periods, but the trustee is himself to expend the money for their support. Of course, therefore, no creditor could take any part of the income so appropriated for their support without entirely defeating the provision for that purpose. It is plain, therefore, that under no circumstances can any creditor of the defendant Margaret take any portion of this property; for she has no interest in it, present or prospective, except the right to be supported during her life, which right could not be reached by a creditor without defeating the trust. *Johnston v. Zane*, 11 Gratt. 552, 569. Nor does the creditor of defendant Emma stand in any better position. Besides her right to a support, which for the reasons shown, cannot be impaired, the only interests she has are a right to one fourth of the

property contingent upon her marriage, and a right to another fourth thereof contingent upon her surviving her mother. Until those events occur the trustee must continue to accumulate the surplus income, for neither of them may ever occur; and if they do not occur, the accumulation as well as the corresponding share of the *corpus* of the property, will belong to some other person. No part of this surplus can therefore be taken by a creditor without defeating the trust for accumulation. An express provision in the will restraining alienation, voluntary or involuntary, would therefore have been no stronger than the necessary implication derived from the purposes to which the property is directed to be applied.

We have not been referred to any rule of law as it stood before the enactment of the Code which is contravened by any provision in this will, and we cannot see any infirmity in any of those provisions. They would be valid even under the English rule (*Chambers v. Smith*, L. R. 3 App. Cas. 795); and even if they had been for any reason invalid, such invalidity could not now defeat the will, for the decree of distribution is conclusive of the validity of all of its provisions. Code Civ. Proc. §§ 1666, 1904; *William Hill Co. v. Lawler*, 118 Cal. 359; *Greenwood v. Murry*, 26 Minn. 259. It follows that the plaintiff is not entitled to subject the property in question to her judgment.

This conclusion renders it unnecessary to consider the other questions argued, and, as the facts appear on the face of the findings, no new trial will be required. *The judgment and order appealed from are reversed*, and the cause remanded, with directions to the court below to set aside its conclusions of law, and to enter judgment upon the findings in favor of the defendants.

We concur: **Harrison, J.; Garoutte, J.; McFarland, J.**

Temple, J., dissenting:

I dissent. If it be held that the case is not governed by the Code provision, then the rule of the common law must prevail. At common law these so-called "spendthrift trusts" were held invalid; the rule being, as was expressed in *Brandon v. Robinson*, 18 Ves. Jr. 429: "Certainly no man shall have an estate to live on, but not an estate to pay his debts with. Certainly property available for the purposes of pleasure or profit shall be also amenable to the demands of justice." It is said that the American rule of decision is in favor of the validity of such trusts. I doubt this. Certainly in many states the English rule has been approved. In some the matter is controlled by statute. See 23 Am. & Eng. Enc. Law, p. 10. In *Nichol v. Levy*, 5 Wall. 441, 18 L. ed. 598, it is said: "It is a settled rule of law that the beneficial interest of the *cestui que trust*, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary, and immunity from his creditors," etc. Such estates are contrary to the policy of our laws, which provides means of subjecting the property of all to the satisfaction of their obligations. Such trusts enable one by his own act to make property exempt from execution, and violate our ideas of equality and fair play. If there is a conflict in the authorities, and we are free to choose, I think the English rule by far most conformable to justice and good policy. I think, also, that the opinion is at variance with the very recent decision in *Re Cavarlay*, 119 Cal. 406.

Rehearing denied.

KANSAS SUPREME COURT.

T. E. B. MASON et al., Plffs. in Err.,
v.

Alexander McLEOD

(57 Kan. 105.)

***1. The provisions of chapter 182 of the Laws of 1889 (11 4005-4007, Gen. Stat. 1889) requiring the vendor of patent rights to file with the clerk of the district court copies of the letters patent, and to make and file an affidavit that the letters patent are genuine and unrevoked, and that he has authority to sell, and providing further, that the words, "Given for a patent right," shall be inserted in any written obligation taken from a vendee of a patent right, are reasonable police regulations, which do not violate the Federal Constitution, or infringe upon the exclusive right secured to the patentee by the Federal law.**

*Headnotes by **JOHNSTON, J.**

- 2. As the purpose of the statute was to prevent and punish fraud, and non-compliance with its provisions was declared to be a misdemeanor, contracts made by a vendor of patent rights in violation of the statute are void as between the parties.**
- 3. The general rule that courts will not enforce contracts prohibited by statute, or allow the recovery of money or property paid or delivered in pursuance of them, does not apply to vendees of patent rights, for whose protection the statute was enacted.**

(June 6, 1896.)*

ERROR to the District Court for Greenwood County to review a judgment in favor of plaintiff in an action brought to annul a con-

*A writ of error taking this case to the Supreme Court of the United States was dismissed by that court May 23, 1898.

NOTE.—As to the power of the state to restrict and regulate the sale or enjoyment of patent rights, see *Com. v. Petty* (Ky.) 29 L. R. A. 786, and note.

41 L. R. A.

As to notes given for patent rights, see also *First Nat. Bank v. Stockell* (Tenn.) 20 L. R. A. 605, and note.

tract for the purchase of a patent right. *As framed.*

Statement by Johnston, J.:

On December 19, 1891, T. E. B. Mason sold to Alexander McLeod the right to manufacture, sell, and use a patent for an improvement in pruning hooks in the undivided half of the state of Texas. The consideration paid by McLeod was a tract of land in Greenwood county, Kansas, together with money and personal property of the aggregate value of \$800, and in addition McLeod gave to Mason his promissory note for the sum of \$500. Afterwards, on March 8, 1892, a new agreement was entered into between the parties by which McLeod was to surrender his patent to the Texas territory, and give a note for \$235, and Mason was to sell to McLeod a right to the territory of Utah, and the state of South Carolina, together with certain counties in western Kansas, and at the same time he was to surrender to McLeod the note of \$500. Under this last agreement McLeod did surrender and deliver up to be canceled the patent deed for the Texas territory, and Mason did convey to McLeod the right to the territory of Utah, the state of South Carolina, and also to certain counties in Western Kansas. When the last agreement was made the \$500 note given by McLeod in pursuance of the first agreement was held by the State Bank of Leroy, Kansas, as collateral security, but it was agreed by Mason that he would obtain the note from the bank, and that then McLeod would execute his note for \$235, and, in exchange, receive the \$500 note. Mason never procured the \$500 note and McLeod did not execute his note for \$235. It was agreed between T. E. B. Mason and Laura A., his wife, that she should have the proceeds of the sales of the patent for the state of Kansas, and in pursuance of that agreement the real estate of McLeod was conveyed to Laura A. Mason, and the personal property was delivered to her. The agreements mentioned were all made in the county of Woodson, and at the time of making the same, as well as at the time of conveying the territory, Mason had not filed with the clerk of the district court of Woodson county copies of the letters patent, duly authenticated, nor had he made an affidavit before the clerk that the letters patent were genuine, and had not been revoked or annulled nor that he had authority to sell and barter the right to the patent; and, further, the note for \$500 given in payment of said patent did not have the words, "Given for a patent right," written or printed therein. No false or fraudulent representations were made by Mason concerning the right to territory in the state of Texas at the time of making the sale, nor concerning the new territory of Utah, South Carolina, and part of Western Kansas. On March 17, 1892, McLeod brought an action against T. E. B. and Laura A. Mason to annul the contract made between them, to set aside the deed to the land in Greenwood county which he had conveyed for the patent right, to cancel the \$500 note which was still in the possession of Mason, and to recover the value of the personal property which had been transferred as a part of the consideration for the patent right. The court, after finding the

facts substantially as above stated, held that the attempted conveyance of the patent right was illegal, and the patent deeds void, and that McLeod was entitled to a judgment for the reconveyance of the real estate previously transferred, for the surrender of the \$500 note, and for the sum of \$815, the value of the personal property delivered and the money paid for the illegal patent right. The defendants complain and bring the case here for review.

Messrs. R. P. Kelley and W. S. Marlin, for plaintiffs in error:

The statute, which requires a patentee or his assignee to file an authenticated copy of letters patent and make affidavit that he is the owner, and insert the words, "given for a patent right," in all notes taken for patent rights, is unconstitutional as contravening the provisions of the Federal Constitution.

Congress has provided a record to be kept of all patents issued and assignments thereof. Such record is designed for the protection of all persons dealing in patent rights. Congress is the sole judge of what record is proper and sufficient.

Can a state legislature say whether Congress has made ample provision for the convenience of its citizens to obtain inspection of letters patent?

If a statute should try to exercise police powers over articles of a given kind, but discriminate against patented articles, such a statute would be void.

Re Sheffield, 64 Fed. Rep. 888; *Re Schechter*, 63 Fed. Rep. 695, 4 Inters. Com. Rep. 849.

What greater discrimination can be made than by this statute, which exempts all kinds of property from its operations, save patent rights?

The following decisions sustain the sale:

Cranston v. Smith, 37 Mich. 309, 26 Am. Rep. 514; *State v. Lockwood*, 43 Wis. 403; *Woolen v. Banker*, 2 Flipp. 33; *Ex parte Robinson*, 2 Biss. 309; *Anthony v. Carroll*, 2 Bonn. & Ard. 195; 4 Fish. Pat. Cas. 18; *Re Robinson*, Scientific American, Feb. 20, 1875, and March 11, 1876; *Castle v. Hutchinson*, 25 Fed. Rep. 394; *Helm v. First Nat. Bank*, 43 Ind. 167, 13 Am. Rep. 395.

The exercise of the powers and rights guaranteed by Federal or state Constitution cannot be violated by the mere declaration that an occupation or any particular act is injurious to the public welfare.

18 Am. & Eng. Enc. Law, p. 746; *Re Jacobs*, 33 Hun. 374, 98 N. Y. 98, 50 Am. Rep. 636.

The statute cannot be justified on ground of police power, for the reason in substance the law is not a police regulation, but a mere arbitrary assertion of power.

People, Nechameus, v. Warden of City Prison, 144 N. Y. 529, 27 L. R. A. 718; *Wheeling Bridge & Terminal R. Co. v. Gilmore*, 8 Ohio C. C. 658. See also *People v. Detroit, G. H. & M. R. Co.* 79 Mich. 471, 7 L. R. A. 717; *Black, Constitutional Prohibitions*, § 64; *Munn v. People*, 69 Ill. 80, 94 U. S. 118, 24 L. ed. 77; 18 Am. & Eng. Enc. Law, pp. 752, 760, 761. *Police power*, note 2; *Toledo, W. & W. R. Co. v. Jacksonville*, 87 Ill. 87, 16 Am. Rep. 611.

The statute referred to is void for the reason that, under the national Constitution, a limita-

tion is placed on state police regulations as to such matters over which the state has control.

Osborne v. Mobile, 16 Wall. 481, 21 L. ed. 478; *Leisy v. Hardin*, 185 U. S. 100, 84 L. ed. 128, 8 Inters. Com. Rep. 36; *Mugler v. Kansas*, 123 U. S. 623, 81 L. ed. 205.

The judgment should have been for the plaintiffs in error because the contract was executed, and the law, even if the statute is good, will leave the parties where it finds them.

Setter v. Alvey, 15 Kan. 159; *Pacific Trust Co. v. Dorsey*, 72 Cal. 55; *Hooker v. De Palos*, 28 Ohio St. 251, Reversing 2 Cin. Sup. Ct. Rep. 369; 5 Lawson, Rights, Rem. & Pr. § 2422, and cases cited in note 2, and § 2431, and notes 3 and 5; *Atwood v. Fisk*, 101 Mass. 363, 100 Am. Dec. 124; *Rossmann v. McFarland*, 9 Ohio St. 369.

Messrs. Stephenson & Hogueland, G. H. Lamb, and G. E. Manchester, for defendant in error:

Statutes similar to ours have been held unconstitutional, in—

Ex parte Robinson, 2 Biss. 309; *Hollida v. Hunt*, 70 Ill. 109; *Wilch v. Phelps*, 14 Neb. 184; *Crittenden v. White*, 23 Minn. 24, 23 Am. Rep. 676; *Cranson v. Smith*, 37 Mich. 309, 26 Am. Rep. 514.

The latter case was in effect overruled in—*Coldwater v. Russell*, 49 Mich. 617, 43 Am. Rep. 478; *State v. Lockwood*, 43 Wis. 403; *Grover & B. Sewing Mach. Co. v. Butler*, 53 Ind. 454, 21 Am. Rep. 200; *Helm v. First Nat. Bank*, 43 Ind. 167, 13 Am. Rep. 395; *State v. Peck*, 25 Ohio St. 26; *Bowen v. Kemmerer*, 2 Pearson (Pa.) 250; *Castle v. Hutchison*, 25 Fed. Rep. 394.

In 1879 the case of *Patterson v. Kentucky* was decided (97 U. S. 501, 24 L. ed. 1115). Since that time we know of no decision holding a similar statute unconstitutional; but, on the contrary, several states that had formerly held such statutes unconstitutional have, on the authority of *Patterson v. Kentucky*, reversed their former decisions.

Haskell v. Jones, 86 Pa. 175; *Tod v. Wick Bros.* 36 Ohio St. 381; *Brechbill v. Randall*, 102 Ind. 528, 52 Am. Rep. 695; *Hockett v. State*, 105 Ind. 250, 55 Am. Rep. 201; *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40; *Sandage v. Studebaker Bros. Mfg. Co.* 143 Ind. 148, 84 L. R. A. 863.

An attempt, by the legislature, in good faith, to regulate the conduct of a portion of its citizens, in a matter strictly pertaining to its internal economy, we cannot but regard as a legitimate exercise of power, although such law may sometimes indirectly affect the enjoyment of rights flowing from the Federal government.

Jordan v. Dayton Overseers, 4 Ohio, 295; *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 585; *Fry v. State*, 68 Ind. 552, 30 Am. Rep. 288; *Livingston v. Van Ingen*, 9 Johns. 507; *Tod v. Wick Bros.* 36 Ohio St. 381; *Herdie v. Roessler*, 109 N. Y. 127; *State, Smith, v. McOlelland*, 138 Ind. 395; *Brechbill v. Randall*, 102 Ind. 528, 52 Am. Rep. 695; *Hockett v. State*, 105 Ind. 250, 55 Am. Rep. 201; *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40; *Hankey v. Downey*, 116 Ind. 118, 1 L. R. A. 447.

Statutes in Ohio, Pennsylvania, and New 41 L. R. A.

York requiring notes taken in whole or in part for a patent right have been held valid.

Tod v. Wick Bros. 36 Ohio St. 381; *Haskell v. Jones*, 86 Pa. 175; *Herdie v. Roessler*, 109 N. Y. 127.

When one party to a contract is by law prohibited from making it, and the other party is not, the innocent party may recover for the wrong done, even though the contract is consummated.

Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132; *Feineman v. Sachs*, 33 Kan. 621, 52 Am. Rep. 547; *Bateman v. Robinson*, 13 Neb. 508.

Johnston, J., delivered the opinion of the court:

No attempt was made by Mason to comply with the statutory requirements concerning the transfer of patent rights, and for this reason the trial court held the contract to be invalid, and adjudged a rescission. The principal question discussed by counsel relates to the validity of the statute in violation of which the contract was made. Among other things, it provides that it is unlawful for any person to sell a patent right in any county of the state without filing with the clerk of the district court copies of the letters patent, and with it an affidavit that the letters patent are genuine, have not been revoked or annulled, and that he has full authority to sell. It is required that the affidavit shall give the name, age, occupation, and residence of the party proposing to sell, and he is required to exhibit a copy of the affidavit to any person on demand. There is a further provision that any person who takes a written obligation in consideration of a patent right shall insert in the body of it, in writing, or print, the words "Given for a patent right." A failure to comply with these provisions is declared to be a misdemeanor, and the penalty is a fine not exceeding \$1,000, or imprisonment in the county jail not exceeding six months. Laws 1889, chap. 182 (§§ 4005-4007, Gen. Stat. 1889). In our opinion, these provisions do not trench upon the Federal power, nor interfere with the right secured to a patentee by the Federal law. It is true that no state can interfere with the right of the patentee to sell and assign his patent, nor take away any essential feature of his exclusive right. The provisions in question, however, have no such purpose or effect. They are in the nature of police regulations designed for the protection of the people against imposition and fraud. There is great opportunity for imposition and fraud in the transfer of intangible property such as exists in a patent right, and many states have prescribed regulations for the transfer of such property differing essentially from those which control the transfer of other property. There were some early decisions holding that such regulations trespassed upon the Federal power and the rights of the patentee, but recent authorities hold that reasonable police regulations may be enacted by the state without usurping any of the powers of the Federal government, or infringing upon the exclusive rights of the patentee. *Brechbill v. Randall*, 102 Ind. 528, 52 Am. Rep. 695; *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40; *Pape v. Wright*, 116 Ind. 503; *Sandage v. Studebaker Bros. Mfg. Co.* 143 Ind.

148, 84 L. R. A. 363; *Tod v. Wick Bros.* 86 Ohio St. 870; *Herdie v. Roessler*, 109 N. Y. 127; *Haskell v. Jones*, 86 Pa. 178; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115; *Webber v. Virginia*, 103 U. S. 844, 26 L. ed. 565. The doctrine of these cases is that the patent laws do not prevent the state from enacting police regulations for the protection and security of its citizens, and that regulations like ours, which are mainly designed to protect the people from imposition by those who have actually no authority to sell patent rights, or own patent rights to sell, should be upheld. We think the statute is valid. The purpose of the statute, as we have seen, was to prevent and punish fraud, and noncompliance with its provisions is declared to be a misdemeanor punishable by fine or imprisonment. The penalty implies a prohibition, and contracts made by a vendor of patent rights, in violation of the act, are void as between the parties. The transfer of Mason being illegal, did not constitute a valid consideration for the money or property obtained from McLeod. *New v. Walker*, 108 Ind. 865, 58 Am. Rep. 40; *Sandage v. Studebaker Bros. Mfg. Co.* 142 Ind. 148, 34 L. R. A. 363.

It is contended by plaintiffs in error that if the statute is bad all of the parties are *in pari*

delicto, and all should be left without remedy. It appears that the contract finally made was not in fact closed up and completed. The \$500 note previously delivered to Mason for the Texas territory was never delivered to McLeod. He had deposited the note as collateral in a bank at Leroy, and it was not then under the control of himself or his wife. The return of this note, and its exchange for the \$235 note, was a part of the consideration of the contract, and until these things were done it was not in fact executed. More than that, the general rule that courts will not enforce contracts prohibited by statute, or allow the recovery of money or property paid or delivered in pursuance of them, does not apply to McLeod. He cannot be held to be *in pari delicto*. The duties prescribed by the statute are imposed upon the vendor of patent rights, and are provided for the protection of purchasers. The law was not violated by McLeod. It placed no burdens upon him, and, having committed no wrong, he is not precluded from asking and obtaining relief. We think the pleadings are sufficient to warrant the findings that were made, and that *the judgment should be affirmed*.

All the Justices concur.

MARYLAND COURT OF APPEALS.

Thomas M. FORD, *Appl.*,
v.

STATE of Maryland.

(35 Md. 465.)

1. Laws and regulations necessary for the protection of the health, morals, and safety of society are within the legitimate exercise of the police powers of the state, provided they are reasonable.
2. Allegations to show that the accused knew what the articles were that he had in his possession are not necessary in an indictment under Laws 1894, chap. 310, § 178, making it unlawful to have possession of any record of numbers drawn in a lottery or of any lottery ticket or anything in the nature thereof, unless they are held for the purpose of procuring or furnishing evidence of a violation of the law.
3. Ignorance of the fact that the articles which a person has in his possession are policy books and slips which it is an offense for him to have under Laws 1894, chap. 310, § 178, does not constitute any defense.
4. The constitutional right of an individual to hold property is subject to those reasonable regulations which are necessary for the common good and general welfare, especially such as affect the health and morals of the people.
5. A person is not deprived of his liberty without due process of law by a statute making it an offense to have possession of prohibited articles, such as a record of lottery drawings, even if he did not know what the articles that he had were.

6. The constitutional right of trial by jury is not infringed by a statute making the mere possession of prohibited articles, even without knowing what they were, an offense.

7. A person is not deprived of the presumption of innocence by a statute making it an offense to have possession of prohibited articles which are of no lawful use.

(April 1, 1897.)

APPEAL by defendant from a judgment of the Criminal Court of Baltimore City convicting him of violating the lottery laws. *Affirmed*.

The facts are stated in the opinion.

Messrs. Thomas C. Ruddell and B. Chambers Wickes for appellant.

Messrs. Harry M. Clabaugh, Attorney General, and Henry Duffy for appellee.

Boyd, J., delivered the opinion of the court:

The appellant was indicted in the criminal court of Baltimore city for violating the lottery laws of this state. There are five counts in the indictment, to the fourth and fifth of which demurrers were filed which were overruled. The traverser then filed a special plea to the fourth and fifth counts, which was demurred to by the state and the demurrer sustained. The case was then submitted to the court on a plea of not guilty and the traverser was found guilty on the fourth and fifth counts and not guilty on the others. During the progress of the trial, he offered certain evidence which was ruled out and an exception was

NOTE.—As to the constitutionality of statutes making it criminal to have the possession of certain property, see *note* to *State v. Lewis* (Ind.) 20 41 L. R. A.

L. R. A. 52; also *Mon Luck v. Sears* (Or.) 23 L. R. A. 738.

taken to that ruling. Although the rulings of the court on the several demurrers and on the admissibility of the evidence offered are all before us, the principal questions involved in them are the construction and constitutionality of § 178 of chap. 810 of the Laws of 1894.

The portion of that section with which we are particularly concerned on this appeal is the provision that "if any person shall have in his possession in this state any book, list, slip, or record of the numbers drawn in any lottery, whether in this state or elsewhere, or any book, list, slip, or record of any lottery ticket or anything in the nature thereof, mentioned in this section, or of any money received or to be received from or for the sale of any such lottery ticket, or thing in the nature thereof as aforesaid [he] shall be liable to indictment, and upon conviction shall be, in the discretion of the court, fined any sum not exceeding \$1,000, or shall be imprisoned for a period not exceeding one year, or shall be both fined and imprisoned; provided, however, that this section shall not apply to any person who may have possession of any of the articles herein mentioned for the purpose of procuring or furnishing evidence of violations of any of the provisions of the laws relating to lotteries."

An examination of our statutes will show numerous efforts on the part of our legislatures to prevent the lottery business from being carried on in this state. Most of the provisions in our present Code looking to that end were in the Code of 1860, and some of the statutes therein codified had been passed many years before that date. Under that Code it was and still is a violation of law to draw any lottery, to sell lottery tickets, policies, certificates or anything by which the vendor or other person promises or guarantees that any particular number, character, ticket, or certificate shall in any event, or on the happening of any contingency, entitle the purchaser or holder to receive money, property, or evidence of debt.

If any person kept a house, office, or other place for the purpose of selling such tickets, policies, certificates, etc., he was subject to a penalty of \$1,000, as was the owner of the house or office who permitted it to be used for such purpose. Then § 178 of article 27 of the Code imposed a like penalty on any person who brought into this state any such lottery tickets, policies, certificates, etc., and other provisions with heavy penalties attached are in the Code looking to the suppression of this great evil, but it still existed. The legislature of 1894 went a step further and added to § 178 the provision above quoted, whereby the mere possession of the articles named therein is made a crime, unless it be for the purpose of procuring or furnishing evidence of violations of any of the provisions of law relating to lotteries.

The language of this section is too plain to admit of any discussion as to its meaning. When considered in connection with the previous legislation on this subject, it is evident that the legislature found that the statutes in force were not sufficient to prevent the lottery business in this state, and it was therefore made a crime for anyone to have any of the articles named in his possession, unless it be for the

one purpose provided for by the statute—procuring or furnishing evidence of violations of the law. It will be necessary, then, for us to determine whether such legislation is a valid exercise of the powers vested in the state. It cannot now be denied that laws and regulations necessary for the protection of the health, morals, and safety of society are strictly within the legitimate exercise of the police powers of the state, provided, of course, that such regulations be reasonable. Such laws are not prohibited, either by the Federal Constitution or that of this state. The cases of *Singer v. State*, 72 Md. 464, 8 L. R. A. 551; *McAllister v. State*, 72 Md. 390; *Long v. State*, 74 Md. 565, 13 L. R. A. 425; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, and *Powell v. Pennsylvania*, 137 U. S. 678, 32 L. ed. 253, will illustrate the application of the doctrine without encumbering this opinion with the citation of the numerous other decisions on the subject.

If it be necessary to refer to any authority to show that the laws for the suppression of lotteries are regarded by the courts to be in the interest of the morals and welfare of the people, the cases of *Ballock v. State*, 73 Md. 1, 8 L. R. A. 671, and *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079, will suffice to give the views of the Supreme Court of the United States and of this court on that subject. There probably never was a time in the history of this state when it was more necessary than the present to use all legitimate means to stamp out this and kindred evils which are demoralizing so many who might otherwise be useful and honest citizens. The man that is always looking for greater returns than his investment or efforts justify, is generally a useless, if not a dangerous member of society, and a lottery is said to be "a game in which small sums are ventured for the chance of obtaining a larger value." It is not difficult to see why one given up to that sort of business soon becomes worse than useless to his community. The tendency is to make him idle, and idleness easily begets crime. Families are deprived of the comforts and sometimes necessities of life, which are due them because those who should provide them either squander their means in pursuit of such gains, or have had their powers of earning paralyzed, by the pernicious habit of this form of gambling.

In view of the disastrous effect on those dealing with lottery tickets, and upon the community where such business is conducted, there can be no doubt about the right of the legislature to prohibit anyone from having them in his possession if that be reasonably necessary for the suppression of the evil. As the statute makes it a crime to have them in possession, the purpose for which the traverser had them is wholly immaterial, and inasmuch as the legislature did not make the crime dependent upon the knowledge of the party as to what the articles were, it was unnecessary to allege in the indictment that the traverser had them in his possession knowingly, wilfully, or in any other words that would impute knowledge of the fact that they were some of the articles prohibited by the law. The allegations in the indictment were clearly sufficient.

But it is contended that if that be conceded, the effect of the statute was simply to shift the

burden to the traverser and he could still prove that he did not have knowledge of what the articles were, and hence was not guilty of a violation of law, and that if the statute must be so construed as to deprive him of that right then it is in conflict with the Constitution of the United States and of this state. This question was intended to be raised by the special plea filed and the offer of testimony stated in the bill of exceptions. The plea alleges that the defendant "was in possession of policy books and slips as stated in said indictment, but also says that he is in no way engaged in the policy business, and that he was not aware that the papers, books, and other articles which were found in his possession were policy or lottery slips; that the said articles were given to him to carry to a certain place and that he was then taking them to that place without knowing what said articles were." The proffer of evidence as stated in the bill of exceptions was "that said articles were given to him by a man who asked him to deliver them to another man; and that he did not know what said articles were, and had no knowledge that they were policy books or anything connected with said business."

It would, of course, be no excuse if the traverser did not know that the law prohibited the possession of these articles. He is, on the contrary, presumed to know that it did. Would, then, his ignorance of the fact that what he had in his possession were policy books and slips excuse him? It is argued that to hold it would not might result in the conviction and punishment of innocent people—that someone might find on the street a book or list of lottery tickets and not know what it was, but be convicted simply because he had it in his possession. We are not informed by the record how the books, lists, slips, and records named in the indictment are made and what they embrace, but in the supplemental brief the learned counsel for the traverser have undertaken to explain them, and we cannot imagine how anyone finding either of them on the street would be induced to take it into his possession unless he knew what it was, for it seems to be merely a collection of figures and letters so arranged as to be utterly unintelligible to anyone not learned in the business, and to an innocent person would certainly not be suggestive of any value. If anyone be so unfortunate as to find one, and while satisfying his curiosity as to what it is a police officer overtakes him, it will be time enough to determine whether he had it in his possession within the meaning of the statute. But if after a person has undoubtedly gotten into his possession one of the prohibited articles he is to be permitted, notwithstanding the language of the statute, to prove that he found it, or did not know what it was, it will make the statute practically useless, for if he swears that such was the case it will generally be impossible for the state to prove the contrary, and will be a great temptation to perjury, not only to the accused, but to others who might come to his assistance.

If a reputable person satisfies the prosecuting officer that he came into possession of it in an innocent way, it is not likely the prosecution would be continued, or if the court be in-

formed of such facts it could take it into consideration in imposing the penalty, and could fine him 15 cents or less, which would relieve him of the cos's. Courts can and frequently do consider facts in imposing penalties that would not bar a prosecution. If, for example, the court is satisfied that the accused was ignorant of the statute under which he was arrested, and if prior to the passage of the statute what is therein prohibited was not unlawful, the court might take the fact that he was ignorant of it into consideration in passing sentence, but still he could be lawfully convicted. So far as the justice of the case is concerned, it would not be more inequitable to punish one for having in his possession what is prohibited, when he did not know that he had it, than to punish him when he did not know it was prohibited, although he knew he had it. But he is presumed to know the law and is therefore punished for its violation, although only unlawful because the statute says so, and why should he not be presumed to know that he had what the law prohibited from being in his possession.

In *State v. Baltimore & S. Steam Co.* 13 Md. 181, the statute under consideration provided "that it shall not be lawful for any slave to be transported on any railroad, or any steamboat, etc., without a permission in writing from the owner of such slave." The defense was that the company or its agents had no knowledge that the negro was on board and had no intention to violate the law, but the court held that the liability could be enforced without reference to such circumstances. Tuck, J., in delivering the opinion of the court said, "If the legislature deemed it expedient, in view of the grievance complained of, to hold persons responsible for transporting negroes, whether they were instigated by a criminal intent or not, they had the power to do so. Such acts may produce mischief in individual cases, but the inconvenience and injury would be much more general if in every case of this kind the party charged could defend himself by offering evidence that he did not know the negro was on board of the boat, and that reasonable diligence had been used to prevent such persons from coming on board. The law would scarcely afford any protection to slave owners." In *Carroll v. State*, 63 Md. 551, this court said: "As ignorance of the existence of such law will not excuse, so also ignorance of a fact necessary to be known to avoid a violation of law will not excuse."

In that case there are quotations from 3 Greenleaf on Evidence, § 21, that "where a statute commands that an act be done or omitted, which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation." Again, "such is the case in regard to fiscal and police regulations, for the violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law, in those cases, seems to bind the party to know the facts and to obey the law at his peril." The court refers to a note in Greenleaf, where the rule "is said to apply to the sale of any articles, the sale of which is prohibited, and it has been held to be

no excuse that the vendor did not know it was the prohibited article." Some of the cases cited in that opinion are very applicable to this case.

Laws of this character have been sustained in numerous decisions, some of which were much more likely to work hardship in individual cases than this statute. In *Ex parte Hotcomb*, 2 Dill. 392; the defendant was held liable for having in his possession miniature photographs of the United States Treasury notes. Laws prohibiting persons from having game in their possession during specified periods have generally been upheld, although the decisions have differed as to whether the statutes applied to game received from beyond the state, prohibiting the possession. *Dickhaut v. State*, 85 Md. 451, 38 L. R. A. 765, decided by this court at the present term; *Phelps v. Racey*, 60 N. Y. 12, 19 Am. Rep. 140; *State v. Randolph*, 1 Mo. App. 15; *Roth v. State*, 51 Ohio St. 209; *Magner v. People*, 97 Ill. 820, and other cases cited in *Dickhaut v. State*, 85 Md. 451, 38 L. R. A. 765.

Some of the cases construing statutes against carrying concealed weapons, regulating the sale of intoxicating liquors, oleomargarine, milk, etc., might be cited as tending to sustain the position taken by the state in this case, but it is unnecessary, as many of them can be found in the note to § 21, 15th ed. of 8 Greenleaf on Evidence.

It is proper to say, however, that such statutes are dealing with articles that may, under certain circumstances and conditions, be lawfully used; yet the Supreme Court of the United States and other courts in numerous cases have held that the articles could be seized and destroyed by the proper authorities on the principle that the constitutional right of the individual to hold property is subject to those reasonable regulations which are necessary for the common good and general welfare—especially such as affect the health and morals of the people. The policy books and slips found in the possession of the traverser could only be put to one legitimate use in this state—procuring or furnishing evidence of the violations of the lottery law, and it is not contended he had them for this purpose.

But it is contended that the statute deprives the accused of the right of trial by jury and of his constitutional guaranty that he be not deprived of his liberty without due process of

law. But the fallacy of the argument is in assuming that it does interfere with those rights. He had the perfect right to prove either that the articles charged in the indictment were not found in his possession, or that those found were not such as the law prohibited him from having. That is the issue made by the statute. It does not deprive him of the presumption of innocence to which he is entitled, but it does make it a crime for him to have in his possession that which is of no lawful use in this state and which injuriously affects the morals and interferes with the welfare of the people. And it is evident that the statute has made the mere possession of the articles a crime because that is the most effectual way to break up the lottery business. The importance of placing the construction we do on the law could not be better illustrated than by what we find in this case and that of *McNeal v. State*, which were argued together.

The pleas and the evidence offered in the two cases are identical. It may be possible, even if not very probable, that both received the forbidden articles under exactly similar circumstances, but if that be so, it looks as if those engaged in the business have for the purpose of shielding themselves and avoiding detection in the delivery of them, resorted to this method of doing so. If the police authorities ascertain who the agent for selling the tickets is he might be detected in delivering them, so he would call someone to his assistance, and according to the contention of the appellant, if the latter does not know what they are, but they are simply "given to him by a man who asked him to deliver them to another man," then he cannot be convicted, although he have his pockets full of some of the articles prohibited by law from being in the possession of anyone. Such a construction of the law would render its enforcement very difficult, if not impossible. It is safer to give the language of the legislature its ordinary meaning and construe it to mean what it says. We do not fear that the innocent will thereby suffer, but if there be any such danger it is for the legislature, and not for the judicial branch of the government, to correct any defect that may be found, from experience, to exist in the statute, and we find no such objection to it as would give the court the right to declare it invalid.

The judgment must be affirmed.

NEW YORK COURT OF APPEALS.

Trustees of the Village of CANANDAIGUA,
Resp't.,
v.

William L. FOSTER, *Appt.*

(156 N. Y. 364.)

The implied duty of the owner to use reasonable care in inspecting and re-

pairing a grate in a sidewalk in front of his premises does not cease by leasing a part only of the structure on the abutting land, and its occupation by a tenant, although that part includes, by implication, the exclusive right of the tenant to use the grate as a beneficial appurtenance.

(June 7, 1896.)

NOTE.—For the liability of a landlord as to the condition of that part of his premises which is controlled by a tenant, see *Jones v. Millsaps* (Miss.) 23 L. R. A. 166.

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As to the liability for excavations under highways, see *Babbage v. Powers* (N. Y.) 14 L. R. A. 303.

APPEAL by defendant from a judgment of a General Term of the Supreme Court, Fifth Department, affirming a judgment of the Ontario County Circuit in favor of plaintiff in an action brought to compel defendant to pay the damages which had been recovered against plaintiff for a defect in a sidewalk. *Affirmed.*

The facts are stated in the opinion.

Messrs. William F. Cogswell, John Gillette, and C. A. Richardson, for appellant.

If premises are in good repair when demised, but afterwards become ruinous or dangerous, the landlord is not responsible therefor, either to the occupant or to the public during the continuance of his lease, unless he has expressly agreed to repair them.

Clancy v. Byrne, 56 N. Y. 129, 15 Am. Rep. 391; *Wolf v. Kilpatrick*, 101 N. Y. 146, 54 Am. Rep. 672; *Martin v. Pettit*, 117 N. Y. 118, 5 L. R. A. 794; *Edwards v. New York & H. R. Co.* 98 N. Y. 245, 50 Am. Rep. 659.

The owner of property adjoining the sidewalk is not under obligation to keep the sidewalk in repair, except by virtue of some contract or by virtue of some statute.

Moore v. Gadsden, 98 N. Y. 12; *Wenzlick v. McCotter*, 87 N. Y. 122, 41 Am. Rep. 358; *Babbage v. Powers*, 130 N. Y. 281, 14 L. R. A. 398; *Rochester v. Campbell*, 128 N. Y. 405, 10 L. R. A. 898; *Fulton v. Tucker*, 8 Hun, 529; *Hartford v. Talcott*, 48 Conn. 525, 40 Am. Rep. 189.

Mr. Frank Rice, with *Mr. John Colmey*, for respondent:

If a municipal corporation has been compelled to pay a judgment for damages recovered by a traveler for injuries sustained from a defect or obstruction in one of its highways which was created by the act or negligence of a third person, it may maintain an action against such third person for reimbursement.

Rochester v. Campbell, 128 N. Y. 405, 10 L. R. A. 898; *Rochester v. Montgomery*, 72 N. Y. 65; *Port Jervis v. First Nat. Bank*, 96 N. Y. 550; *Seneca Falls v. Zalinski*, 8 Hun, 571; *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298; *Troy v. Troy & L. R. Co.* 49 N. Y. 657; *Brooklyn v. Brooklyn City R. Co.* 47 N. Y. 475, 7 Am. Rep. 469; *Stoughton v. Porter*, 18 Allen, 191; *Boston v. Worthington*, 10 Gray, 496; *Lowell v. Short*, 4 Cush. 375; *Woburn v. Henshaw*, 101 Mass. 198, 8 Am. Rep. 383.

This defendant appeared in and defended the action of *McSherry v. Canandaigua*, and the judgment roll therein was conclusive evidence against him in this action of the amount of damages, the liability of this plaintiff to *McSherry* for the damages, and any matter which might have been urged as a defense against such liability.

Rochester v. Montgomery, 72 N. Y. 65; *Port Jervis v. First Nat. Bank*, 96 N. Y. 550; *New York v. Brady*, 151 N. Y. 611.

If the plaintiff by long acquiescence is deemed to have consented to this excavation, and such acquiescence amounted to a license, it was the duty of the defendant to perform the work in a careful manner, and to see that the opening was properly and carefully covered so as not to be perilous to travelers upon the street.

Jennings v. Van Schaick, 108 N. Y. 580; *Ir-*
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vine v. Wood, 51 N. Y. 224, 10 Am. Rep. 608; *McGuire v. Spence*, 91 N. Y. 303, 48 Am. Rep. 668; *Cosgrove v. Smith*, 18 N. Y. 79; *Clifford v. Dum*, 81 N. Y. 52.

The defendant was chargeable with implied or constructive notice, and this question was properly submitted to the jury.

Pomfrey v. Saratoga Springs, 104 N. Y. 459; *Todd v. Troy*, 61 N. Y. 506; *Weed v. Ballston Spa*, 76 N. Y. 329.

The landlord did not surrender the possession and control of the sidewalk at the point in question. On the contrary, he assumed the control and undertook to make repairs during the existence of the lease.

If the cover on the sidewalk was so made that it could be opened by anybody from the outside, maliciously or accidentally, the construction was faulty.

Jennings v. Van Schaick, 108 N. Y. 580; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Calder v. Smalley*, 66 Iowa, 219, 55 Am. Rep. 272; *Milford v. Holbrook*, 9 Allen, 17, 85 Am. Dec. 785.

The person who seeks and receives the sole favor or benefit in such case should bear any new burden which such favor or burden creates.

Wickwire v. Angola, 4 Ind. App. 258; *Heacock v. Sherman*, 14 Wend. 59; *Whalen v. Gloucester*, 4 Hun, 24; *Matthews v. De Groff*, 18 App. Div. 356; *Briggs v. New York C. & H. R. Co.* 80 Hun, 291; *Sexton v. Zett*, 44 N. Y. 480; *Wolf v. Kilpatrick*, 101 N. Y. 146, 54 Am. Rep. 672; *Ahern v. Steele*, 115 N. Y. 208, 5 L. R. A. 449; *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391; *Babbage v. Powers*, 130 N. Y. 281, 14 L. R. A. 398; *Jennings v. Van Schaick*, 108 N. Y. 580; *Congrove v. Morgan*, 18 N. Y. 64, 73 Am. Dec. 495; *Rochester v. Campbell*, 128 N. Y. 405, 10 L. R. A. 898; *Seneca Falls v. Zalinski*, 8 Hun, 571; *Woodring v. Forks Twp.* 28 Pa. 355, 70 Am. Dec. 184; *Bears v. Ambler*, 9 Pa. 198; *Wabasha v. Southworth*, 54 Minn. 79; *Lowell v. Spaulding*, 4 Cush. 277, 50 Am. Dec. 775; *Gridley v. Bloomington*, 68 Ill. 47.

Vann, J., delivered the opinion of the court:

By this action the plaintiffs sought to recover the damages which they had been compelled to pay on account of personal injuries sustained by one *McSherry*, through an accident caused by a defective grate in the sidewalk in front of defendant's premises. For many years prior to 1889 the defendant owned certain land on the northwest corner of Main and Bristol streets, in the village of Canandaigua, bounded on the east and south by the outer line of said streets, and extending 96 feet on Bristol, and 40 feet on Main. A brick block, consisting of several stores, three stories high, substantially covered the lot. In 1872 the grate in question, with several others, was constructed by the defendant along the north line of Bristol street, to enable him and his tenants to convey coal to the cellars under said block; and they remained there without complaint on the part of the public authorities until March 4, 1889, when said *McSherry* stepped on one of the grates that was out of repair, and was injured. This grate was in the sidewalk in front of a "store" in said

block that was leased to one Parsons for a term, which had not expired when said accident happened. The lease gave the defendant no right of access to the premises for any purpose during the term, and imposed upon him no obligation to make repairs. The tenant covenanted to surrender the premises at the end of the term in as good condition as they were at the date of the lease, necessary wear and damage by the elements excepted. The description of the demised premises included the "store," with the privileges and appurtenances, but did not specifically describe or include the use of the sidewalk or the grate, which was in good order when Mr. Parsons took possession. The two stories over the store were retained by defendant or leased to other tenants who could not use the grate, as it was connected only with the premises leased to Parsons. After the commencement of said term, the defendant repaired the grate once, but there was evidence tending to show that it had been out of repair for a number of weeks prior to the accident. When the plaintiffs were sued by McSherry, they notified the defendant to defend, and he aided in the defense; but the action resulted in a judgment against the village for \$1,608.29, which, after affirmance both by the general term and the court of appeals, was paid by the plaintiffs. 59 Hun, 616, mem., 35 N. Y. S. R. 432, and 129 N. Y. 612. The recovery in that case was upon the ground that the grating in the sidewalk was out of repair, and that the village authorities knew, or should have known, of the fact.

Upon the trial of the action now before us, the court charged the jury that if they found the grate was not properly reconstructed when repaired in 1888, and that was the cause of the accident, the defendant was liable to the plaintiffs, but, if they found "that it was not a faulty construction, he is not liable, as far as that question goes." No fault is found by the appellant with this part of the charge. The court further charged that, "upon all this evidence, it is for you to say whether or not this defendant, acting with due care and reasonable diligence in the protection of the public against injury, ought to have known the condition in which that grate was. If he ought to have known it, he is in the same position, legally, as if he had actually known it; and, if he had actually known it, the duty rested upon him with diligence to put the walk into condition so it would be reasonably safe for public use. If you find that the defendant did not use reasonable care to ascertain whether or not the grate was in reasonably proper condition for public use, you will find a verdict for the plaintiff." To this the defendant excepted. The court also charged "that Mr. Foster owed no duty to repair the sidewalk generally which can be used as a basis for any recovery here, but he did owe the duty to keep in repair the particular place we are talking about." To this the defendant also excepted. These exceptions present the only question argued before us.

From the length of time the grate was permitted by the representatives of the village to remain in the sidewalk without objection, the presumption arises that it was placed there with their consent. *Babbage v. Powers*, 130 N. Y. 41 L. R. A.

281, 14 L. R. A. 398; *Jorgensen v. Squires*, 144 N. Y. 290. The defendant alleged in his answer that the grate was constructed with the consent of the plaintiffs, and therefore, after the lapse of seventeen years, he cannot be held liable as a trespasser, but only, if at all, upon the ground of negligence. *Irvine v. Wood*, 51 N. Y. 224, 228, 10 Am. Rep. 603. It was his duty, however, as long as he owned and was in full possession of the premises, to use reasonable diligence to keep the grate in repair, so that it would be as safe as any other part of the sidewalk. *Congreve v. Morgan*, 18 N. Y. 84, 72 Am. Dec. 495; *McGuire v. Spence*, 91 N. Y. 303, 43 Am. Rep. 668, 2 Shearn & Redf. Neg. 5th ed. § 703. It was built for his accommodation, and was a benefit to his property only; and the law placed upon him the obligation of using due care to keep it in a suitable and safe condition for the public to walk over as a part of the sidewalk. Proper construction, in the first place, was not enough to relieve him from liability; but the duty of inspection and repair continued while he owned and was in the exclusive possession of the premises. The duty ran with the land as long as the grate was maintained for the benefit of the land. As was said as early as *Heacock v. Sherman*, 14 Wend. 58, 60, the owner "is bound to repair . . . in consideration of private advantage." The doctrine of implied duty, which is well established by the authorities, requires the person who, even with due permission, constructs a scuttle hole in the sidewalk in front of his premises, to use reasonable care for the safety of the public, as long as it remains there and is subject to his control. *Babbage v. Powers*, 130 N. Y. 281, 14 L. R. A. 398; *Wolf v. Kilpatrick*, 101 N. Y. 146, 54 Am. Rep. 672; *Jennings v. Van Schaick*, 103 N. Y. 530; *Port Jervis v. First Nat. Bank*, 98 N. Y. 550; *Davenport v. Ruckman*, 37 N. Y. 568; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Briggs v. New York C. & H. R. R. Co* 30 Hun, 291; *Heacock v. Sherman*, 14 Wend. 58; *Seneca Falls v. Zalinski*, 8 Hun, 571; *Whalen v. Gloucester*, 4 Hun, 24; *Matthews v. De Groff*, 13 App. Div. 356; *Elliott, Roads & Streets*, p. 541; *Thomas*, Neg. 1145. If, however, the grate is properly constructed in the first place, and is kept in proper repair afterwards, the owner is not liable for the carelessness of a tenant or third parties in using the grate, as by leaving the hole unguarded when in use, or uncovered when not in use. *Jennings v. Van Schaick*, 103 N. Y. 530.

The precise question now presented is whether an implied duty rests upon the owner to use reasonable care in inspecting and repairing a grate in a sidewalk in front of his premises, when a part only of the structure on the abutting land is leased to and occupied by a tenant, but that part includes, by implication, the exclusive right to use the grate as a beneficial appurtenance. It must be conceded that, as between the defendant and his tenant, there was no obligation on the part of the former to repair, because he had entered into no covenant to that effect, and the duty of a landlord to make repairs rests solely on express contract, so far as his tenant is concerned. *Witty v. Matthews*, 52 N. Y. 512; *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391. It must be

further conceded that, if the store was in proper condition at the beginning of the term, the owner was not bound to repair it for the protection of those who, upon the express or implied invitation of the tenant, might enter it for the transaction of business or any other purpose. *Ahern v. Steele*, 115 N. Y. 208, 5 L. R. A. 449. The question before us did not arise between the owner and his tenant, or the patrons of the tenant, but between the owner and the plaintiffs, as representatives of the general public entitled to free and safe passage over the sidewalk as a part of the highway. While the owner cannot be held liable in this action for failing to repair the entire sidewalk in front of his premises, was he properly held liable for failing to keep in repair the grate itself, which was his own structure? This depends upon the duty that he assumed when he cut a hole in the sidewalk, and covered it with the grate. That duty included proper construction in the first place, and reasonable care on the part of the owner to keep the grate in repair thereafter, as long as he continued in possession. The duty sprang from the necessity of having safe sidewalks, and as the necessity is continuous, so is the duty. Upon no other ground can the construction of a grate in a sidewalk, which is an interference with a public highway, be justified, even when permission is duly granted. Upon the transfer of the entire interest and possession to another, as the duty runs with the land, it would be cast upon the grantee. So, a lease of the entire premises, and possession thereof by the tenant, would doubtless throw the burden upon the latter. 2 *Shearm. & Redf. Neg.* 5th ed. §§ 710, 718. The conveyance of an undivided interest, however, would not have that effect, and the demise of a part of the premises should not. The obligation goes with the land, and cannot be discharged by a partial alienation of the land, at least unless the alienation, if for a fixed term, carries with it the exclusive possession of the premises for that term. Entire possession by a tenant from foundation to roof doubtless involves the duty of keeping a grate in front of the premises in repair, which otherwise rests on the owner of the fee. But whoever, even by due permission, cuts a hole in the sidewalk for the benefit of his adjoining property, must use reasonable care to protect the public from danger on account thereof. Reasonable care requires that he should provide a proper covering, inspect it from time to time, and repair it when necessary, as otherwise passers-by, for whose benefit the sidewalk

is maintained, may be injured. If he parts with the premises, or parts with the possession thereof for a period, the burden falls on his successor in title or possession. If he transfers either title or possession in part only, he does not escape the burden. The implied duty assumed when the hole was cut and the grate placed over it requires reasonable precaution on the part of the owner to protect the public as long as he remains the owner and is in possession of any part of the building on the abutting land. He cannot cast the burden of maintenance on the public any more than he could have cast upon them the burden of original construction, for the grate is wholly for the benefit of his property. Nor can he relieve himself of the duty without parting with the entire possession of the property benefited, for the safety of the public requires that the owner, as long as he is in possession of any part of the property, should be compelled to keep his structure in the sidewalk in suitable condition for use as a part of the sidewalk. As the duty is imposed by law for the public safety, its extent is measured by whatever public safety requires. Anything less than the alienation of the entire property, either permanently, as by deed, or temporarily, as by lease, would leave the public without adequate protection. A person injured by a defective grate should not be subject to the hazard of ascertaining the precise relation existing between the owner and one of his tenants with reference to the control of the grate; but a simple rule, resting upon ownership and possession, in whole or in part, of the adjacent structure, is required by sound public policy.

The argument that the defendant had no right of access to repair the grate, except by consent of the tenant, is without force, for the law imposing the duty was a part of the lease, and impliedly excepted from its provisions such necessary access at reasonable times as would enable the owner to discharge that duty. The lease covered the grate, by implication only, the same as it embraced the rights of the owner in the entire sidewalk in front of his premises. That would not prevent him from rebuilding or repairing the sidewalk proper, when required by municipal ordinance, nor does it prevent him from rebuilding or repairing the grate when required by the common law.

We find no error in the record, and the judgment should therefore be affirmed.

All concur, except **Haight, J.**, not sitting, and **Martin, J.**, not voting.

WISCONSIN SUPREME COURT.

TRAVELERS' INSURANCE COMPANY
of Hartford, *Appt.*,

v.

William A. FRICKE, Resp't.

(.....Wis.....)

1. The license of a foreign insurance

NOTE.—For restrictions on business of foreign insurance company, see note to *State, Richards v. Ackerman* (Ohio) 24 L. R. A. 298; also *People, Stephens, v. Fidelity & C. Co.* (Ill.) 26 L. R. A. 296. 41 L. R. A.

company for the current year may be revoked by the insurance commissioner, under Rev. Stat. § 1955, on account of its failure to pay the full license fees required by § 1220 for past years during which it has done business within the state, as its failure to comply with the law is a present, existing failure.

2. The state is not estopped from insisting upon the condition prescribed for the business of a foreign corporation by failure of officials to require compliance with the law at the proper time.

3. A foreign corporation having its residence in another state is not entitled to the benefit of the statute of limitations.
4. An action in equity to prevent the revocation of the license of a foreign insurance company for failure to pay license fees cannot be based on the ground that the statute of limitations would prevent an action to collect the fees.
5. Unpaid license fees of a foreign corporation bear legal interest from the date upon which they ought by law to have been paid.

(Ossoday, Ch. J., dissents.)

(March 1, 1898.)

APPEAL by plaintiff from a judgment of the Circuit Court for Dane County in favor of defendant in a suit brought to enjoin the revocation of a license permitting plaintiff to do business in the state. *Affirmed.*

Statement by Winslow, J.:

This is an action in equity, brought to enjoin the defendant, who is the insurance commissioner of the state of Wisconsin, from revoking a license issued by said commissioner to the plaintiff March 1, 1896. The facts in the case are not materially in dispute, and are as follows: Since the enactment of the Revised Statutes of 1878, up to the time of the commencement of this action, the plaintiff has done both a life and accident insurance business within this state, under licenses issued annually by the various insurance commissioners. During that time the plaintiff has paid, as a license fee for each year, only the sum of \$300 up to the year 1895, since which time it has also paid 2 per cent upon its gross accident business within the state, pursuant to the decision of this court in a previous case between the same parties, reported in 94 Wis. 258. In December, 1896, the insurance commissioner demanded of the plaintiff, in substance, that it should pay an additional \$300 license fee for the transaction of its accident business for each year since 1880; also the 2 per cent tax for each year since 1880, with legal interest on such sums from the 1st of March in each year, and threatened to revoke the license issued March 1, 1896, in default of such payment. The total amount of the sum so demanded, with interest, is \$85,297.74. The plaintiff declined to pay this sum, and immediately brought this action in equity to enjoin the commissioner from revoking its license. The circuit court held, upon these facts, that the insurance commissioner was authorized to revoke its license, and dismissed the complaint, and from this judgment the plaintiff appeals.

Messrs. Winkler, Flanders, Smith, Bottum, & Vilas, for appellant:

Chapter 105 of 1880 declares that the license fee and tax upon the business of accident insurance shall thereafter be the same as those paid by foreign insurance companies. That does not mean the same plus \$300.

When chapter 105 of 1880 was enacted, § 1220 was amended according to the terms of that act.

It required of such business the payment of the same fees as a fire insurance company. To 41 L. R. A.

that extent it operated as a repeal, by implication, of so much of § 1220, Rev. Stat., as would make the fees anything other than the same fees paid by foreign fire insurance companies.

Lewis v. Stout, 22 Wis. 234; *Burlander v. Milwaukee & St. P. R. Co.* 26 Wis. 76; *Simmons v. Bradley*, 27 Wis. 689; *Oleson v. Green Bay & L. P. R. Co.* 36 Wis. 383; *State v. Campbell*, 44 Wis. 529; *Fire Department of Onkosh v. Tuttle*, 48 Wis. 91; *Schneider v. Staples*, 66 Wis. 167.

The license fees imposed upon these companies, both by § 1220, and chapter 105 of 1880, contain all the characteristics of a tax.

A tax is not a debt.

The license fee is a tax.

It is an involuntary burden laid upon the business itself, and, like all other taxes, is not the subject of contract, but its levy and collection is a proceeding *in invitum*.

Cooley, Const. Lim. 6th ed. p. 611.

The license fees required to be paid by a railroad company and on palace cars under this chapter are taxes imposed for purposes of revenue, and the statutes imposing them subject to the rules of construction governing statutes imposing taxes.

State, Abbot, v. McPetridge, 64 Wis. 180; *State v. Pullman's Palace Car Co.* 64 Wis. 89.

That this license fee is exacted for the purposes of revenue and taxation is demonstrated by the fact that the cost of regulation is provided for by other statutes and paid thereunder by the insurance companies.

The exaction of a sum for a license in excess of what is necessary to cover public expenses, and graduated by the amount of business done, is a tax upon the business, upon its face.

State, Muhlenthal v. Long Branch Comrs. 42 N. J. L. 364, 36 Am. Rep. 518; *License Tax Cases*, 5 Wall. 462, 474, 18 L. ed. 497; *Postal Teleg. Cable Co. v. Charleston*, 153 U. S. 693, 38 L. ed. 873, 4 Inters. Com. Rep. 637; *Adams Exp. Co. v. Owensboro*, 85 Ky. 265; *Com. v. Stodder*, 2 Cush. 562, 48 Am. Dec. 679; *Re Wan Yin*, 22 Fed. Rep. 701; *Cooley*, Const. Lim. 6th ed. pp. 242, 243, 611.

A tax is not a debt and can be collected only at the time and in the manner provided by the statute creating the tax, and any method of collection or remedy given by the statute is exclusive.

Lane County v. Oregon, 7 Wall. 71, 19 L. ed. 101; *Camden v. Allen*, 26 N. J. L. 398; *Baldwin v. Hewitt*, 88 Ky. 678; *Louisville Water Co. v. Com.* 89 Ky. 244, 6 L. R. A. 69; *State v. Baltimore & O. R. Co.* 41 W. Va. 81; *Monterey County v. Abbott*, 77 Cal. 541; *Packard v. Tisdale*, 50 Me. 876; *State v. Southwestern R. Co.* 70 Ga. 11; *Detroit v. Jepp*, 52 Mich. 458; *Shaw v. Peckett*, 26 Vt. 482; *Cooley*, Taxn. 2d ed. p. 16, and notes.

Taxes not being debts, and resting upon no promise to pay, do not bear interest.

State v. Southwestern R. Co. 70 Ga. 11; *Western U. Teleg. Co. v. State*, 55 Tex. 814; *Shaw v. Peckett*, 26 Vt. 482; *State, Brenner v. Farrier*, 47 N. J. L. 75; *Louisville & N. R. Co. v. Hopkins County*, 87 Ky. 605; *Camden v. Allen*, 26 N. J. L. 399; *Perry v. Washburn*, 20 Cal. 818; *Cooley*, Taxn. 1st ed. p. 300, note 4, also pp. 13, 14; *Danforth v. Williams*, 9

Mass. 324; *Hurd v. Galveston*, decided at the Galveston term in 1881; Perley, Interest, 184; Cooley, Taxn. 2d ed. p. 17, and note 3, p. 16.

There is no power or authority vested in the commissioner of insurance to collect these back fees, whether they constitute a debt or not. The commissioner is a ministerial officer and acts in a ministerial capacity. He had no judicial powers or functions to perform.

Hartford F. Ins. Co. v. Raymond, 70 Mich. 485.

He has no power or authority to revise the action of his predecessors or to revoke the license granted by him because former commissioners failed to exact the full legal fee for licenses granted by them. It would require an express statutory grant to give him such power.

Com. v. Pennsylvania Co. 145 Pa. 266; *Philadelphia v. Ridge Ave. R. Co.* 142 Pa. 484.

The good faith of the state ought, upon the strongest considerations of fair dealing and honorable conduct, to intervene between this company and the enforcement of an unconscionable claim.

The appellant has been induced by the tender of certain conditions to continue in business from year to year, and to accept from the state a license to conduct such business.

The appellant was asked to pay a certain sum after 1890, which it thought in excess of the legal fee. It asserted its belief in good faith and its contention was assented to for years. Had it paid the additional fee, even under protest, and it had afterwards proved to be more than the state or commissioner could legally have exacted, appellant could not recover back the excess, for, under all the authorities, the payment would be deemed voluntary.

Powell v. St. Croix County Supers. 46 Wis. 210; *Louisville & N. R. Co. v. Com.*, Marion County, 89 Ky. 531; *Phillips v. Jefferson County Comrs.* 5 Kan. 412.

The statute of limitations is not open to the appellant, for it is a foreign corporation; but the policy of our laws is that the state is bound by the statute of limitations in all cases in which a citizen would be bound.

Rev. Stat. 1878, §§ 4222, 4229; *Coleman v. Peshtigo Co.* 47 Wis. 180; *United States v. Wilmamette Valley & C. M. Wagon-Road Co.* 54 Fed. Rep. 807; *Michigan v. Jackson, L. & S. R. Co.* 87 U. S. App. 220, 69 Fed. Rep. 116, 16 C. C. A. 845; *State, Atty. Gen., v. Janesville Water Co.* 92 Wis. 406, 32 L. R. A. 891.

Petition for rehearing.

Can a party who has paid all that under the law he conceives that he ought to pay, and all that the official of the state, who is charged with the duty of assessing and collecting the impost, conceives that he ought to pay, be assumed to promise that he will pay more.

The contemplation clearly is that the party has paid all that is due and that nothing more is to be demanded of him.

Gilman v. Gross, 97 Wis. 224.

If the commissioner has erred as to the law, the transaction, so far as it remains executory, can be annulled. When he discovers his own error he can annul the license, or he may cause an action to be brought to annul it.

His successor in office cannot annul his act. 41 L. R. A.

tion, but he may cause a suit to be brought for that purpose.

United States v. Bank of the Metropolis, 15 Pet. 377, 10 L. ed. 774; *Lavalette v. United States*, 1 Ct. Cl. 147.

But is it not logically inconsistent to say that an action may be maintained to recover an additional fee upon an implied promise?

The commissioner has power by this "hold-up" process to compel us to pay what the state legitimately may not be able to collect.

An insurance company which has complied with all the laws of this state is within the state, has residence within the state in the meaning of the statutes of limitation.

Rev. Stat. §§ 1920, 1964; *State v. Citizens' Ins. Co.* 71 Wis. 411.

On principle no reason for barring a licensed foreign insurance corporation from the benefit of the statute of limitations can be cited. It is as completely within this state as it is possible to be.

Wall v. Chicago & N. W. R. Co. 69 Iowa, 498; *Winney v. Sandwich Mfg. Co.* 86 Iowa, 608, 18 L. R. A. 524; 6 Thomp. Corp. § 7841; *Huss v. Central R. & Bkg. Co.* 66 Ala. 473; *Pennsylvania Co. v. Sloan*, 1 Ill. App. 864; *Wall v. Chicago & N. W. R. Co.* 69 Iowa, 498; *McCabe v. Illinois C. R. Co.* 4 McCrary, 496; *Lawrence v. Ballou*, 50 Cal. 258; *King v. National Min. & Exploring Co.* 4 Mont. 1; *Johnson & L. Dry Goods Co. v. Cornell*, 4 Okla. 412; *United States Exp. Co. v. Ware*, 20 Wall. 548, 22 L. ed. 422; *Tvoga R. Co. v. Blossburg & C. R. Co.* 20 Wall. 187, 22 L. ed. 831.

A judgment against a foreign corporation, pursuant to service upon an agent appointed in another state in accordance with requirements of its laws expressly for the purpose of receiving the service of process, is absolutely conclusive.

Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451; 6 Thomp. Corp. § 8028.

Mr. W. H. Mylrea, Attorney General, for respondent:

A foreign corporation has no constitutional right to do business in any other state except such corporations as may be engaged in a business of interstate commerce, or acting as agents in carrying out the purposes of the Federal government.

Home Ins. Co. v. Moree, 20 Wall. 445, 18 L. ed. 365; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 973; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451; *Doyle v. Continental Ins. Co.* 94 U. S. 542, 24 L. ed. 152; *Philadelphia Fire Asso. v. New York*, 119 U. S. 110, 30 L. ed. 342; *Horn Silver Min. Co. v. New York*, 143 U. S. 805, 36 L. ed. 164, 4 Inters. Com. Rep. 57; *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610.

When a litigant enters a court of equity, and the court takes jurisdiction of the controversy, such jurisdiction is always exclusive of any other court or remedy.

1 Pom. Eq. § 181; 1 Story, Eq. Jur. § 64; *Akerly v. Vilas*, 15 Wis. 402.

If the borrower files his bill seeking relief against a usurious contract, the only terms upon which the court will interfere are that the plaintiff will pay the defendant what is really due to him, deducting the usurious in-

terest, and if plaintiff does not make such an offer in his bill, upon demurrer the bill will be dismissed.

Riets v. Poetsa, 20 Wis. 695; *Haggerson v. Phillips*, 37 Wis. 364.

He who seeks equity must do equity.

Hart v. Smith, 44 Wis. 218; *State, Smith, v. Cooper*, 59 Wis. 677.

Plaintiff cannot rely on the statute of limitations.

De Walsh v. Braman, 160 Ill. 415; *Galveston, H. & S. A. R. Co. v. Blakeney*, 78 Tex. 180; *Johnston v. San Francisco Sav. Union*, 75 Cal. 184; *McQuiddy v. Ware*, 20 Wall. 14, 22 L. ed. 311.

Mr. John L. Erdall, also for respondent:

The requirement as to the payment of the fees under consideration is not made pursuant to the taxing power of the state for the purposes of revenue, but under the police power for the purpose of regulating and restricting the business of such corporation within this state.

Lane County v. Oregon, 7 Wall. 71, 19 L. ed. 101; *Opinions of the Justices*, 68 Me. 591; *Merrithew v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *Atty. Gen. v. Eau Claire*, 37 Wis. 400; *Wisconsin Keeley Institute Co. v. Milwaukee County*, 95 Wis. 153, 36 L. R. A. 55; *State, Drake, v. Doyle*, 40 Wis. 175, 23 Am. Rep. 692; *Fire Department of Milwaukee v. Helfenstein*, 16 Wis. 140; *Tenney v. Lens*, 16 Wis. 569; *Carter v. Dow*, 16 Wis. 299; *State, Henshall, v. Ludington*, 83 Wis. 107; *Childers v. People*, 11 Mich. 43; *Jenkins v. Ewin*, 8 Heisk. 455; *Exempt Firemen's Benev. Fund v. Roome*, 93 N. Y. 313; *Pleuler v. State*, 11 Neb. 547.

Although the statute does not expressly provide that an action may be brought, nevertheless an action in the nature of debt or assumpsit will lie for the collection of the fees, and the mere fact that the former commissioners of insurance might have insisted upon the payment of such fees prior to the issuing of the license in no way affects the right to bring such action.

Fire Department of Oshkosh v. Tuttle, 48 Wis. 91; *Hillsborough County v. Londonderry*, 43 N. H. 451; *Bath v. Freeport*, 5 Mass. 325; *Pawlet v. Sandgate*, 19 Vt. 621.

The appellant was liable for interest at the legal rate on the unpaid fees.

O'Brien v. Young, 95 N. Y. 428, 47 Am. Rep. 64; *Sanders v. Lake Shore & M. S. R. Co.* 94 N. Y. 641; *State v. Guenther*, 87 Wis. 673.

There is a substantial continuing violation of law on the part of the appellant. Certainly the state would have a right to revoke the license for such a cause.

Doyle v. Continental Ins. Co. 94 U. S. 535, 24 L. ed. 148.

The state is not estopped from insisting upon the payment of these fees, or from revoking the license of appellant for this nonpayment.

Meechem, Pub. Off. § 837; *Herman, Estoppel*, § 676; *Bicelow, Estoppel*, 5th ed. p. 341; *State, Lott, v. Brewer*, 64 Ala. 287; *Union School Twp. v. First Nat. Bank*, 102 Ind. 464; *Sturgeon v. Hampton*, 89 Mo. 203; *Atty. Gen. v. Marr*, 55 Mich. 445; *Rush County Comrs. v. State, Lord*, 103 Ind. 497; *Mones v. St. Louis Sectional Dock Co.* 84 Mo. 242; *United States v. Lyman*, 1 Mason, 432; *United States v. Wil-*
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lamette Valley & C. M. Wagon Road Co. 54 Fed. Rep. 807; *Michigan v. Jackson, I. & S. R. Co.* 37 U. S. App. 220, 69 Fed. Rep. 116, 16 C. C. A. 345.

The fact that there has been delay in the collection of these fees is no bar to the right of the state now to insist upon their payment.

United States v. Kirkpatrick, 9 Wheat. 720, 6 L. ed. 199.

Winslow, J., delivered the opinion of the court:

In the former action in equity brought by this same company, and reported in 94 Wis. 258, the question presented and decided was whether the insurance commissioner had power to revoke the license of the plaintiff to do an insurance business in this state on account of failure to pay the license fees required by law for the year for which the license was issued. In the present suit the question presented is whether the insurance commissioner has power to revoke the defendant's license for the current year, on account of its failure to pay the full license fees accruing for past years, during which it has done business in this state under license. We have no intention of reviewing again the questions discussed and decided in the previous action. The statutes were then deliberately considered and construed, and the conclusions then reached are entirely satisfactory; and, so far as applicable, they will be applied to the present case. It was then held, in effect, that the annual license fees required to be paid by foreign insurance companies desiring to do business in this state were levied upon the business transacted, and not upon the company transacting the business; that chapter 105 of the Laws of 1880 (Sanborn & B. Anno. Stat. § 1953a), was an amendment simply to § 1220, Rev. Stat., and that it added to the fees previously required the payment of 2 per cent upon the gross income received upon accident business during the preceding year; that the doctrine of practical construction had no application, because the statute was plain, and not doubtful; and that the commissioner had a right to revoke the license for the current year on account of failure to pay the 2 per cent upon the previous year's business. The question of the power of the commissioner to revoke the current license on account of past defaults in payment of license fees was expressly reserved for future consideration, and that is the question now to be decided. When it was held that the license fees were fees levied upon the business, and not upon the company transacting the business, it necessarily followed under the provisions of § 1220, Rev. Stat., that a foreign company which transacted both life and accident business in this state was required to pay two fees of \$300 each, and, in addition, was required to pay 2 per cent upon its previous year's income arising from the accident business. The plaintiff company has been such a company ever since the enactment of the Revised Statutes, and it has paid but one fee of \$300 during each year, although doing both kinds of business; and hence it has failed to comply with the law in this respect, as well as in omitting to pay the 2 per cent additional required by chapter 105 of the Laws of 1880.

The default of the plaintiff company being established, the vital question for consideration is as to the power of the commissioner to revoke an existing license on account of such default. It is not, and cannot now be, denied that the plaintiff company could only transact business in this state by permission of the state, and under such conditions as the state might impose. This principle has been laid down again and again in no uncertain terms. Ryan, Ch. J., in *State, Drake, v. Doyle*, 40 Wis. 175, 22 Am. Rep. 692, says: "Save by voluntary license of the state, the insurance company has no right to carry on its business within the state. . . . Authorizing such license, out of its mere discretion it was competent for the legislature to impose any conditions, reasonable or unreasonable, and to provide for revocation, upon any cause or no cause, in any manner it might see fit." See also *Fire Department of Milwaukee v. Helfenstein*, 16 Wis. 186; *Lewis v. American Sav. & L. Assn.* (Wis.; present term), 89 L. R. A. 559. These propositions being impregnable, we may at once proceed to consider what power of revocation the legislature has given to the commissioner of insurance. Sanborn & B. Anno. Stat. § 1935, provides as follows: "If any such corporation [referring to foreign insurance corporations] shall violate or fail to comply with any provision of law applicable thereto, or in case its capital shall be impaired and shall not be made good, within such time as the commissioner of insurance shall require according to § 1964, it shall be the imperative duty of said commissioner to revoke any and every authority, license, or certificate granted to such corporation or any agent thereof to transact business in this state." etc. It is argued that the power here granted to the commissioner is "not a power of revision of the past, but of provision for the future;" that the language is prospective and not retrospective; and that, for defaults occurring during the existence of previous annual license, there can be no revocation of an existing license the fees for which have been fully paid. Carried to its legitimate result, this argument would produce this result: that, when a license was once issued by the commissioner, all past matters, even in connection with the issuance of the license itself, would become a sealed book. It might have been obtained without compliance with the necessary provisions, and yet it could not be revoked, because the power of revocation is only given to be exercised upon violations occurring after the issuance of the license. We do not say that this was the argument made by the appellant, but that such is the ultimate effect of the argument. It is manifest, of course, that such could not have been the intent of the legislature; and it was substantially admitted on the argument that, in case of the failure to comply with any of the provisions which are a prerequisite to the issuance of a given license, that license might be revoked; but it was argued that this was the extent of the power of revocation, and that for the defaults occurring during the existence of previous licenses there could be no revocation. Certainly, this position seems reasonable, as applied to defaults which might be called "temporary," as distinguished from "contin-

ing" defaults. For instance, in case the company had failed during some previous year to file a copy of its charter or appoint its resident attorney, but had supplied the omission before the issuance of the current license, it would seem that there could scarcely be a revocation of the existing license on account of such default. But can such an argument be applied to a failure to pay the lawful license fee? Is not this a continuing failure to comply with the law, and just as much a present failure as it was during the year when it occurred? Certainly, it was a legal duty then to pay the required fee. Did the duty cease at the end of the year? Has the lapse of time made it any the less a duty? Has the offense been condoned by the issuance of new licenses, decorated with gilt seals? So long as the fee remains unpaid, is it not a present failure to comply with the law, just as much as it was in the year when it occurred? We are unable by any chain of logical reasoning to say that this failure to comply with the law is a failure which is past and closed, and that it is not an existing failure as well. If it be a present existing failure, then the present existing license may be revoked because of such failure, under the strictest construction that can be given to the law.

It avails nothing to say that this license fee is essentially a tax, and that no action lies to recover a tax unless it be given by express statutory enactment. Concede for the moment that this be so, the failure to pay the lawful license was none the less a failure to comply with the provisions of the law when it occurred, and none the less a continuing failure up to the present time. Is it a hardship? No more a hardship now than it would have been if the annual amounts had been paid at the times required by the law. If a hardship at all, it is a hardship imposed by the law itself, and the legislature had full power to impose the hardship, if such in fact it be. But, whatever the rule be in other jurisdictions, it is not a tax under the decisions of this court. It was distinctly held by this court more than thirty years ago that substantially such a requirement as the one before us was not an exercise of the power of taxation. In *Fire Department of Milwaukee v. Helfenstein*, 16 Wis. 186, this court had before it a law requiring the agents of foreign insurance companies to pay to the fire department of the city of Milwaukee annually 2 per cent of the premiums collected by them in such business, and the law was attacked as an unconstitutional exercise of the taxing power, in that it violated the rule of uniformity in taxation. In passing upon this contention, it was said that this requirement was not an exercise of the power of taxation, "but only a proper exercise of the police power inherent in the sovereignty of the state." The same general principle was afterwards approved and applied to laws requiring the payment of dog licenses and licenses for the sale of liquors (*Tenney v. Lenz*, 16 Wis. 566; *State, Henshall, v. Ludington*, 33 Wis. 107); and it must be considered as the settled law of this state. The principle is not infringed upon by the decisions holding that the license fees required of railroad companies for operating their roads and cars within this state are, in substance,

taxes. These license fees are imposed upon an inherently lawful business, in lieu of taxes, the property of the company being entirely exempted from ordinary taxation, and are necessarily construed to be in the nature of taxation, and not as an exercise of police power; but in none of these cases are the principles laid down in *Fire Department of Milwaukee v. Helfenstein*, 16 Wis. 186, in any respect overruled. Being a mere condition imposed as the price of a privilege, which might be refused entirely, it logically follows that, when the privilege is requested, obtained, and used, the corporation obtaining the privilege impliedly agrees to the conditions which go with it and upon which alone it can be obtained. *Fire Department of Oshkosh v. Tuttle*, 48 Wis. 91, 50 Wis. 552.

By accepting the license and doing business under it, the company undoubtedly bound itself to comply with the law governing the issuance of the license. *Lewis v. American Sav. & Loan Assn.* (Wis.) 89 L. R. A. 559. Nor, upon familiar principles, is the state estopped from now insisting upon the condition on account of the failure of its officers to require compliance with the law at the proper time. The law was plain, and, as before stated, there was no room for the application of the doctrine of practical construction. Nor does the statute of limitations apply, for two reasons: (1) the plaintiff was a foreign corporation all of the time, and had its residence in another state. *Larson v. Aultman & T. Co.* 86 Wis. 281. (2) This is not an action to collect the unpaid fees, but simply an action in equity, to prevent the commissioner from revoking the license.

We perceive no error in adjudging that the unpaid license fees bear legal interest from the various dates upon which they ought by law to have been paid. The plaintiff has not only had all the benefit of its license, but has also had the use of the license moneys during all the time, and presumably has obtained legal interest thereon. During that time, also, the state has been deprived of the use of the money which it was entitled to have in its treasury. If, as held in this opinion, there was an implied agreement by the company when it obtained a license, and did business thereunder, that it would perform all the requirements of the law, including the payment of the fees required at the proper time, no reason appears why the unpaid fees should not bear interest. In connection with the entire matter, it should be remembered that this is an action in equity, and not a mere action at law. Even supposing that the propositions here decided were doubtful, it would not necessarily follow that the plaintiff, standing confessedly in arrears to the state in sums aggregating many thousands of dollars, could invoke the aid of equity to stay the hand of the commissioner in an apparent effort to carry out the plain will of the law-making power. The judgment of the circuit court was, in our opinion, right.

Judgment affirmed.

Cassoday, Ch. J., dissenting:

All agree that during the years in question the state had the absolute power to exclude
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foreign insurance companies from doing any business in this state, and that such plenary power included the authority to prescribe the conditions upon which such companies might be allowed to do business within the state. Of course, each company was at liberty to accept or reject such conditions. Without attempting any argument or to give any reasons therefor, I am forced to dissent from the conclusions reached by my brethren, on the ground that the statute which makes it the imperative duty of the commissioner to revoke any license granted to such corporation for any violation or failure "to comply with any provision of law applicable thereto" (Sanborn & B. Anno. Stat. § 1955) is not, in my judgment, broad enough to cover and include failures to pay license fees which might properly have been exacted by the commissioner for licenses which expired before the license here sought to be revoked was issued, but which was never before exacted. By granting such expired license, without exacting the full amount which might have been exacted for the same, and then, after the expiration of such license, to exact and enforce payment of the balance, would, necessarily, deprive the company of the legal right which it clearly possessed, of rejecting the conditions which are for the first time exacted. In other words, by paying all that was exacted for such expired license at the time it was granted, the state is in no position, after such license has expired, to claim an implied obligation to pay an additional sum, which the company had the legal right to reject had it been made when that license was issued, or at any time during the existence of such license. These views have some support in the construction which this court has heretofore given to this and other sections of the statute applicable. *State v. United States Mut. Acci. Assn.* 69 Wis. 76. True, such exaction was not a tax, within the meaning of the provision of our state Constitution which requires the rule of taxation to be uniform. Nor was it a direct tax in any sense, since it was not imposed specifically upon any particular property, person, or corporation. *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 158 U. S. 601, 39 L. ed. 1108. But it was, nevertheless, an indirect tax in the same sense that an impost, duty, or excise is a tax; and that they are species of taxes is elementary. 1 Story, Const. Law, § 950; *State, Sanderson, v. Mann*, 76 Wis. 475 and 480.

In my judgment, such exaction which the state might have made, and which, if made, the company was at liberty to reject, but which was never, in fact, made and insisted upon, cannot properly be regarded as an obligation implied by law upon contract or otherwise, even if such obligation might be implied from the imposition of a direct tax. The company was only obliged to perform such conditions as it voluntarily accepted and agreed to perform; and the one now sought to be enforced is a condition which it expressly repudiated, and never agreed to perform.

Rehearing denied May 8, 1898.

Mary E. SELLECK, *Resp't.*,
v.
City of JANESVILLE, *Appt.*

(.....Wis.....)

1. Taking the testimony of the plaintiff at her own house, to which the presiding judge and the jurors go for that purpose, against the defendant's objection, although it cannot be regarded as done in open court, does not deprive the court of jurisdiction or nullify the judgment, but is at most an irregularity.
2. Allowing the plaintiff in an action for personal injuries to exhibit her actual condition to the jury by lying on a lounge with her physician attending her when her testimony is taken, and allowing her daughter to weep, are not ground of reversal.
3. The fact that hypothetical questions to a physician are based in part upon his personal examination and knowledge does not make them objectionable.
4. Mistakes or errors of a physician or surgeon who was employed in the exercise of ordinary care will not preclude the recovery of all the damages sustained from personal injuries.

(Bardden, J., dissents.)

(June 23, 1898.)

A PPEAL by defendant from a judgment of the Circuit Court for Rock County in favor of plaintiff in an action brought to re-

NOTE.—*Validity of proceedings in the course of a trial outside of the court room.*

The court is the place in which causes are to be tried, and to suffer them to be tried elsewhere would destroy confidence in trial by jury. *Hayward v. Knapp*, 22 Min. 5, *dictum*.

And a constitutional guaranty that every person accused of crime shall have a public impartial trial, and that the accused shall have the right to appear and defend in person and by counsel, implies that the trial shall be conducted in open court and under protection of the court. *O'Brien v. People*, 17 Colo. 561.

Nor is a trial conducted in part away from the place appointed for the holding of the court, in the absence of the judge and of the accused, that trial to which every man accused is entitled within the meaning of the constitutional right guaranteed to every person charged with a crime to be confronted with the witnesses against him. *Foster v. State*, 70 Miss. 755.

And a hearing of testimony in a prosecution for felony, by the jury at a place other than that at which the court was being held and in the absence of the trial judge, constitutes error for which the judgment must be reversed. *O'Brien v. People*, 17 Colo. 561.

So, the trial of a case cannot be removed from the place appointed for the trial of cases, and be allowed to proceed in the streets of a city or on a line of a railroad by the running of trains for the observation of the jury, taken while in a position analogous to that of the person in whose behalf the action is brought. *Moore v. Chicago, St. P. & K. C. R. Co.* 98 Iowa, 484.

And it cannot be claimed in an action against a railroad company for a personal injury that the question of the removal of the jury to the street is not involved in an appeal because the court directed a verdict for the defendant on the evidence introduced by the plaintiff, without any consideration of that part of the trial which occurred in the 41 L. R. A.

cover damages for personal injuries alleged to have been caused by a defective sidewalk. *Affirmed*.

The facts are stated in the opinion.

Messrs. Horace A. McElroy and William Ruger for appellant.

Messrs. Fethers, Jeffris, Fifield, & Monat, for respondent.

The testimony of witnesses too ill to go to the court-house has been taken at their homes before the court and jury in some of the most important criminal trials ever had in the state. It is right in principle and upon precedent.

Bates v. Sabin, 64 Vt. 511; *LeGrange v. Ward*, 11 Ohio, 258; *State v. Peyton*, 32 Mo. App. 522; *Reed v. State*, 147 Ind. 41; *Mohon v. Harkreader*, 18 Kan. 383.

After detailing the facts he has seen, a medical witness may express an opinion as to what produced the symptoms he saw.

Jones, Ev. § 377; Louisville, N. A. & O. R. Co. v. Wood, 113 Ind. 544.

Such statements may not only rest upon his own knowledge of the patient's condition or upon a medical examination of him, which he has made, but upon a hypothetical case stated to him in court.

Louisville, N. A. & O. R. Co. v. Falvey, 104 Ind. 409.

The examination of experts is not to be limited by narrow and stringent rules.

Leopold v. Van Kirk, 29 Wis. 549.

If the question is defective or the facts given

streets where the order directing the verdict was authorized. *Moore v. Chicago, St. P. & K. C. R. Co.* 93 Iowa, 484.

And in a county where there is a regular court-house provided and used for the holding of courts the court has no authority, unless by consent of the parties, to adjourn to a private house for the purpose of taking the testimony of a sick witness who is unable to attend at the court-house, and if done the court so sitting is without jurisdiction under Iowa Code, § 173, providing that courts must be held at the place provided by law, except for the determination of actions, special proceedings, and other matters not requiring a jury, when they may by consent of the parties therein be held at some other place. *Funk v. Carroll County*, 98 Iowa, 158.

So, in *Cooper v. American Central Ins. Co.* 8 Colo. 318, involving the validity of a judgment rendered by the judge who tried the case after the term of court at which the trial was had, had expired, it was said that a judgment is the sentence of the law resulting from proceedings instituted, and is a judicial act which must be pronounced by the court at a time and place appointed by law.

Where from special emergency steps are taken in a cause before a special judge while another cause is on trial rendering it necessary to occupy a room in the court-house other than the court room, however, error is not available, if it exists, when it is manifest that no substantial injury has been done. *Reed v. State*, 147 Ind. 41.

And the act of probate justices in probating a will at a place other than the county seat, where they were required by law to do all official business at the county seat, is erroneous merely, and not absolutely void. *Le Grange v. Ward*, 11 Ohio, 237.

And the probate of a will may be taken within the county at a place other than the county seat by probate justices whose jurisdiction is limited only by the county lines, and such probate is evidence to establish the will. *Le Grange v. Ward*, 11 Ohio, 237.

So, the adjournment of the court in an action on

are not found by the jury, it simply goes to the weight of the opinion expressed thereon.

Smalley v. Appleton, 75 Wis. 18.

The plaintiff is not held responsible for the error or mistakes of a physician or surgeon in treating the injury received by a defect in a street, providing she exercises ordinary care in securing the services of such physician.

Lyons v. Erie R. Co. 57 N. Y. 489; *Tuttle v. Farmington*, 58 N. H. 13; *Stover v. Blue Hill*, 51 Me. 439; *Bardwell v. Jamaica*, 15 Vt. 438; *Collins v. Council Bluffs*, 32 Iowa, 824, 7 Am. Rep. 200; *Rice v. Des Moines*, 40 Iowa, 638; *Eastman v. Sanborn*, 8 Allen, 594, 81 Am. Dec. 677; *Nagel v. Missouri P. R. Co.* 75 Mo. 654, 42 Am. Rep. 413; *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20, 50 Am. Rep. 601; *Reed v. Detroit*, 108 Mich. 224.

Where personal injuries result proximately from negligence or other tort, the wrongdoer is liable for the damages actually sustained, although they are increased by a tendency to disease on the part of the person injured.

McNamara v. Clintonville, 62 Wis. 207, 51 Am. Rep. 722.

As the city had notice of the former defective condition, its obligation to repair continued until the same was put in proper repair, and it must be conclusively presumed that the city knew of the defect in question, and is responsible for it.

Woodward v. Boscobel, 84 Wis. 226.

It was competent to show that the sidewalk was defective in the immediate vicinity of the place of the accident for a considerable time previous thereto.

Kellogg v. Janesville, 84 Minn. 132.

Cassoday, Ch. J., delivered the opinion of the court:

This is an action to recover damages for personal injuries sustained by reason of an al-

an account by the presiding judge to the house of an assistant judge who was ill and unable to leave his residence which was situated in the same village with the court-house, and the rendition of judgment at that place, are within the power of the court under Vt. Comp. Stat. chap. 44, § 5, providing that the county court for that county shall be held in such village, and Vt. Rev. Laws, § 804, providing that the supreme and county courts when the state of business requires it may adjourn their respective courts within the county in which they are usually held to any day previous to the next stated term. *Bates v. Sabin*, 64 Vt. 511.

And the proceedings of the court in an action in which the judge directed the jury, officers, parties, and witnesses to repair to a neighboring law office while arguments in a preceding trial were being made, where such judge called and swore the jury and swore the witnesses and heard the testimony and received the verdict and discharged the jury and delivered the proceedings to the clerk, after which he returned to the bench and conducted the business of the court as usual, though irregular, do not render the judgment therein void, or authorize its reversal, when the complaining party took part in all the proceedings, and there was nothing to show that he did not have a fair trial, or that a different judgment should have been rendered. *Mohon v. Harkreader*, 18 Kan. 888.

When a case is finally submitted to the jury, and they retire for deliberation, the place of trial is unchanged, and there is simply a temporary removal of the jury, whether they retire to the next room

leged defective sidewalk on the westerly side of South River street, in Janesville, about 1 o'clock in the afternoon of October 18, 1893. Issue being joined and trial had, the jury returned a verdict in favor of the plaintiff, and assessed her damage at \$5,000. From the judgment entered thereon the defendant brings this appeal.

It appears from the record that after the cause came on for trial, May 17, 1897, and the jury had been sworn, the plaintiff's counsel stated to the court, in substance, that the plaintiff, who resided near Evansville, was unable to attend the trial at the court house, and asked leave to take her testimony, and requested that the presiding judge and the jury be present at her home at the taking of her testimony; that the defendant objected to such request, and to having any part of the cause tried away from the court house, and then offered to waive any objection as to notice, and to consent to take her deposition in the ordinary way, and allow it to be read on the trial. The court, however, granted the plaintiff's request, to which the defendant excepted; and thereupon the presiding judge and the jurors sworn in the case were taken to the plaintiff's home, near Evansville, in charge of the sheriff; and the plaintiff was carried into their presence upon a lounge, and was sworn and testified as a witness in her own behalf while so lying upon the lounge, and being administered to by her physician. Error is assigned because such testimony of the plaintiff was so taken at her home, in the presence of the jurors and the presiding judge, instead of being taken in the court-house in Janesville. The statute provides that "each county shall at its own expense provide at the county seat, a court-house . . . and keep the same in good repair. . . . Until such court-house be provided or when the court house shall from

or are taken to a building many blocks away. *State v. Adams*, 20 Kan. 311, *dictum*.

And the sentencing of a person tried and convicted on a criminal accusation is not a part of the trial so as to invalidate the action of the court in pronouncing the sentence in a room other than the usual public court room within the meaning of § 13 of the Indiana Bill of Rights, which secures to an accused the right of a public trial. *Reed v. State*, 147 Ind. 41.

It is to be observed, with reference to the cases above set forth which appear to conflict with the doctrine of the principal case, that the constitutional provisions held to be violated by a trial held in part away from the place appointed for the holding of the court apply to criminal cases only, and in each case the absence of the judge was also an element of the decision; and that in *Moore v. Chicago, St. P. & K. C. R. Co.* 93 Iowa, 484, *supra*, which was a view case, the point of the controversy was the propriety of permitting experiments before the jury on a view, and that in *Funk v. Carroll County*, 96 Iowa, 158, *supra*, the decision turned upon the construction of the language of a particular statute, and that in *Cooper v. American Central Ins. Co.* 8 Colo. 818, *supra*, the question was with relation to the time of the rendition of the judgment,—the rendition after the term of court,—rather than with relation to the place of its rendition.

As to views by the jury regarded in some courts as proceedings in the cause, see note to *People v. Thora*, — L. R. A. —.

F. H. R.

any cause become unsafe, inconvenient, or unfit for holding court, the county board shall appoint some other convenient building at the county seat, for that purpose temporarily; and such building shall then be deemed the courthouse for the time being for all purposes." Sanb. & B. Anno. Stat. § 656. The statute also provides that "whenever it shall be deemed unsafe or inexpedient by reason of [certain calamities, therein mentioned], to hold any court at the time and place appointed therefor, the justices or judges of the court may, [by an order in writing], appoint any other place within the same county, and any other time for holding the same; and the said adjourned session shall be taken as part and continuance of said term, and all proceedings in the said court may be continued at said adjourned times and places and be of the same force and effect as if said court had continued its sessions at the place it was holden before such adjournment." Id. § 2574. This court has held "that a county can only have one county seat, and that the court house must be at the county seat, except in the special cases prescribed, when from necessity courts may be temporarily held elsewhere." *Pepin County v. Prindle*, 61 Wis. 307. To the same effect, *White County Comrs. v. Guin*, 136 Ind. 562, 22 L. R. A. 402. It will be observed that our statute does not expressly require the circuit court to be held at the county seat, as in some of the states (*Funk v. Carroll County*, 96 Iowa, 158), nor as required of the county courts in this state (Rev. Stat. § 2440). Nevertheless it would certainly be error to hold a circuit court at a place other than the county seat, except in cases prescribed by statute. We cannot regard the proceeding at the home of the plaintiff as being taken in open court, although it must be regarded as a proceeding in the action. The important question is whether the irregularity in the manner of taking the plaintiff's testimony was such as should work a reversal. There is no pretense that she was not regularly sworn before giving her testimony, nor that any of the jurors or the presiding judge was absent during any portion of the time her testimony was being taken, nor that the defendant's counsel did not have and exercise the full opportunity to cross-examine her at length. The proceeding was somewhat similar to a view of "the premises or place in question, or any property, matter, or thing, relating to the controversy between the parties," by the presiding judge and jury, which a trial court, in a proper case, is expressly authorized by statute to order. Rev. Stat. § 2852. While we may not be willing to go to the extent of some courts in upholding trials and adjudications had outside of the courthouse, yet the authorities are ample to support the proposition that the taking of the plaintiff's testimony in the manner indicated did not deprive the court of jurisdiction, nor nullify the judgment, but was at most an irregularity. *Le Grange v. Ward*, 11 Ohio, 257; *Molon v. Harkreader*, 18 Kan. 383; *State v. Peyton*, 33 Mo. App. 522; *Bates v. Sabin*, 64 Vt. 511; *Reed v. State*, 147 Ind. 41. Being a mere irregularity, the question recurs whether it is such an error as should work a reversal. The statute expressly requires this court

to disregard any error in the proceedings which does not affect the substantial rights of the adverse party, and declares that no judgment shall be reversed or affected by reason of such error. Rev. Stat. § 2829. This court has applied that statute in cases too numerous to mention. In our judgment, the substantial rights of the defendant were not prejudiced or affected by the taking of the plaintiff's testimony in the manner indicated. The theory of counsel seems to be that the plaintiff's appearance upon the lounge, with her attending physician, may have created sympathy on the part of the jury; but that is just as likely to occur in any case where the injured party appears in court as a witness upon the trial. If the condition and appearances of such party are genuine, then there is no good reason for concealing them. If, on the contrary, they are feigned, then the jury are quite likely to detect the pretension; and so the influence is liable to operate against the party, as well as in his favor, according to the facts. We must hold that the taking of the plaintiff's testimony in the manner indicated, although irregular, is not reversible error. We perceive no error in allowing the plaintiff to exhibit her actual condition to the jury, nor in allowing her daughter to weep.

Error is assigned by reason of exceptions taken to certain hypothetical questions put to the physicians. These questions are lengthy. It is enough to say that they appear to contain nothing but what is supported by evidence. Upon objection being made, counsel were informed that if there was anything as to the plaintiff's condition not embraced in the question and the defendant's counsel would point it out, then it might be added, but nothing additional was suggested. The criticism that the question was indefinite, is without foundation. The mere fact that the questions were in part based upon the personal examination and knowledge of such physicians did not make them objectionable. The rules of law applicable to such questions have frequently been stated by this court in cases cited by the respective counsel, and need not be restated here. *Quinn v. Higgins*, 63 Wis. 864, 58 Am. Rep. 805; *Kreuziger v. Chicago & N. W. R. Co.* 73 Wis. 158; *Smalley v. Appleton*, 75 Wis. 18; *Vodbury v. Putney*, 80 Wis. 523, 14 L. R. A. 226; *Zoldoske v. State*, 83 Wis. 580; *Louisville, N. A. & O. R. Co. v. Wood*, 118 Ind. 544; *Louisville, N. A. & O. R. Co. v. Fulvey*, 104 Ind. 409.

Error is assigned because the court charged the jury that "the plaintiff is not held responsible for the errors or mistakes of a physician or surgeon in treating an injury received by a defect in the street or sidewalk, providing she exercises ordinary care in procuring the services of such physician. Where one is injured by the negligence of another, or by negligence of a town or city, if her damages have not been increased by her own subsequent want of ordinary care she will be entitled to recover in consequence of the wrong done, and the full extent of damage, although the physician that she employed omitted to employ the remedies most approved in similar cases, and by reason thereof the damage to the injured party was not diminished as much as it

otherwise should have been. Such charge is certainly supported by authority as well as reason. *Loesser v. Humphrey*, 41 Ohio St. 378; *Louisville, N. A. & O. R. Co. v. Fulvey*, 104 Ind. 411, 424; *Reed v. Detroit*, 103 Mich. 224; *Pullman Palace Car Co. v. Blum*, 109 Ill. 20, 50 Am. Rep. 601; *Rice v. Des Moines*, 40 Iowa, 638; *Stover v. Bluehill*, 51 Me. 439; *Tuttle v. Farmington*, 58 N. H. 18; *Boynnton v. Somersworth*, 58 N. H. 821; *Lyons v. Erie R. Co.* 57 N. Y. 489; *Baradwell v. Jamaica*, 15 Vt. 438.

The wrongdoer may well anticipate that the person injured will employ a physician or surgeon, and in doing so will exercise ordinary care in making the selection; but, where that is done, such person cannot be expected to assume the responsibility of the very highest degree of skill. This court has gone so far as to hold that, "where personal injuries result proximately from negligence or other tort, the wrongdoer is liable for the damages actually sustained, although they are increased by a tendency to disease on the part of the person injured." *McNamara v. Clintonville*, 62 Wis. 207, 51 Am. Rep. 732.

This disposes of the principal errors assigned. Others are mentioned, but they are not such as require particular consideration. They must be regarded as overruled. Certainly there is evidence sufficient to sustain the verdict.

The judgment of the Circuit Court is affirmed.

Bardeen, J., dissenting (filed July 7, 1898):

The record in this case shows that, after the trial had commenced, at the request of plaintiff's counsel, the judge, the attorneys on both sides, the reporter, together with the jury and the sheriff, left the court-house, in the city of Janesville, and proceeded to Evansville, some 15 miles away, and continued court proceedings at the home of the plaintiff, by taking her testimony in the same manner as though present in court. This was done against the protest of defendant's counsel, and in the face of an offer by them to go and take the deposition, waiving any objection to its use at the trial. The majority opinion virtually concedes that court proceedings can only be lawfully had at the place duly appointed for holding such court. While there is no express statutory provision saying that the courts shall be held at the county seat, the fact that they have been so held since the state was organized, and the further fact that authority is given by law to the judge to appoint some other place to hold

court than the place usually designated therefor, implies that it cannot be changed except for the causes stated in the statute. Rev. Stat. § 2574. The implication thus arising is as potent and binding as though there had been an express prohibition in the statute against the itinerancy of the court. The mischiefs that might arise from permitting a court to assume a vagrant character, and to travel from place to place, are so manifold that it requires no argument for their demonstration. It needs but the suggestion of the fact to bring to the mind a panorama of trouble that might follow, fatal alike to the rights of parties and to the dignity of the court. So far as I can discover, courts have uniformly held that the acts and proceedings of a court outside of the place appointed by law for holding the same are void. The law is so stated in *White County Comrs. v. Gwin*, 136 Ind. 562, 23 L. R. A. 402, and this conclusion is in harmony with good sense and sound reason. See also *Williams v. Reutezel*, 60 Ark. 155; *Funk v. Carroll County*, 96 Iowa, 158. I desire to emphasize the fact that such proceedings are void, as distinguished from irregularities, because, as I view it, this court has mistakenly treated the procedure of the trial court in this case as a mere irregularity. The theory upon which this branch of the case was disposed of is that the proceeding of the trial court amounted simply to the taking of the deposition of plaintiff,—an irregularity or error in discretion, cured by the beneficent provisions of § 2829, Rev. Stat. This conclusion is not in harmony with the record. The testimony of plaintiff was taken the same as if she were in open court, at the proper place, but in fact at a farm house more than 15 miles distant from the county seat. There is no pretense of its having been offered as a deposition. The proceeding was nothing, if not a proceeding in court. If a deposition, it was contrary to every rule of procedure, and inadmissible against defendant's objection. It was a proceeding contrary to every rule of correct practice, prejudicial to defendant's rights, and derogatory to the dignity of the court. It was a complete departure from the ordinary course of legal procedure, and without right or authority. If the proceeding was void, it cannot be cured by resort to the statute. It tinctured the whole case with error so plain and palpable as to render the judgment utterly void. Because of its flagrancy, and lest it become a precedent for future departures from correct practice by trial courts, I desire to here enter my protest against glossing it over or excusing it as an irregularity.

VERMONT SUPREME COURT.

Andrew AITKEN

v.

Village of WELLS RIVER.

(.....Vt.....)

1. The destruction of a mill and a mill.

NOTE.—As to the right of compensation for property destroyed as a nuisance, see note to *Orlando v. Pragg* (Fla.) 19 L. R. A. 196; also *Saran-41 L. R. A.*

dam by village trustees in time of danger to prevent damage to a highway and other property, even if they act with authority, is not a taking of property for a public use in the exercise of eminent domain, but rather an exercise of the police power of the state.

2. A village is not liable for the acts of

nah v. Mulligan (Ga.) 29 L. R. A. 303; *Chicago v. Union Stock Yards & Transit Co.* (Ill.) 35 L. R. A. 281; and *Wallace v. Richmond* (Va.) 36 L. R. A. 554.

its trustees in destroying property to avert an imminent public injury, as they are not its servants or agents within the principle of *respondet superior*.

(March 2, 1898.)

EXCEPTIONS by plaintiff to rulings of the Orange County Court made during the trial of an action brought to recover for the destruction by defendant's trustees of plaintiff's property to prevent injury to a highway which resulted in a verdict in defendant's favor. *Affirmed*.

The facts are stated in the opinion.

Mr. John H. Watson, for plaintiff:

The trustees being public officers, the presumption of law is that they acted in the premises in good faith; and if said property could have been taken by them under the right of eminent domain, for public use, it follows that they were acting within the scope of their authority. But, if this was a taking of private property for public use, within the meaning of the law, the plaintiff was entitled to compensation therefor from the defendant, and to thus take his property without such compensation renders the defendant liable in this action.

2 Dill. Mun. Corp. 8d ed. § 618; *Allen v. Decatur*, 28 Ill. 383, 76 Am. Dec. 692; *Whipple v. Fair Haven*, 68 Vt. 221; *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552; *Eaton v. Boston*, C. & M. R. Co. 51 N. H. 504, 12 Am. Rep. 179; *Winn v. Rutland*, 52 Vt. 494; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *Vanderlip v. Grand Rapids*, 73 Mich. 523, 8 L. R. A. 247, 16 Am. St. Rep. 597, and note; *Sheehy v. Kansas City Cable R. Co.* 94 Mo. 574, 4 Am. St. Rep. 396, and note; *Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392; *Ward v. Peck*, 49 N. J. L. 42.

The act being done by direction of the trustees of defendant, acting in good faith, the defendant is liable.

Hawks v. Charlemont, 107 Mass. 417; *Hildreth v. Lovell*, 11 Gray, 349; *Platter v. Seymour*, 86 Ind. 323; *Conniff v. San Francisco*, 67 Cal. 45; *Waldron v. Haverhill*, 143 Mass. 582; *Thayer v. Boston*, 19 Pick. 511, 81 Am. Dec. 157; *Port Wayne v. Hamilton*, 132 Ind. 487.

If it was an interference with the flow of a natural stream of water whereby plaintiff was injured, defendant is liable.

Lewis, Em. Dom. §§ 61, 66, 104.

The trustees are made the servants or agents of the corporation for the purposes named. The corporation thereby undertakes to perform those duties by means of its agents or servants whom it can direct, and not because imposed upon it by law.

Under such circumstances, a municipal corporation is responsible for a tort committed by such agents.

Deane v. Randolph, 132 Mass. 475; *Hawks v. Charlemont*, 107 Mass. 414; *Sullivan v. Holyoke*, 135 Mass. 278.

Messrs. Smith & Sloane, for defendant:

The trustees were not acting, and could not act, as the servants of the village, which is a municipal corporation.

Clark v. Easton, 146 Mass. 48.

The action of the trustees, if necessary to prevent the destruction of other property, was justifiable on precisely the same principle that 41 L. R. A.

a building is razed to prevent the spread of a conflagration.

In such cases, in the absence of a statute giving compensation, there is no redress against anyone, for *salus populi suprema est lex*.

See 2 Dill. Mun. Corp. 4th ed. § 955, and note 1; *Bowditch v. Boston*, 101 U. S. 16, 25 L. ed. 980, and note; *American Print Works v. Lawrence*, 28 N. J. L. 590, 57 Am. Dec. 420.

The trustees were either acting as public officers in the discharge of a public duty, or else they were acting as private individuals, and, in either event, they were not acting as servants of the village, therefore the doctrine of *respondet superior* has no application.

2 Dill. Mun. Corp. §§ 974-979; *Welsh v. Rutland*, 56 Vt. 238, 48 Am. Rep. 762; *Weller v. Burlington*, 60 Vt. 28.

The corporation cannot be made liable for the malfeasance of such officers, outside the scope of the power conferred by the charter.

2 Dill. Mun. Corp. § 970, and note 8; *Cavanagh v. Boston*, 139 Mass. 426, 52 Am. Rep. 716.

There is no power given in the charter to either the corporation or its trustees to destroy property in a case like the present one, therefore such an attempted exercise of power would be wholly *ultra vires*; but if it should be held that the corporation is given implied power to destroy property in order to protect highways, the legislature did not provide for compensation for such destruction, and in the absence of a statute there is no liability of the corporation, for this was not a mere ministerial act, but the performance of a public duty, if it was a duty at all.

McCarthy v. Boston, 135 Mass. 197; 7 Am. & Eng. Enc. Law, p. 999, and note; *Field v. Des Moines*, 39 Iowa, 575, 18 Am. Rep. 46; 2 Dill. Mun. Corp. §§ 956, 957; *Tiedeman, Mun. Corp.* § 338; *Clark v. Easton*, 146 Mass. 43; *Russell v. New York*, 2 Denio, 461; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332.

Such destruction is not a taking of private property for public use for which compensation must be made.

Tiedeman, Mun. Corp. § 335; *American Print Works v. Lawrence*, 28 N. J. L. 590, 57 Am. Dec. 420.

Rowell, J., delivered the opinion of the court:

The defendant is an incorporated village, and constitutes a highway district of the town. All the highway taxes assessed by the selectmen on the polls and ratable estate of the village are collected like other village taxes, and two thirds thereof paid to the village treasurer; and the trustees of the village are to expend the same in building and maintaining highways and bridges, and they are authorized to lay out, alter, maintain, and discontinue highways, and to appraise and settle the damages therefor; and the village can lay a tax for any of those purposes. The by laws of the village authorize the trustees to draw orders on the village treasurer for the payment of any sums assessed as damages for land or other property taken or improved for a highway or other public use, and provide that the trustees may remove nuisances, and direct the cleaning, repairing, and improvement of streets, com-

mons, lanes, walks, and bridges. The charter authorizes the village to make by-laws for protecting its highways from injury, but it does not appear that any have been made. Before and at the time in question the plaintiff owned a mill in said village, and a dam across Wells river; and on the mill side of the river was a highway, also in the village. At said time, because of rains or otherwise, the water of the river was very high, and carried away part of plaintiff's dam, and cut a channel around the mill, and between it and the highway, which was badly washing out; and to change the current away from the highway, to prevent further damage to it and to other property, the trustees burned the mill and its contents, and blew up and destroyed the dam; and the question is whether the village is liable for their action.

The plaintiff contends that this was a taking of his property for public use by an exercise of the right of eminent domain; that the trustees had a right, in the circumstances, to take it as they did, and therein were acting within the scope of their authority; that therefore he is entitled, under the Constitution, to compensation from the village, and, as the taking was without compensation, that the village is liable in this action. But this proposition cannot be maintained, for this was not a taking of the plaintiff's property for a public use, in the sense contended for, but a destruction of it to avert an imminent public injury, which is a different thing from taking by the right of eminent domain, and in no legal sense an exercise of that right, but stands on entirely different ground, namely, on the ground of necessity, or, more properly speaking, on the ground of the police power of the state, whereas the right of eminent domain stands on constitutional grounds. In *Field v. Des Moines*, 39 Iowa, 576, 18 Am. Rep. 46, it is said that the great weight of judicial authority holds that the destruction of property under authority conferred by law upon officers of municipal corporations is not an exercise of the right of eminent domain, but a regulation of the right that individuals have to destroy private property, in cases of inevitable necessity, to prevent the spreading of fire, or other great calamity. In *Keller v. Corpus Christi*, 50 Tex. 614, 32 Am. Rep. 618, the distinction between an exercise of the right of eminent domain and a police regulation to meet an impending peril by the destruction of property is sharply drawn. It is said that one can wait the forms and delay of the law, but that the other is governed by necessity, which knows no law; and reference is made to the unwise delay of the lord mayor of London to destroy some wooden buildings, which caused half that city to be burned in the great conflagration of 1666. In *Russell v. New York*, 2 Denio, 461,—a case that grew out of the great fire of 1835,—it is said that authority conferred by statute upon the mayor to order the destruction of buildings to prevent the spreading of a fire is not a grant of a right of eminent domain, and therefore not within the constitutional provision requiring compensation for property taken for public use, but that it is a regulation of the right that individuals possess to destroy private property to avert a public calamity. But in 41 L. R. A.

Hale v. Lawrence, 31 N. J. L. 714, 47 Am. Dec. 190, a case growing out of the same fire,—the court of errors and appeals of New Jersey held that said statute granted power not before existing, and that, therefore, it was the grant of a right of eminent domain. That case was again before the court, with the *American Print Works* against the same defendant, in 23 N. J. L. 590, 57 Am. Dec. 420; when the distinction above stated was clearly made. The distinction is well stated by Senator Verplanck in *Stone v. New York*, 25 Wend. 157, 173, which also grew out of that fire. See also Randolph, Em. Dom. §§ 8, 9; 1 Dill. Mun. Corp. 4th ed. § 141. The plaintiff cites *Bishop v. Macon*, 7 Ga. 200, in which it was held that the owners of property destroyed to stay a conflagration were entitled, under the Constitution, to compensation, and that the city was liable on the ground of an implied assumpsit, for which proposition *New York v. Lord*, 17 Wend. 285, and 18 Wend. 126, is referred to as authority. But in that case liability was imposed by statute, without which it was expressly said that no liability would exist. It is said in *Field v. Des Moines*, above cited, that *Bishop v. Macon*, stands alone, and that, in the language of the supreme court of California in *Dunbar v. The Alcalde & Ayuntamiento*, 1 Cal. 858, without some charter or other statutory enactment imposing liability the decision cannot be sustained. It is decisive of this question that if the act complained of can be justified on the ground of public necessity, as it must be if justified at all, the plaintiff's loss is a damage without legal injury.

The plaintiff further contends that the by-law that authorizes the trustees to remove nuisances, and to direct the cleaning, repairing, and improvement of streets, commons, lanes, walks, and bridges, makes them the servants and agents of the village, and that thereby the village undertakes to perform those duties by its servants and agents whom it may control, and not because the duty is imposed upon it by law, and that, therefore, the village is liable on the principle of *respondet superior*. But this contention cannot be maintained. There is no statute, nor provision in its charter, nor by-law, that makes the village liable; and assuming, without deciding, that the by-law referred to authorized the act complained of, and that the village had power to authorize it, yet the by-law did not make the trustees the servants and agents of the village so that the principle of *respondet superior* applies. The city council of Charleston, South Carolina, acting under the general municipal powers of the city, without any statute creating liability, adopted an ordinance authorizing the intendant, among other officers, in time of fire, to demolish such buildings as might be judged necessary by him to prevent the further spread of a fire; thereby investing this officer with power to judge whether the necessity existed. A fire being in progress, the plaintiff's house was blown up by order of the intendant, and the fire was subsequently extinguished before it reached his premises. He brought an action of trespass against the city; claiming that the property was destroyed without necessity, and that the ordinance authorizing the intendant to destroy the property for the bene-

fit of the city was sufficient to charge the city in case he proved that the destruction was unnecessary, and that the intendant had abused his discretion. But the court gave judgment against the plaintiff on the ground that the city, being a municipal corporation, was not liable to an action, unless given by statute. *White v. Charleston*, 2 Hill, L. 571. Judge Dillon says the result of this case was right, but that, assuming the power to pass the ordinance, the decision should have been put upon the ground that the intendant was discharging a public, as distinguished from a municipal or corporate, duty, and was not in that matter to be regarded as the agent of the city, and that, therefore, the city was not, on the principle of *respondent superior*, responsible for his acts. 2 Dill. Mun. Corp. 4th ed. § 975, note 1. In *McDonald v. Red Wing*, 18 Minn. 88 (Gil. 25), it was held that a city is not liable for the destruction of a building torn down to arrest the progress of a fire, unless such liability is created by statute, and that it makes no difference whether the building is torn down by direction of the city officers, assuming to act in their official capacity, or by citizens and bystanders on their own motion. *Field v. Des Moines*, above cited, was an action to recover the value of buildings destroyed by order of the mayor to prevent the spread of a fire. It was contended that as the city, by its ordinance, had authorized the mayor to judge of the emergency, and to direct the destruction of the buildings, it thereby made his acts the acts of the city. The court said it would not stop to inquire whether the statute authorized the city to pass the ordinance under which the mayor acted; for if it did, and the ordinance was valid, and authorized the mayor to judge of the emergency, yet the city was not liable for

his acts, in the absence of a statute creating such liability. There are numerous other cases to the same effect, but it is not necessary to refer to them.

The case at bar falls clearly within that class of cases in which the municipality is exempt from liability, in the absence of a statute imposing it, on the ground that the act complained of is not its act, but the act of persons who are deemed to be public officers, and who, though appointed and paid by the municipality, and though its agents, perhaps, for other purposes, yet are held not to sustain that relation to it in respect of the particular act in question. This is upon the ground that the municipality acts in the matter in a governmental capacity, and, as it were, for and on behalf of the state, and therefore, in the absence of a statute making it otherwise, enjoys the same immunity from liability for the acts of its officers that the state itself would have enjoyed had it done the same thing by its own officers. *Freel v. Crawfordville School City*, 142 Ind. 27, 37 L. R. A. 801. This doctrine is held and applied in *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762, and *Weller v. Burlington*, 60 Vt. 28. Nor is *Whipple v. Fair Haven*, 63 Vt. 221, in conflict with it. That case was not put on the ground of *respondent superior*, but on the ground that the village owed the orators, not a general duty as a part of the public, but a special duty as individuals, not to discharge water upon their land, and that the injury complained of was imputable to a neglect of that duty by the village itself, and not to the wrongful act of its trustees, and that the orators' land could not thus be subjected to servitude for the benefit of the public.

Judgment affirmed.

MISSISSIPPI SUPREME COURT.

J. H. ELLERBEE, *Appt.*,

v.

STATE of Mississippi.

(.....Miss.....)

1. The temporary relinquishment by a judge of the control of proceedings in a trial for felony by going 250 or 300 yards from the court room, leaving a member of the bar presiding in his absence, and being gone about twenty minutes, during which the trial goes on,

NOTE.—Temporary absence of judge, when fatal to trial.

- I. Scope of note.
- II. When court consists of single judge.
- III. When court composed of more than one judge.

I. Scope of note.

This note is only intended to cover absence of the judge which leaves the court without anyone to preside, and does not include questions with relation to a change of judges during a trial or during the different stages of a proceeding, or with relation to motions for new trial or other motions or proceedings in the action before some judge other than the trial judge.

Some of the cases deny the right of a judge to
41 L. R. A.

amounts to a dissolution of the court which makes the trial void.

2. A judge cannot delegate his judicial authority to another, and his attempt to do so, even with the consent of the parties, cannot bind the defendant on a prosecution for felony.

(January 17, 1898.)

A PPEAL by defendant from a judgment of the Circuit Court for Lauderdale County convicting him of murder. *Reversed.*
The facts are stated in the opinion.

act as a witness in a trial had before him, on the ground that this constitutes an absence of the judge, and breaks up the court. But the question of the competency of the judge as a witness in a case on trial before him is fully treated in a note to *Rogers v. State* (Ark.) 31 L. R. A. 466, and such cases are therefore omitted from this note.

II. When court consists of single judge.

In a legal sense the judge of a court is the court, and there can be no court without a judge. *Pressley v. Lamb*, 105 Ind. 171, *dictum*; *State v. Beuerman* (Kan.) 53 Pac. 874.

And in felony cases the presence of the judge is essential to the organization of the court. *O'Brien v. People*, 17 Colo. 561.

Messrs. McIntosh & McIntosh, F. V. Brahan, and Ethridge & McBeath, for appellant:

This cause should be reversed because the judge absented himself from the bench during the argument of counsel.

Turbeville v. State, 56 Miss. 798; *Davis v. Wilson*, 65 Ill. 525; *Brownlee v. Hewitt*, 1 Mo. App. 860; *State, Gehring, v. Claudius*, 1 Mo. App. 551.

Messrs. Walker & Amis also for appellant.

Messrs. Wiley N. Nash, Attorney General, and **Fewell & Son**, for appellee:

The judge was absent with the consent of the accused, and the absence of the judge was a matter about which consent can be given.

A prisoner even is only required to be present during the more important steps.

Rolls v. State, 53 Miss. 891.

We do not consider that there was an absolute relinquishment by the judge of his seat on the bench. The point is. Was the judge beyond recall? No. Was he not within the call of the court? He certainly was.

Everything stated outside the facts of the case in *Turbeville v. State*, 56 Miss.

798, were *obiter dicta* and of no authority.

Methodist Episcopal Church v. Jacques, 3 Johns. Ch. 95; *Johnson v. Cooper*, 56 Miss. 617; *Pave v. McRae*, 36 Miss. 148; *State v. Williams*, 49 Miss. 664.

Whitfield, J., delivered the opinion of the court:

The appellant was tried for murder, convicted, and sentenced to imprisonment in the penitentiary for life. During the trial, while one of the counsel for the appellant was making his argument to the jury, the circuit judge left the bench, calling Mr. Bozeman, a member of the bar, to preside in his absence, with the consent of part of the counsel for the state and the defendant, and then left the courthouse. During his absence a heated, excited altercation occurred between one of the counsel for the state, Judge Fewell, and one of the counsel for the defendant, Mr. Ethridge, then addressing the jury. What occurred, as developed by the testimony on the motion for a new trial, was this: Says one of the witnesses: "Mr. Ethridge said in his argument that Mr. Hoffer had stated to W. W. Henry, a member

Evidence can only be delivered to the jury in a criminal case in open court, and unless there is a judge or judges present there can be no court. *Shular v. State*, 105 Ind. 299, 55 Am. Rep. 211, *dictum*.

It is the duty of the presiding judge at criminal trials, and especially where life is involved, to be visibly present every moment of their actual progress so that he can always see and hear all that is being done. *State v. Smith*, 49 Conn. 378; *State v. Beuerman* (Kan.) 53 Pac. 874.

The judge cannot, even temporarily, relinquish control of the court or the conduct of the trial. It is necessary that he should hear all that transpires in order that he may intelligently review the proceedings upon motion for a new trial. *State v. Beuerman* (Kan.) 53 Pac. 874.

And the absence of the judge against the objections of the defendant, in a trial of a felony case, while a certain witness was examined and while material evidence was taken, is error for which a new trial should be granted. *O'Brien v. People*, 17 Colo. 561.

The judge, as well as the jury, must be present in every criminal trial to superintend the proceedings, uphold the majesty of the law, and thus give protection and security to all parties interested or concerned in the result of the trial. *O'Brien v. People*, 17 Colo. 561; *Hayes v. State*, 58 Ga. 35.

And when, during the trial of a capital case, the judge leaves the bench and withdraws beyond the bar, he should order a suspension of business until his return,—especially while a witness for the state is under examination. *Hayes v. State*, 58 Ga. 35.

And a prisoner is entitled to a new trial where the judge left the bench and withdrew beyond the bar in the progress of the trial without requiring the examination to cease during his absence. *Hayes v. State*, 58 Ga. 35.

A trial conducted in part in the absence of the judge and of the accused is not that trial to which every man accused of crime is entitled within the meaning of the constitutional provision guaranteeing to every person charged with crime the right to be confronted with the witnesses against him. *Foster v. State*, 70 Miss. 756.

And no substantial part of a trial for felony can properly be carried on in the absence of the presiding judge, even with the consent of the defendant. *O'Brien v. People*, 17 Colo. 561.

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Neither the accused nor his counsel in a criminal prosecution can consent to the departure of the judge during the progress of the trial, and his engaging in his official duties elsewhere. *Meredeth v. People*, 84 Ill. 479.

So, the general rule is that judicial office must be exercised in person, and that a judge cannot delegate his authority to another. *State, Hovey, v. Noble*, 118 Ind. 380, 4 L. R. A. 101, *dictum*.

Judicial functions cannot be delegated to be exercised by agent or deputy, and it is error for a circuit judge to call an attorney to occupy the bench in a civil cause before it is determined, without the consent of the parties appearing of record. *Davis v. Wilson*, 65 Ill. 525; *ELLERBEE v. STATE*.

The validity of proceedings in a circuit court depends upon the presence of the judge, and he cannot authorize any ministerial officer of the court to exercise his judicial powers; and where the court meets on the first day of a regular term, and adjourns to the next day, when the judge leaves, directing the sheriff and clerk to meet and open and adjourn court from day to day, which they do for a week, and then enters an order declaring court adjourned until the next regular term, the court must be deemed to have been adjourned after the first day for want of a judge. *Wight v. Wallbaum*, 39 Ill. 554.

And under Cal. act 1853, § 95, providing that if no judge attends on the day appointed for holding a court before noon the sheriff or clerk shall adjourn the court until the next day, and so on from day to day for a week if no judge attends, where the sheriff and clerk adjourn court on Monday and so on until Saturday, when they adjourn it for the term, the last adjournment is a nullity, and a judgment entered by the court thereafter is valid notwithstanding such adjournment of the term. *Thomas v. Fogarty*, 19 Cal. 644.

As to absence during trial which proceeds, see *ELLERBEE v. STATE*.

So, the reception of a verdict is a judicial act which cannot be delegated, and where after a cause has been given to the jury the judge, desiring to go home, designates an attorney of the court to receive the verdict, which is done, the verdict is a nullity, and the fact that the defendant assented thereto does not give it validity. *McClure v. State*, 77 Ind. 287.

of this bar, that he (Hoffer) was a witness to the tragedy. He then discussed the failure of the state to introduce Mr. Henry, and he further discussed or criticized the state for objecting to the introduction of Mr. Henry as a witness on the part of the defense. At this point he was interrupted by Judge Fewell, of counsel for the state, who denounced Mr. Ethridge's argument as being outrageous. There was a clash of words between Mr. Ethridge and Mr. Fewell. But finally Mr. Ethridge said, 'I will take it back,'—all, or a part of it, I am not sure which; I am not sure what he said. Capt. Fewell, however, tried to invoke a ruling from Mr. Bozeman, who at that time was occupying the chair of the judge. Mr. Bozeman said he was not sufficiently advised as to what was the testimony in the case to rule on it. But he thought the matter had been settled by the withdrawal of the language objected to. Judge Fewell, however, insisted that the matter was not settled, and that he wanted a ruling, but at about this juncture one of the jurors retired from the box, and before Mr. Ethridge resumed his argument in the case, and before the juror returned to his seat in the box, Judge Huddleston—presiding judge in the case—had returned

to the court room from a temporary absence." Another witness testifies that when Mr. Ethridge "retracted the language" "Capt. Fewell then said, 'No, sir, you shant do it,' and, looking up to the bench, called for the court, and appealed to Mr. Bozeman, saying, 'You, sir, are a lawyer, and ought to know better.' I don't know how that was expressed,—don't remember exactly how that was. Mr. Bozeman then remarked that the judge would be back in a little while, and that was the end of the matter." This witness also testified that Henry's testimony had been excluded by the court, in the absence of the jury, who never heard it. He also testifies that Judge Huddleston had gone to Walker and Hall's building to see Mr. Schamberger, whom he said was sick, and that that building was between 250 and 300 yards from the court-house. Judge Huddleston testified that he went to see a sick friend, Mr. Schamberger, to get him to go up to his house, he being dangerously sick. He saw him; talked, in the Higgins building, with him, trying to get him to go to his house, which he declined to do. He then went into Mr. Amis's office, in an adjoining room, and sat down to smoke a cigar. That he smoked nearly half

And the jury cannot be authorized to render their verdict to the clerk in the absence of the judge, and be discharged by consent of the parties, and a verdict thus rendered is invalid. *Baltimore & O. R. Co. v. Polly*, 14 Gratt. 447.

And it is the duty of the judge to be personally present in court, and to find judicially the facts upon which his conclusion to discharge the jury is based, and where, in a criminal prosecution, he leaves upon the going out of the jury, and goes to his home in another county, and upon being informed by the clerk several days after that the jury could not agree, he instructs him by telegraph to discharge the jury and remand the prisoner, which the clerk does, the prisoner is entitled to a discharge. *State v. Jefferson*, 66 N. C. 309.

Nor does the fact that the judge who conducted a trial was weary authorize him to appoint someone else to take his place; and where the jury retired to deliberate in the afternoon, and subsequently the judge asked an attorney to receive the verdict, and left the court room, and did not return until the next morning, during which time the jury came in and the verdict was taken by such attorney and the jury discharged, the verdict is invalid and a new trial should be granted, and the fact that the attorneys for the parties were present and did not object does not make the appointment effective. *Britton v. Fox*, 39 Ind. 309.

So, the appellate court will not presume on appeal that the judgment appealed from was rendered upon a proper trial of the issue, where the record shows that during the trial the judge of the court below left the bench and his place was assumed by a member of the bar who was not a judge but who tried the cause. It will treat the proceedings as *exram non judice*, and the judgment as void. *Van Slyke v. Trempealeau County Farmers' Mut. F. Ins. Co.*, 39 Wis. 300, 20 Am. Rep. 50.

And a referee decides both the law and the fact, and where a cause is referred to three referees that full number must be present, free from all bias and competent to decide every question presented, and one of the three cannot be called from the bench and sworn and examined as a witness on the trial, as that would disorganize the court. *Morse v. Morse*, 11 Barb. 510.

So, there can be no court without a judge, and his presence as the presiding genius of the trial is

as necessary during the argument as at any other time. *Turbeville v. State*, 56 Miss. 733.

The arguments of counsel, as well as the taking of the evidence, are a part of a trial, and the judge cannot properly absent himself while such proceedings are being carried on. It is his duty to be present and see to it that counsel do not travel outside the record, or transcend the limits of legitimate discussion. *O'Brien v. People*, 17 Colo. 561; *State v. Beuerman* (Kan.) 53 Pac. 374; *Brownlee v. Hewitt*, 1 Mo. App. 360.

And where the presiding judge in a criminal prosecution left the bench during the final argument of the cause, and retired from the court room, and permitted the argument to continue while he was absent, this is reversible error. *Palin v. State*, 38 Neb. 387.

And where in a criminal prosecution the jury is sent out of the court room with counsel for the purpose of hearing the argument to save the time of the court, and the closing address of counsel to the jury is not made in the presence of the court, in consequence of which remarks are made by one of the counsel which would not have been permitted in the presence of the court, a new trial should be granted. *Brownlee v. Hewitt*, 1 Mo. App. 360.

And judgment in a criminal prosecution will be reversed where the jury and counsel were sent out of the court room for the purpose of arguing the cause, and counsel, having the closing speech, states as evidence to influence the action of the jurors, matters which were not in evidence, and which, though perfectly true, should not have been permitted to be stated or made known to them. *State, Gehring v. Claudius*, 1 Mo. App. 551.

The law requires a presiding judge to sit during each and every stage of a proceeding before him, whether it be a jury trial or some other proceeding in court, and his presence cannot be dispensed with, and a judgment rendered by him will be reversed, where, during the argument of the case before the jury, he left the court room and remained out during the entire closing argument of the state's attorney, though he was in a private room adjoining the court room preparing instructions to be given the jury. *Thompson v. People*, 144 Ill. 373.

And the absence of the judge from the court room, engaged in other judicial labors for a period of two days, in the trial of a criminal proee-

of it up, walked down the stairway, and started in the direction of the court-house, and met a party who advised him there was an altercation between counsel in the court room. He states further that he observed the time when he left the bench, and when he got back to the foot of the stairway leading up to the court room, and noted that up to that time he had been absent from the bench eighteen minutes. We have thus the case of a circuit judge leaving the court room in the progress of a trial for murder, going to a building some 250 or 800 yards away, leaving the court in charge of a member of the bar called to the bench to preside in his absence, and being gone about twenty minutes, a heated altercation occurring meantime between counsel, in the hearing and presence of the jury. It is not the case of a circuit judge being absent a few moments, from necessity, suspending, as he

should, all proceedings in his absence, but a clear and manifest case of temporary relinquishment of the control of proceedings which were not suspended, but going forward with a member of the bar presiding as judge, in the way above shown. In *Turbeville v. State*, 56 Miss. 798, 799, the circuit judge merely retired from the bench to a room immediately adjoining, and in the rear of the bench, and separated from it only by the thickness of the wall, through which a door was opened. He placed a member of the bar on the bench, with instructions to call or notify him, if needed. He remained in this room, thus absent from the bench, and distant from it 5 or 6 feet only, during the greater part of the argument to the jury. The court says: "If we could consider this statement of the facts as showing such absence from the room on the part of the judge as constituted even a temporary relinquish-

ment of great magnitude, is error and fatal to a conviction, though he was in another part of the same building. *Meredeth v. People*, 84 Ill. 473.

And the fact that during the argument in behalf of the defendant in a prosecution for murder the judge left the bench and passed into an adjoining room, closing the door behind him and remaining there about ten minutes, during which time he appears to have been out of sight and hearing of the jury and counsel, and where he could not hear the argument or exercise control over the proceedings in the court room, is sufficient ground for a new trial. *State v. Beuerman* (Kan.) 53 Pac. 874.

Nor does failure of counsel to object to the sending out of the court room of the jury with counsel for the purpose of hearing the argument which was made without the presence of the court, constitute a waiver of the right to have the argument conducted in the presence of the court, since such consent is extorted, counsel not being in a position where they could well refuse it. *Brownlee v. Hewitt*, 1 Mo. App. 380; *State, Gehring, v. Claudius*, 1 Mo. App. 551.

And such omission to object will not prejudice him or affect his right to raise the objection on appeal. *State, Gehring, v. Claudius*, 1 Mo. App. 551.

The fact that the judge may not see or hear everything occurring in the court room, however, or that he may step into an adjoining room but not out of hearing of the proceedings, is not necessarily prejudicial to the interests of the defendant in every case. *State v. Beuerman* (Kan.) 53 Pac. 874.

And a judge is not precluded from changing his seat to any portion of the room he may prefer, or from temporarily engaging in conversation or reading or writing during a trial, but he must remain within the hearing of counsel so as to be able to assert his authority if required by anything that may occur. *Turbeville v. State*, 56 Miss. 793.

And the fact that while the attorney for the state in a criminal prosecution was making his opening argument the judge withdrew to the judge's ante-room for a few moments, but was all the time within hearing of the proceedings in court, and it did not appear that he could not and did not see as well as hear everything pertaining to the trial, does not invalidate the proceedings and require that a new trial be ordered. *State v. Smith*, 49 Conn. 878.

And that the judge in a criminal prosecution left the bench and stepped into a room immediately adjoining and in the rear of the bench separated from it only by a wall, through which a door opened, and placed a member of the bar on the bench with instructions to call him if needed, remaining there the greater portion of the time

consumed by the address of counsel to the jury, where it does not appear whether the door was opened or closed, is not such a relinquishment of control of the court and of the conduct of the trial as will require a reversal of the judgment. *Turbeville v. State*, 56 Miss. 793.

In a civil action the adjournment of court on Saturday night, after a case had been submitted to the jury but while they were still unable to agree, until the succeeding Tuesday, during which time the judge intended to be absent from the county, and the discharge of the jury until Sunday morning with admonition to them and directions to the bailiff to keep them in his custody, except that he may allow them to separate at night and for meals, is irregular but not a ground for reversal, where on Tuesday morning the court convened and the jury returned their verdict, and it does not appear that they were not in fact kept together from the moment they convened on Sunday morning until the court met on Tuesday, and the proceedings do not appear to have wrought any prejudice to the substantial rights of the parties. *Morrow v. Saline County Comrs.* 21 Kan. 484.

Where it is alleged in a criminal prosecution that the jury have received evidence in the absence of the judge and of the prisoner it is for the court before which the trial takes place to investigate the facts and ascertain whether the alleged irregularity has occurred, and in the absence of such examination it is impossible for the court on appeal to reverse the conviction on a mere statement of what the judge below was informed, which might be a mere rumor. *Queen v. Martin*, L. R. 1 Q. C. 378.

And complaint that a jury was sent into another room to hear the arguments of counsel while the court proceeded with other business in the court room cannot be first made upon appeal where no objection was offered at the time and it does not appear that any unfairness resulted. *Burns v. Wilson*, 1 Mo. App. 129.

III. When court composed of more than one judge.

The rules above laid down apply, also, when the court is composed of more than one judge, to any absence of any of them which for the time being disorganizes the court.

Thus, under the Constitution of the state of New York providing that the county judges with two justices of the peace to be designated according to law may hold courts of session, the two justices are indispensable to constitute a legally organized court; and where during the trial of a case in that court one of the justices of the peace thus designated abandons the trial and goes home, the court is disorganized so far as the trial is concerned so that the judgment is invalid, though the county

ment of the control of the court and of the conduct of the trial, we should unhesitatingly reverse the judgment. There can be no court without a judge, and his presence, as the presiding genius of the trial, is as essential during the argument as at any other time. We do not mean to say that he must actually listen to every word that falls from the lips of counsel while they are addressing the jury, for this might impose a burden too heavy to be borne, but we do mean that the conduct and control of the argument within legitimate limits is confided to him as a judicial duty, and cannot be by him devolved upon another. While he will not be precluded from changing his seat to any portion of the room he may prefer, or from temporarily engaging in conversation, or reading, or writing, he must remain within hearing of counsel, so as to be able instantly to assert his authority, if demanded by any-

thing that may occur. While it will rarely be necessary or proper from him to interfere with counsel, instances may arise that will require it; and, moreover, the conduct of the jurors, spectators, or officers of court may be such as to demand the instant interposition of his authority. In civil cases or prosecutions for misdemeanors he may give place to another by consent, and if he does so without objection in advance, consent will, perhaps, be presumed; but in prosecutions for felonies no consent can be given, and, if given, it will not be binding on the accused." These words could not be more apt if this court had been considering this case. Here it is idle to say that the circuit judge remained "within the hearing of counsel, so as to be able instantly to assert his authority." Beyond all cavil, he had abandoned the "control of the court, and the conduct of the trial" "temporarily" to Mr.

Judge appointed another justice of the peace to fill the vacancy. *Blend v. People*, 41 N. Y. 604.

In this case it is said that when the Constitution requires a court to be constituted of a certain number of members the court on appeal is not at liberty to determine judicially that two members of such court are so far useless appendages that they may be changed during a trial to suit their convenience, and others substituted in their place.

And a conviction and sentence in a prosecution for larceny is invalid and will be set aside where, after the charge by the court and the retirement of the jury, the presiding judge commenced the trial of a civil cause, and the justices of the sessions, who were members of the court during the trial, left the court room, one of them going to the lower hall and the other into the street, and the jury came in during their absence, and the county judge received the verdict. *Hinman v. People*, 13 Hun, 266.

In this case *Tuttle v. People*, 36 N. Y. 431, and *People v. Reagle*, 60 Barb. 527, *infra*, were distinguished upon the ground that in the case at bar the justices of sessions left, not the court room only, but one of them left the court-house, and when the verdict was received the court was held by the county judge only.

So, under the New York judiciary act prescribing that courts of oyer and terminer shall be composed of a justice of the supreme court, who shall preside, the county judge and the justices of the peace designated as members of the court of sessions, and that the presiding justice and any two of the others shall have power to hold said court, a trial before a court consisting at the beginning of a justice of the supreme court and county judge and two session justices, during which one of the session justices absented himself for an entire day after the trial had progressed several days while the trial proceeded, when he returned again and took part in the subsequent proceedings, and the county judge left and did not return after the charge had been delivered and before the rendition of the verdict, is improper, and a new trial should be granted, as the justice of sessions disqualified himself from further sitting as a member of the court by leaving, and after the county judge left the only competent members of the court remaining were the presiding justice and the other justice of sessions. *People v. Shaw*, 83 N. Y. 36.

And the presiding justice at a court of oyer and terminer in New York has no authority to discharge a jury upon its failure to agree in the absence of his associate, the presence of whom is necessary to constitute a court of oyer and terminer. *People v. Reagle*, 60 Barb. 527.

And the failure of the defendant in a criminal prosecution to object at the time is not a waiver of 41 L. R. A.

the right to insist upon the defective organization of the court when a verdict is received by the presiding judge in the absence of the sessions justices. *Hinman v. People*, 13 Hun, 266.

When a court of sessions is in progress with a quorum in actual attendance, however, the casual and temporary absence of one of the judges from the seat assigned him neither breaks up the court nor impairs the validity of its proceedings. *Tuttle v. People*, 36 N. Y. 431.

And the fact that one of the session justices in a prosecution for perjury had occasion to leave the bench for a few minutes to hand a paper to a person who is waiting in court to receive it, and who was some 20 feet from the presiding judge when an objection to the admission of a deed in evidence was overruled, does not vitiate the proceedings. *Tuttle v. People*, 36 N. Y. 431.

And that one of the three members of the court of sessions was not in the place in the room which it was customary for one holding his office to occupy during a trial, does not disorganize or disrupt the court so that it will lose jurisdiction where all and each were ready and able to perform each and every duty incumbent upon them. *People v. Dohring*, 59 N. Y. 374, 17 Am. Rep. 849.

In this case *Blend v. People*, 41 N. Y. 604, *supra*, was distinguished upon the ground that in that case one of the justices of sessions absented himself from the place where the court was held, and did not reappear, and another justice was called to the vacant place, while in this case the justice of the sessions, who was sworn as a witness, did not leave the court room while the trial was progressing, and merely left the bench for a space intending soon to return to it and soon returning.

So, a trial in the oyer and terminer of New York, at the commencement of which the circuit judge, the associate judge, and two aldermen presided, after which during the progress of the trial the circuit judge retired from the bench and did not again return, is regular, and a conviction and sentence therein will not be reversed on account of such departure, as the associate judge and the two aldermen associated with him had authority to hold a court of oyer and terminer without the circuit judge. *People v. White*, 22 Wend. 167.

And where two judges hear a demurrer to a plea in abatement in a criminal prosecution, and the opinion sustaining the demurrer is drawn up by one of them and assented to by the other, and delivered by the one drawing it up, sitting alone, and both judges subsequently sit at the trial of the indictment, there is no irregularity for which a new trial will be ordered under a statute providing that two judges shall be a quorum and that the court shall always be open. *State v. Congdon*, 14 R. I. 458.

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Bozeman. And here a signal illustration of the wisdom of the rule announced in *Turbeville's Case* is furnished. We have given this proposition the most anxious consideration. We have failed, after exhaustive search, to find a single authority that would support us in disallowing this assignment of error, and neither the attorney general nor the exceptionally able and learned counsel representing the state in conjunction with the attorney general refers us to a single authority which opposes the rule in *Turbeville v. State*, in harmony with which also is *Peter v. State*, 6 How. (Miss.) 826. On the contrary, the authorities elsewhere uniformly sustain that rule. In *People v. Dohring*, 59 N. Y. 874, reported in 17 Am. Rep. 349, at page 353 (bottom of the page), the supreme court of New York expressly affirms the rule in the *Turbeville Case* that the judge must be where it is "physically possible for him at any moment, on the arising of a question" calling for his decision, to be present, and make it. In *Merredeth v. People*, 84 Ill. 479, the judge of the court was in the court-house, but in a different court room, trying another case, after having heard all the evidence in a murder case, and then having called two members of the bar in succession, to the bench, to preside in the murder case during the argument of counsel, himself having gone back several times to the court room where the murder case was being tried. The court said (p. 482): "It is no less error than if he had been in another county. . . . The argument of a cause is as much a part of the trial as the hearing of evidence. It is a right in his defense, secured by the law of the land, of which a citizen cannot be deprived. . . . The decision is not affected by the consideration the judge was present a part of the time during the argument of the case. If he could be absent during any part of the trial, and his official duties could, during such time, be performed by a member of the bar, on the same principle, his absence during the entire trial could be justified." Mr. Works, in his "Courts and Their Jurisdiction," says (p. 87): "When the court is once opened, the presence of the judge is necessary at all times when judicial business is being transacted." The following authorities clearly support all three of the propositions laid down in the *Turbeville Case*, to wit, that in the trial of a felony the judge must always be where he can immediately respond to any call for the exercise of his authority in controlling the court and the conduct of the trial, his relinquishment, though even temporary, of such control of the court and conduct of the trial, working, as to that case, a dissolution of the court; that the judge

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cannot delegate his judicial authority to another; and that his doing so, even with the consent of the parties, cannot bind the defendant. Cases cited in note to *Roy v. Horsley* (Or.) 25 Am. Rep. 540, 541; 12 Am. & Eng. Enc. Law, p. 11, note 5, with authorities; *Shaw v. People*, 8 Hun. 272, opinion by Hardin, J., at page 279, 68 N. Y., at pages 38, 39; *People v. White*, 24 Wend. 528, bottom page 545, opinion of Walworth, Ch., also opinions of other judges at pages 546, 549, 555, 556, 563; *Blend v. People*, 41 N. Y. 606; *Hoagland v. Creed*, 81 Ill. 506; *Van Slyke v. Trempealeau County Farmers' Mut. F. Ins. Co.* 39 Wis. 390, 20 Am. Rep. 50. Section 165 of the Constitution has no application to the case made by the record. If this error were merely a technical one, not vital in its nature, we would not, for that alone, reverse the judgment. But the error here is of the gravest character. It goes to the very organization and constitution of the court trying the appellant on a charge of murder. So far as the lawful power of this court can be exerted, in affirming convictions for violations of the law of the land, it shall be exerted. And mere technical errors, without intrinsic merit, when we can, after a careful and thorough examination of the whole case, confidently say that the right result has been reached, that substantial justice has been done, and that, on a new trial, no other result could reasonably be arrived at, will not avail here for reversal, in civil or criminal cases. But when the defendant has been, as here, denied a right secured to him by the Constitution and the laws of the land, in a matter going to the very constitution of the court trying him, we are compelled to reverse the case. In such cases the interests of society, the stability of the laws, the due administration of justice, demand a reversal. Disregard of fundamental right in the case of the guiltiest defendant, his conviction in violation of settled constitutional and legal safeguards, intended for the protection of all, are not things which affect the particular defendant in a given case alone, but, in their disastrous and far-reaching consequences, involve, in future trials, the innocent and guilty alike, subvert justice, and disorganize society. Guilt should be punished certainly, and condignly, most assuredly; but guilt must be manifested in accordance with the law of the land. Else some day the innocent, who are sometimes called to answer at the bar of their country, may come to find themselves involved in a common ruin, deprived of the legal trial necessary to the vindication of their innocence.

Reversed, new trial awarded, and cause remanded.

WISCONSIN SUPREME COURT.

Nickolas ZEHREN, *Resp't.*,
v.
MILWAUKEE ELECTRIC RAILWAY &
LIGHT COMPANY, *Appt.*,

Charles ROBRAN, *Resp't.*,

SAME, *Appt.*

(.....Wis.....)

An electric passenger railroad on a country highway constitutes an additional burden, and cannot be built without the consent of the abutting owner and payment of compensation.

(March 22, 1898.)

APPEAL by defendant from an order of the Superior Court for Milwaukee County refusing to vacate certain temporary restraining orders enjoining defendants from changing the grade of a street in front of plaintiff's property. *Affirmed.*

Statement by Winslow, J.:

These are two actions in equity brought to permanently enjoin the defendant railway company from grading down the highway in front of the residences of the plaintiffs, and from laying an electric street railway thereon. The cases are identical in their facts, and but one statement will be necessary. The facts appearing by the complaint and the affidavits used upon the motion to dissolve the preliminary injunction were substantially as follows: Oakland avenue is a highway 60 feet in width, and running north and south in the city of Milwaukee, and extends northward into the town of Milwaukee, and reaches the village of White Fish Bay, which is an incorporated village of 400 or 500 inhabitants whose southern boundary is about $1\frac{1}{4}$ miles north from the northern boundary of the city of Milwaukee. The plaintiffs own, respectively, two small lots, on which they reside, fronting on the east side of this highway, about $\frac{1}{4}$ of a mile north of the city limits of Milwaukee. This highway has existed and been traveled by ordinary travel for many years, during all of which time there has been a grade in front of plaintiff's lots, ascending to the north about 1 foot in 21, and the plaintiffs' lots are now 4 or 5 feet above the grade. This grade extends for a distance of 800 feet along the highway, and for an additional 300 feet there is a grade of 1 foot in 80 feet. Most of the property on the highway from the city limits north past the plaintiffs' lots has been platted into city lots, and many of the lots have been sold; but the greater part of them are held by nonresident owners for sale, and are not occupied or improved. There are about twenty-five actual residents upon the road from the limits of the city to the limits of White Fish Bay. The village of

White Fish Bay is composed largely of people doing business in Milwaukee. The defendant owns and operates substantially the entire electric street-railway system of the city of Milwaukee, and carries passengers only. In the summer of 1897 many of the inhabitants of White Fish Bay desired an extension of the defendant's electric street railway on Oakland avenue to the village of White Fish Bay; and the defendant was desirous of making that extension, but it declined to build the line unless the steep grade above mentioned was considerably reduced, and, after negotiations with the town board of the town of Milwaukee, a written agreement was made between the defendant and the town board, August 17, 1897, by which the defendant was allowed to build its electric road for passenger service upon Oakland avenue, past the plaintiffs' premises, and to operate it under certain conditions for fifty years, provided that it would grade the highway at its own expense, and save the town harmless from all damages by reason of the change of grade, such new grade being made according to a profile attached to the agreement. By this agreement and profile the highway was to be cut down in front of the plaintiffs' lots, and for a long distance on either side of them, and was to be filled in at other places so as to reduce the grade. The depth of the cut in front of the plaintiffs' premises was about 8 feet, and the width of the cut at the bottom 36 feet, with the sides sloping back on each side to the street line. Afterwards, on October 16 following, the town board made an order fixing the grade of the street as indicated in the profile. A large proportion of the property owners on the highway along the line of the proposed change consented, in writing, to the change; but others, including the plaintiffs, did not consent. By the change proposed, the lots of the plaintiffs were to be left from 12 to 14 feet above the roadbed, and access to them by team will be either entirely cut off or made very difficult. A temporary restraining order was obtained upon the complaint, and accompanying affidavits in each case at the commencement of the actions. Afterwards the defendant appeared, and, upon affidavits, moved in each case to vacate the order, which motions were denied, and the defendant appeals in both cases.

Messrs. Miller, Noyes, Miller, & Wahl, for appellant:

Any damage caused the plaintiff by the change of the grade of the street in front of his premises is *damnum absque injuria*.

Coldclough v. Milwaukee, 93 Wis. 186; Booth, Street Railway Law, pp. 185-189.

The town board of supervisors had authority to grant the street-railroad franchise to the street-railroad company.

Wis. Laws 1960, chap. 813.

NOTE.—For electric-car line as additional burden on highway, see note to *Western R. Co. v. Alabama Grand Trunk R. Co.* (Ala.) 17 L. R. A. 478; State, *Kennelly v. Jersey City* (N. J. L.) 26 L. R. A. 241; State, *Boebeling v. Trenton Pass. R. Co.* (N. J. L.) 33 L. R. A. 129; *Reid v. Norfolk City R. Co.* (Va.) 41 L. R. A.

36 L. R. A. 274; *Chicago & N. W. R. Co. v. Milwaukee, R. & E. Electric Co.* (Wis.) 37 L. R. A. 856.

For such line in country road, see also *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.* (Pa.) 27 L. R. A. 768.

Oakland avenue is not an ordinary country road.

Chicago & N. W. R. Co. v. Milwaukee R. & K. Electric R. Co. 95 Wis. 561, 87 L. R. A. 856.

An electric street railroad upon a country road is not an additional burden.

When it appropriates the land of an individual for a highway the public pays full value and can use such land without paying additional compensation for any public purpose not inconsistent with its use as a street and which does not impair the abutter's right of access to his property.

Norton v. Peck, 3 Wis. 714.

Just compensation for the taking of land for a highway is its full value, the same as when taken for a railroad.

Sanborn & Berryman, Wis. Anno. Stat. § 1848, and note.

When land is taken for a railroad a proper deduction in the absence of a statute is made from the damages for the benefits.

Washburn v. Milwaukee & L. W. R. Co. 59 Wis. 364; *Milwaukee & M. R. Co. v. Eble*, 3 Pinney, 334; *Chapman v. Oshkosh & M. River R. Co.* 33 Wis. 629.

So when land is taken by the public for a highway the fee remains in the abutter but the land taken can be used for all public purposes.

Chicago & N. W. R. Co. v. Milwaukee R. & K. Electric R. Co. 95 Wis. 567, 37 L. R. A. 856.

A street railroad in a street is not an additional burden, because not inconsistent with the use of a street as a street, and the abutter is "not entitled to a compensation therefor, except where some private right of such an owner (as his free access to his own land or buildings) has been materially impaired thereby."

Hobart v. Milwaukee City R. Co. 27 Wis. 194, 9 Am. Rep. 461; *Huston v. Fort Atkinson*, 56 Wis. 350; 2 Dill. Mun. Corp. §§ 656, 675; *Paine Lumber Co. v. Oshkosh*, 89 Wis. 480; *Huston v. Fort Atkinson*, 56 Wis. 350; *Chicago & N. W. R. Co. v. Milwaukee R. & K. Electric R. Co.* 95 Wis. 567, 37 L. R. A. 856.

Authorities differ as to how land taken for a street may be used without paying additional compensation to the abutter. The courts of Massachusetts and New York have adopted different views. The courts of Wisconsin have followed Massachusetts.

Where, under the authority of the legislature in virtue of the sovereign power of eminent domain, private property has been taken for a public use, and full compensation for a perpetual easement in land has been paid to the owner therefor, and afterward the land is appropriated to a public use of a like kind, no new claim for compensation can be sustained by the owner of the land over which it passes.

Chase v. Sutton Mfg. Co. 4 Cusb. 152; *Pierce v. Drew*, 136 Mass. 80, 49 Am. Rep. 7; *Boston v. Richardson*, 13 Allen, 146; *Com. v. Temple*, 14 Gray, 69; *Com. v. Lovell Gas Light Co.* 12 Allen, 75; *Atty. Gen. v. Metropolitan R. Co.* 125 Mass. 515, 28 Am. Rep. 264; *Lincoln v. Com.* 164 Mass. 9.

In New York it is held that the appropriation of land for the use of a highway is for a specific purpose, and the public thereby acquire

a mere right of passage, with the powers and privileges which are incident to such a right.

Bloomfield & R. Natural Gas Light Co. v. Calkins, 63 N. Y. 886.

The New York courts have held the following uses of a street to be additional burdens for which additional compensation must be paid:

(1) A street railroad.

Craig v. Rochester City & B. R. Co. 39 N. Y. 404.

(2) Gas pipe in a country road.

Bloomfield & R. Natural Gas Light Co. v. Calkins, 62 N. Y. 888.

(3) City sewer in a country road.

Van Brunt v. Flatbush, 128 N. Y. 55.

(4) Telephone poles in a country road.

Eels v. American Teleph. & Teleg. Co. 143 N. Y. 133, 25 L. R. A. 640.

The supreme court of Wisconsin has followed the Massachusetts decisions and adopted its view as to what uses a street can be put to without paying additional compensation to the abutter.

Hobart v. Milwaukee City R. Co. 27 Wis. 194; *Chicago & N. W. R. Co. v. Milwaukee R. & K. Electric R. Co.* 95 Wis. 568, 37 L. R. A. 856; *Huston v. Fort Atkinson*, 56 Wis. 350.

The Massachusetts doctrine has also been adopted by the weight of authority in other states.

Booth, Street Railways, par. 82; *Chicago & N. W. R. Co. v. Milwaukee R. & K. Electric R. Co.* 95 Wis. 567, 37 L. R. A. 856; *Hewett v. Western U. Teleg. Co.* 4 Mackey, 424; *Irwin v. Great Southern Teleph. Co.* 37 La. Ann. 63; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Cater v. Northwestern Teleph. Exch. Co.* 60 Minn. 539, 28 L. R. A. 310; *Reversing Willis v. Erie Teleg. & Teleph. Co.* 37 Minn. 347; *People v. Eaton*, 100 Mich. 208, 24 L. R. A. 721; *Julia Bldg. Assn. v. Bell Teleph. Co.* 88 Mo. 258, 57 Am. Rep. 398; *Gay v. Mutual Union Teleg. Co.* 12 Mo. App. 495; *Hershfield v. Rocky Mountain Bell Teleph. Co.* 12 Mont. 102; *Mills, Em. Dom.* § 187; *Keasby, Electric Wires*, pp. 82-83.

The New York doctrine is fallacious which holds certain uses of a country highway are an additional burden when the same uses would not constitute an additional burden upon a city street.

This New York view is repudiated by Massachusetts and Minnesota.

Pierce v. Drew, 136 Mass. 80, 49 Am. Rep. 7; *Lincoln v. Com.* 164 Mass. 9.

The supreme court of Minnesota also repudiates the New York doctrine.

Cater v. Northwestern Teleph. Exch. Co. 60 Minn. 548, 28 L. R. A. 310.

Street railroads can be constructed upon country roads without paying additional compensation.

Heilman v. Lebanon & A. Street R. Co. 145 Pa. 28; *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.* 3 Pa. Dist. R. 58; *Peddicord v. Baltimore C. & E. Mills Pass. R. Co.* 34 Md. 463.

The supreme court of Wisconsin has held that an electric street railroad outside of the city limits but in a suburb is not an additional burden, but it is if it be a commercial electric railroad.

Chicago & N. W. R. Co. v. Milwaukee R. &

K. Electric R.R. Co. 95 Wis. 567, 87 L. R. A. 856.

Messrs. O'Connor, Hammel, & Schmitz, for respondent:

The town board of supervisors had no authority to grant the street-railway company a franchise to grade and use the street in front of plaintiff's premises, without compensation, and especially where private property rights are affected.

The owners of lands bounded by a public street acquire an easement in the street for ingress and egress to and from their premises, sometimes called "the easement of access," and the taking of which is the taking of private property for public use, entitling such abutting owner to compensation.

Chicago & N. W. R. Co. v. Milwaukee R. & K. Electric R. Co. 95 Wis. 561, 87 L. R. A. 856; *Hobart v. Milwaukee City R. Co.* 27 Wis. 194. 9 Am. Rep. 461; 3 Elliott, Railroads, § 1085; *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268; *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146; Booth, Street Railways, § 91.

If the street is laid out or widened or altered colorably for the use of the town, but really for the benefit of the individual, such proceeding is void.

2 Dill. Mun. Corp. § 596; *Willamette Iron Works v. Oregon R. & Nav. Co.* 26 Or. 224, 29 L. R. A. 88; Elliott, Roads & Streets, p. 560.

The construction and operation of a horse railway in the public streets of a city, by authority from the city government, is not a new burden imposed upon the owners of the fee of the land, and they are not entitled to compensation therefor, except where some private right of an abutting owner, as his free access to his own land or buildings, has been materially impaired thereby.

Hobart v. Milwaukee City R. Co. 27 Wis. 200; *Chicago & N. W. R. Co. v. Milwaukee, R. & K. Electric R. Co.* 95 Wis. 570, 87 L. R. A. 856; *Hankin v. Chicago & N. W. R. Co.* 61 Wis. 515; *Cincinnati & S. G. Ave. Street R. Co. v. Cumminsville*, 14 Ohio St. 528; *Campbell v. Metropolitan Street R. Co.* 82 Ga. 320; *Ford v. Santa Cruz R. Co.* 59 Cal. 290.

There is a distinction between a city street and a country road—an urban and a rural servitude—the city street being subject to uses growing out of the needs of an urban community—uses which do not bear the same relation to the welfare of a rural community. The construction of a street railway upon a country highway imposes a new burden and an additional servitude on the land entitling the abutting landowner to compensation.

Chicago & N. W. R. Co. v. Milwaukee, R. & K. Electric R. Co. 95 Wis. 561, 87 L. R. A. 856; *Palmer v. Larchmont Electric Co.* 6 App. Div. 12; Elliott, Roads & Streets, p. 299; *Bloomfield & R. Natural Gas Light Co. v. Calkins*, 62 N. Y. 886; *Eels v. American Teleph. & Teleg. Co.* 148 N. Y. 183, 25 L. R. A. 640; *Fobes v. Rome, W. & O. R. Co.* 121 N. Y. 505, 8 L. R. A. 453; *Van Brunt v. Flatbush*, 128 N. Y. 50; *Sterling's Appeal*, 111 Pa. 41, 56 Am. Rep. 246; *Kincaid v. Indianapolis Natural Gas Co.* 124 Ind. 577, 8 L. R. A. 602; *Borden v. Atlantic Highlands, R. B. & L. B. Electric R. Co.* (N. J. Ch.) 33 Atl. 227; *Pennsylvania* 41 L. R. A.

R. Co. v. Montgomery County Pass. R. Co. 167 Pa. 62, 27 L. R. A. 766.

A broad distinction is recognized in the authorities between urban and suburban or rural servitudes.

Western R. Co. v. Alabama Grand Trunk R. Co. 96 Ala. 273, 17 L. R. A. 474; *Palatine v. Kreuger*, 121 Ill. 78.

Electric railway poles so placed as to actually impair access entitle abutting owners to compensation.

Pelton v. East Cleveland R. Co. 23 Ohio L. J. 67; *Tiedeman, Mun. Corp.* § 304; *Lewis, Em. Dom.* § 124.

Wisconsin has accepted the middle doctrine, and has not followed the Massachusetts decisions.

Any kind of a street railway may be an additional burden, if it is so constructed as to deprive the abutter of his easement, and entitles such abutting landowner to compensation.

Lahr v. Metropolitan Elev. R. Co. 104 N. Y. 268; *Fobes v. Rome, W. & O. R. Co.* 121 N. Y. 505, 8 L. R. A. 453; *Detroit City R. Co. v. Mills*, 85 Mich. 634; *Louisville & N. R. Co. v. Finley*, 86 Ky. 294.

Winslow, J., delivered the opinion of the court:

The defendant proposes to construct and operate an electric street railway for the carriage of passengers upon a highway in a country town outside of the city limits of Milwaukee, and, for that purpose and by permission of the town authorities, to cut down the highway about 8 feet, so that an abutting owner's right of access to his property will be seriously impaired; and the question is whether this can be done without the consent of the abutting owner, and without the payment of compensation to such owner. The question is a new one in this court, and one the importance of which, in view of the rapid development of electric power as a means of carriage for long distances, can hardly be overestimated. If the highway in question in this case can be so used, the question at once arises whether every country highway may not be used in the same way. If it be said that the highway before us in this case is in effect a city street because of its close proximity to the city, and because the adjoining lands are platted, and because it connects a suburban village with the city, and that a clear distinction ought to be drawn between such a highway and the ordinary country road in farming districts, the inquiry will then be: Can such a distinction be practically drawn, and can it be satisfactorily applied, and upon what solid grounds will it rest? A distinction so important must in reason be one which can be drawn with some reasonable degree of certainty in every case, and must be capable of practical application. Is the line to be drawn according to density of population, and, if so, what degree of density is to be the test? Is it to depend upon the activity and hopefulness of adjoining landowners in platting their land into building lots, or upon the question whether a neighboring village or town can properly be called a suburb of the principal city? Or is it to depend upon a judicious consideration of all

fully, we are unwilling to subscribe to the doctrine that the mere consent of the town authorities will free the railway company from liability to the adjoining property owner whose property will be rendered practically inaccessible. We regard it as clear that the abutters' right of access has been cut off by the building of the road and the necessary acts connected therewith, and not by the merely nominal act of the town board in attempting to fix the grade at the request and for the sole benefit of the street-railway company.

There is, however, another question in the present case, which is much broader in its scope, and which is becoming a more pressing question every day; and that is the question whether passenger railroads operated by mechanical power can be laid over country highways without consent of, or compensation paid to, the adjoining landowner; or, in other words, are they additional burdens to the fee? The development of electric railways and motors is so rapid that this question should, if possible, be settled, as the day is evidently not far distant when such passenger railways running from city to city will be numerous, and extend to all parts of the state. It is well settled that a horse railroad upon a city street, built upon grade, and for the carriage of passengers only, is not an additional burden. The drift and weight of authority in other states seem to be also that the operation of the road by electricity or other mechanical power does not change the nature of the road in this respect, although it is also held by some other courts that, if permanent erections in the street interfering with the right of access are necessary for the operation of the road, these may constitute an additional burden. This court, however, has not passed upon these questions; and, however they may be decided, the result would not necessarily determine the status of a country road in these respects.

That there are many and marked differences between the uses to which a city street is put and the uses to which a country highway is put cannot be denied; nor can it be denied that the uses contemplated when the land is taken vary widely, except that both are intended for purposes of travel. The street railway in its inception is a purely urban institution. It is intended to facilitate travel in and about the city, from one part of the municipality to another, and thus relieve the sidewalks of foot passengers and the roadway of vehicles. It is thus an aid to the exercise of the easement of passage; strictly, a city convenience, for use in the city, by people living or stopping therein, and fully under the control of municipal authorities, who have been endowed with ample power for that purpose. This strictly urban character of the street railways remained practically unchanged for many years, and during these years the long line of decisions grew up recognizing the street railway as merely an improved method of using the street, and rather as a help to the street than a burden thereon. Time, however, has made changes in conditions. New motive power has been discovered and it is found that by its use an enlarged city street car may profitably run long distances, and compete to some extent with the steam railway. It is proposed to convert the city

railways into lines of passenger transportation, covering long distances, and connecting widely separated cities and villages, by using the country highways, and operating long and heavy coaches, sometimes made up into trains of several cars. Thus, the urban railway has developed into the interurban railway, and threatens soon to develop into the interstate railway. The small car which took up passengers at one corner, and dropped them at another, has become a large coach, approximating the ordinary railway coach in size, and has become a part, perhaps, of a train which sweeps across the country from one city to another, bearing its load of passengers ticketed through, with an occasional local passenger picked up on the highway. The purely city purpose which the urban railway subserved has developed into or been supplanted by an entirely different purpose, namely, the transportation of passengers from city to city over long stretches of intervening country. When this train or car, with its load of through passengers, is passing through a country town, it is clearly serving no township purpose, save in the most limited sense. It is very difficult to say that this use of a country highway is not an additional burden. It is built and operated mainly to obtain the through travel from city to city, and only incidentally to take up a passenger in the country town. This through travel is unquestionably composed of people who otherwise would travel on the ordinary steam railroad, and would not use the highway at all. Thus, the operation of this newly-developed street railway (so called) upon the country road is precisely opposite to the operation of the urban railway upon the city street. It burdens the road with travel which would otherwise not be there, instead of relieving it by the substitution of one vehicle for many. However we regard this development of the urban into the interurban railway, it seems utterly impossible and illogical to say that it is essentially the same in its purpose or effects as the mere street railway, which was held in the *Hobart Case* not to be an additional burden on the fee. The reasons given for that holding in that case either do not apply at all, or only in a very limited degree, to the interurban railway. The difference is not so much in the change of motive power, but in the entirely different character of the use. Suppose a steam railway corporation were organized to carry passengers only from city to city, and should attempt to lay its track upon the country roads without compensation; is there any doubt but that it would be held that it could not do so? We think not. Our conclusion is that an interurban electric railway, running upon the highways through country towns, is an additional burden upon the highway. *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.* 167 Pa. 62, 27 L. R. A. 766.

But it is said that a distinction should be drawn between a highway in close proximity to a city, or running between the city and a neighboring suburb, and the ordinary country road through a farming district. The suggestion is not without weight. There is much difference between the practical uses to which the two highways are generally put. The suburban highway very frequently approximates

closely to the city street. But, as indicated at the outset of this opinion, the difficulty in drawing any clear line of demarcation between the two is very great. If a line be drawn in one case upon the facts in that case, depending upon mere proximity, or upon the manner of use, or the density of population, or the prospect of rapid settlement, or upon all of these circumstances together, it cannot apply to any other case; and the question will always be one of doubt and embarrassment, leading to different conclusions in different courts. Such a condition of the law is to the last degree undesirable. The legislature, by chapter 175 of the Laws of 1897, has provided that such corporations may condemn lands necessary for their use, but has further provided that the act should not apply to streets in an incorporated city. In thus clothing street-railway companies with the power to condemn as to all property except streets within city limits, the legislature seems to have indicated its conclusion that the city line was the proper line of demarcation, and that within that line at least, condemnation of a street was unnecessary. While this legislative idea has no binding force in determining the question of additional burden, it may justly be considered by the court which is called upon to pass upon a question beset with so much difficulty. If the line be fixed at the limits of the corporation, it will at least

have the great merit of certainty, and be capable of unerring application. Presumably the city limits include the entire urban area, and we feel, under all the circumstances, that it is the true and proper line.

We are not unmindful of the fact that the questions discussed in this opinion are vexed questions, upon which there has been much contrariety of opinion in the various courts of the country, and that the law is only in process of settlement, and must continue in that condition for years. In endeavoring to draw the line between the public right of passage, upon the one side, and the rights of the private owner, on the other, great care is manifestly needful that neither be sacrificed nor unduly magnified at the expense of the other. We held in the case of *Chicago & N. W. R. Co. v. Milwaukee, R. & K. Electric R. Co.* 95 Wis. 561, 37 L. R. A. 856, that an electric railway for the carriage of passengers, freight, and express matter between cities constitutes an additional burden upon the highway in a country town through which it passes. We hold in this case that an electric passenger railroad upon a country highway falls under the same rule. Both holdings seem to us to be founded upon good reason as well as authority, and we believe them to be salutary and just.

Orders affirmed.

MISSOURI SUPREME COURT (Division 2).

G. S. MADDOX, *Respt.*,

v.

M. Y. DUNCAN, *Appt.*

(.....Mo.....)

1. One who writes on the back of a note an assignment with a guaranty of payment is an indorser.
2. Payments by the maker of a note will not interrupt the running of the statute of limitations as to an indorser, under Rev. Stat. § 6786, which provides that nothing contained in the two preceding sections (which require an acknowledgment or promise to be in writing, subscribed by the party to be charged, and that a person shall not be bound by an acknowledgment or promise of a joint obligor) "shall alter, take away, or lessen the effect of the payment of any principal or interest made by any person."

(April 20, 1898.)

APPEAL by defendant from a judgment of the St. Louis Court of Appeals affirming a judgment of the Circuit Court for Audrain County in favor of plaintiff in an action brought to enforce defendant's liability as indorser of a promissory note. *Reversed.*

The facts are stated in the opinion.

Mr. George Robertson, for appellant:

The contract of indorsement is a new con-

tract, and is independent of the note, and it is not an engagement with the maker.

Edwards, Bills & Notes, 8d ed. § 988, p. 264; 2 Am. & Eng. Enc. Law, p. 885; Beach, Modern Law of Contr. § 605; Tiedeman, Com. Paper, § 256; *Dunnigan v. Stevens*, 122 Ill. 896; *Bowes v. Industrial Bank*, 58 Ill. App. 498; *Furgerson v. Staples*, 82 Me. 159; *Trabus v. Short*, 18 La. Ann. 257; *Lee v. Sellock*, 38 N.Y. 615; *Trimble v. Thorne*, 16 Johns. 152, 8 Am. Dec. 302; *Prescott Bank v. Caverly*, 7 Gray, 217, 66 Am. Dec. 473; *Aymar v. Sheldon*, 12 Wend. 489, 27 Am. Dec. 137, note; *Musson v. Lake*, 4 How. 262, 11 L. ed. 967; *Scudder v. Union Nat. Bank*, 91 U. S. 412, 23 L. ed. 248; *Hunt v. Standart*, 15 Ind. 85, 77 Am. Dec. 79; *Burnham v. Goenell*, 47 Mo. App. 637; *Gardner v. Mathews*, 81 Mo. 627.

The contract of guaranty of the note is a new contract. It is not a joint engagement with the maker of the note.

Central Sav. Bank v. Shine, 48 Mo. 457, 8 Am. Rep. 112; *Graham v. Ringo*, 67 Mo. 324; *Farmerlee v. Williams*, 71 Mo. 410; *Prior v. Kiso*, 81 Mo. 241; *Burnham v. Goenell*, 47 Mo. App. 637; 9 Am. & Eng. Enc. Law, pp. 67, 68.

The note became due June 4, 1880. The guaranty of Duncan was made August 8, 1877. The note was assigned by Samuel Grant to plaintiff in 1891. Suit was filed on the note May, 1898. The guaranty upon which suit is brought against Duncan is not assignable by

NOTE.—As to the transfer of title to a note by indorsement in the form of a guaranty, see note to *Dunham v. Peterson* (N. D.) 36 L. R. A. 232, 41 L. R. A.

As to the assignment of a promissory note as an indorsement, see note to *Markey v. Corey* (Mich.) 36 L. R. A. 117.

Grant to plaintiff, and plaintiff cannot maintain an action thereon.

Brandt, Suretyship & Guaranty, 1st ed. § 85; *Springer v. Hutchinson*, 19 Me. 359; *Ten Eyck v. Brown*, 8 Pinney, 452; *Turley v. Dodge*, 3 Humph. 78; *Hove v. Kamball*, 2 McLean, 103; *Iriah v. Outter*, 81 Me. 586; *Tinker v. McCauley*, 8 Mich. 188; *Ekel v. Sneyity*, 3 Watts & S. 272, 88 Am. Dec. 758.

The note became due June 4, 1880, and from that minute the statute began to run against the defendant, and it is immaterial whether he be held to be an indorser or guarantor. Action must have been commenced against him within ten years from that date.

Rev. Stat. 1889, § 6774; Wood, Limitation of Actions, § 184, p. 805, 1st ed. § 146, p. 324; *Williams v. Granger*, 4 Day, 444; *Koch v. Melhorn*, 25 Pa. 89, 64 Am. Dec. 685.

An indorser of a note negotiable is not a surety within the contemplation of the act concerning securities.

Freligh v. Ames, 81 Mo. 258; *Deits v. Corwin*, 85 Mo. 876.

When the promises of obligors are several no admission by one can remove the bar of the statute of limitations as against the others.

Powers v. Southgate, 15 Vt. 471, 40 Am. Dec. 691; *Meiteler v. Todd*, 12 Ind. App. 881; *Van Keuren v. Parmelee*, 2 N. Y. 528, 51 Am. Dec. 322.

Meers. R. D. Rodgers and W. W. Fry, for respondent:

A maker and indorser of a promissory note are joint obligors. Payments made on a promissory note by the maker will arrest the statute of limitations as to an indorser who has waived demand and notice.

Maddox v. Duncan, 62 Mo. App. 474; *Leach v. Asher*, 20 Mo. App. 656; *Zerois v. Unnerstall*, 29 Mo. App. 474; *Craig v. Callaway County Ct.* 12 Mo. 94; *Lawrence County School Fund v. Dunkle*, 85 Mo. 895; *Chrisman v. Irwin*, 87 Mo. 174, 90 Am. Dec. 875; *Mastin v. Branham*, 86 Mo. 651.

Our statute declares that a payment of principal or interest "by any person" will stay the statute of limitations, and keep the note alive as to all parties to the note.

Mo. Rev. Stat. 1889, § 6795; *Bennett v. McCane*, 65 Mo. 194; *Block v. Dorman*, 51 Mo. 81; *Leach v. Asher*, 20 Mo. App. 659; *Beck v. Haas*, 81 Mo. App. 183.

Payment by the administrator of one revives the note as to others.

Vernon County School Fund v. Stewart, 64 Mo. 408, 27 Am. Rep. 250.

Payment by one partner after dissolution binds both.

McClurg v. Howard, 45 Mo. 385, 100 Am. Dec. 378; *Harris v. Odeat*, 39 Mo. App. 270; *Shannon v. Austin*, 67 Mo. 485.

Payment by sale under mortgage prevents the running of the statute.

Bender v. Markle, 37 Mo. App. 247; *Green v. Greensboro Female College*, 88 N. C. 449, 35 Am. Rep. 579.

The payee of a note, when he transfers it by indorsement before maturity, waiving demand, notice, and protest, combines the liability of an indorser and guarantor, and is liable as an indorser.

Hammett v. Truworthy, 51 Mo. App. 281; 41 L. R. A.

Johnson County Sav. Bank v. Lowe, 47 Mo. App. 151; *Airey v. Pearson*, 87 Mo. 424; 2 Dan. Neg. Inst. § 1781; *Heard v. Dubuque County Bank*, 8 Neb. 16, 80 Am. Rep. 811; *Upham v. Prince*, 12 Mass. 15; *Gage v. Mechanics' Nat. Bank*, 79 Ill. 62; 2 Parsons, Contr. p. 776.

The maker and the defendant in this case, who was the payee of the note, who indorsed it before maturity, waiving notice, demand, and protest, were jointly and severally liable for the payment of the note.

They may be joined as defendants in the same action.

Hunter v. Hempstead, 1 Mo. 67, 18 Am. Dec. 468; *Perry v. Barret*, 18 Mo. 140; Mo. Rev. Stat. § 784.

During the life of the note defendant and Carter were jointly and severally liable for its payment.

Rev. Stat. §§ 1995, 2384; *Perry v. Barret*, 18 Mo. 140; *Whits v. Howland*, 9 Mass. 814, 6 Am. Dec. 71; *Hough v. Gray*, 19 Wend. 302; *Huntington v. Ballou*, 2 Lans. 120.

By this manner of indorsement by this defendant—waiving notice, protest, and demand, before maturity—he became a "fixed indorser" and liable as a surety.

2 Dan. Neg. Inst. §§ 997, 1805.

Being so liable, partial payments by either Carter or himself kept the note alive as to both of them.

Mo. Rev. Stat. § 6795; *Harris v. Odeat*, 39 Mo. App. 275; *Vernon County School Fund v. Stewart*, 64 Mo. 410, 27 Am. Rep. 250; *Lawrence County School Fund v. Dunkle*, 85 Mo. 895.

After the liability of a party to a note once becomes fixed, no indulgence or delay in suit will affect his liability.

Clark v. Barrett, 19 Mo. 40; *Wright v. Dyer*, 48 Mo. 535; *Miller v. Mellier*, 59 Mo. 388.

The defendant, by his indorsement obligated himself to pay the note, and as long as it remains a note his obligation is binding.

Koenig v. Bramlett, 20 Mo. App. 639; *Hammett v. Truworthy*, 51 Mo. App. 285.

The assignment by indorsement of a negotiable promissory note carries with it to the indorsee all the securities and collateral security.

Hagerman v. Sutton, 91 Mo. 519; 1 Dan. Neg. Inst. § 834.

Burgess, J., delivered the opinion of the court:

On June 1, 1877, James T. Carter executed his note to the defendant for the sum of \$2,000, due three years after date, with interest at the rate of 10 per cent per annum, compounded annually. Thereafter defendant, by the following indorsement, assigned said note to Samuel Grant:

Waiving notice and protest and demand, I assign the within note to Samuel Grant, for value received, and I guarantee the payment of it.

August 8, 1877.

M. G. Duncan.

Grant assigned the note to plaintiff about June 1, 1891. The petition was in two counts. The first count was an action against the defendant as indorser, and the second count was against him as indorser and surety. The answer was a plea of the ten years' statute of

limitations. Numerous payments were made upon the note by the maker Carter. The last payment made by him was \$150, paid January 27, 1891. The note, however, was secured by deed of trust on a tract of land in Audrain county, which was sold thereunder by J. N. Stephens, sheriff and acting trustee, and \$1,915.93 realized from the sale, which was applied as a credit on said note on March 16, 1894. No payment was ever made upon the note by defendant. At the September term, 1895, of the circuit court of Audrain county, the case was tried to the court without the aid of a jury, and judgment rendered in favor of plaintiff for \$2,680.24, from which defendant appealed.

It is a rule of universal application in commercial law that every indorsement of a promissory note, whether for accommodation or otherwise, is essentially a new contract, independent of any contract obligations of the maker. *Edwards, Bills & Notes*, 3d ed. § 863; *Beach, Modern Law Contr.* § 605; *Tiedeman, Com. Paper*, § 256; *Dunnigan v. Stetens*, 122 Ill. 896; *Trabus v. Short*, 18 La. Ann. 257; *Trimble v. Thorne*, 16 Johns. 152, 8 Am. Dec. 302; *Aymar v. Sheldon*, 12 Wend. 439, 27 Am. Dec. 187; *Hunt v. Standart*, 15 Ind. 85, 77 Am. Dec. 79. In *Ferguson v. Staples*, 82 Me. 159, it is said: "The indorsement of a note is a new contract. The indorser engages that the note shall be paid according to its tenor; that is upon proper presentment, demand and notice. He engages that it is genuine, and the legal obligation that it purports to be, and that he has title to it, and a right to indorse it. *Story, Prom. Notes*, § 185; 1 *Dan. Neg. Inst.* § 669; *State Bank v. Fearing*, 16 Pick. 533, 28 Am. Dec. 265; *Prescott Bank v. Caverly*, 7 Gray, 217, 66 Am. Dec. 473. All engagements of the indorser, except payment, conditioned upon demand and notice, and possibly the validity of the note when it is voidable only, are absolute warranties, and not dependent upon any condition whatever. If the note transferred by indorsement be a forgery, or absolutely void for any other reason, the indorser may be sued for the original consideration paid him, or may be held as a party without demand and notice. 1 *Dan. Neg. Inst.* §§ 669, 675; 2 *Dan. Neg. Inst.* § 1113; 2 *Parsons, Notes & Bills*, p. 444; *Copp v. M'Dugall*, 9 Mass. 1; *Burrill v. Smith*, 7 Pick. 291." The indorser's liability, as such, becomes fixed when demand of payment of the note is made of the principal on the day that it falls due, is refused, and he is notified thereof. These conditions were expressly waived by the indorser in this case, so that the liability of Duncan became fixed when the note became due, and default was made in the payment.

The question to be determined is with respect to the relation that defendant bore to the holder of the note,—whether that of indorser or surety. It is perfectly clear that he was not a surety; so that, whether he be indorser or guarantor, he could not, in the absence of statutory enactment, be joined in the same action with the maker. *Ross v. Jones*, 22 Wall. 576, 22 L. ed. 730; *Graham v. Ringo*, 67 Mo. 324. But by § 1995, Rev. Stat. 1889, it is provided that "every person who shall have a cause of action against several persons, includ-

ing parties to bills of exchange and promissory notes, and who shall be entitled by law to one satisfaction therefor, may bring suit thereon jointly against all or as many of the persons liable as he may think proper;" so that plaintiff, had he desired to do so, might have maintained an action against Duncan and the maker of the note jointly. In *Vanant v. Arnold*, 81 Ga. 210, the defendant negotiated notes with the following indorsement on the back: "For value received, we assign the within notes to A. J. & H. and H. E. D. & Co., waiving demand and notice, and guarantee the payment of the same." And it was held that the defendants were liable on said notes as indorsers. In *Weitz v. Wolfe*, 28 Neb. 500, the payee of a negotiable promissory note sold the same with the following written on the back: "I guarantee the payment of the within note, waiving demand and notice of protest,"—which was signed by the payee, and it was ruled that he was indorser. By guaranteeing the payment of the note, the position of the indorser and payee was not changed from that of indorser to that of guarantor. It will be observed that the indorsement on the note here sued on is in almost the exact words of the indorsements on the notes sued on in those cases, and seems to settle the question that the defendant herein occupies the relation towards the notes in question of indorser.

What effect, then, did the payments on the note by the maker, which stayed the statute of limitations, and kept the note alive as to him, have upon the defendant as indorser? This depends upon the proper construction to be given to our statute of limitations. The sections bearing upon the subject now under consideration are as follows:

"Sec. 6798. In actions founded on any contract, no acknowledgment or promise hereafter made shall be evidence of a new or continuing contract, whereby to take any case out of the operation of the provisions of this article, or deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing subscribed by the party chargeable thereby.

"Sec. 6794. If there be two or more joint contractors or joint executors or administrators of any contractor, no such joint contractor or executor or administrator shall lose the benefit of the provisions of this article, so as to be chargeable by reason only of any acknowledgment or promise made or subscribed by any other or others of them.

"Sec. 6795. Nothing contained in the two preceding sections shall alter, take away, or lessen the effect of the payment of any principal or interest made by any person."

In *Craig v. Callaway County Ct.* 12 Mo. 94, it was ruled that the payment of interest by one of several joint obligors in a bond, before the statute of limitations attaches, takes it out of the statute of limitations as to the others. So, it was held in *Vernon County School Fund v. Stewart*, 64 Mo. 408, 27 Am. Rep. 250, that part payment made upon a bond by the administrator of one of the joint makers within the statutory period would prevent the running of the statute of limitations in favor of the other makers of the bond. And in *Bennett v. McCane*, 65 Mo. 194, it was intimated that part

payment of a note by a comaker will arrest the running of the statute as against all the parties to the note. The same rule was announced in *Bender v. Markle*, 37 Mo. App. 284. When this case was before the St. Louis court of appeals (*Maddox v. Duncan*, 62 Mo. App. 474), Rombauer, J., in delivering the opinion of the court, said: "In *Leach v. Asher*, 20 Mo. App. 656, and *Zervis v. Unnerstall*, 29 Mo. App. 474, we reviewed the decisions in this state on that subject, and were forced to conclude that the rule as stated in *Craig v. Callaway County Ct.* 12 Mo. 94, was the rule prevailing in this state, whatever the rule may be in other jurisdictions." Duncan was neither joint maker of, nor co-obligor on, the note in question. His position was that of indorser, and his contract as such was separate from and independent of the note, and so entirely independent from that of maker or co-obligor that he could not at common law have been sued jointly with the maker, but a separate action was indispensable. 1 Dan. Neg. Inst. 4th ed. § 689; *Ross v. Jones*, 23 Wall. 576, 23 L. ed. 730. An indorser's contract is governed by the laws of the state where the indorsement is made, and not necessarily by the laws of the state where the note is made. They may be and often are made in different states. The position of indorser is so at variance with that of surety and co obligor that the adjudications to the

effect that payment made on a note by one joint maker or co obligor within the statutory period takes it out of the statute of limitations as to the other makers or co obligors have no bearing upon this case. Nor does the fact that, under the statute, the maker and indorser may be sued jointly, change the relation of the parties. The statute which provides (§ 6795, *supra*) that "nothing contained in the two preceding sections shall alter, take away, or lessen the effect of a payment of any principal or interest made by any person," means that such payment, in order to arrest the statute of limitations, must be made by some co surety or co-obligor, or the legal representative of such person, and does not mean that such a payment by a maker or surety on the note or a stranger thereto will arrest the statute as to an indorser. Our conclusion is that the payments on the note by the maker, Carter, did not arrest the running of the statute of limitations as to the indorser, Duncan, and that, more than ten years having elapsed after plaintiff's cause of action accrued against him as indorser, the action was barred at the time of the commencement of the suit.

We therefore reverse the judgment, without remanding the cause.

Gantt, P. J., and Sherwood, J., concur.

OHIO SUPREME COURT.

FIRST NATIONAL BANK OF BELMONT, *Plff. in Err.*,
v.
FIRST NATIONAL BANK OF BARNESVILLE.

(58 Ohio St. 207.)

- *1. The general rule that the drawee of a check, draft, or bill of exchange is held to know the signature of the drawer, and makes payment at his own peril, has not been modified in this state, except by local custom, as held in *Ellis v. Ohio Life Ins. & T. Co.* 4 Ohio St. 628, 64 Am. Dec. 610.
2. An indorsement of a check, draft, or bill of exchange "for collection" by one other than the payee, does not guarantee that the name of the drawer is genuine.
3. Such indorsement is a guaranty that the names of the indorsers, then on the paper, are genuine.
4. An indorsement "For collection" is notice to the drawee that the indorsee is not the owner of the paper, but only the agent of the owner authorized to receive payment for him.
5. Presentation for payment of a check by a bank which is the indorsee "For collection" does not justify the drawee bank in relaxing any of its vigilance in determining whether or not the name of the drawer is genuine.
6. Where the drawer of a check has no account individually with the bank upon

*Headnotes by the COURT.

NOTE.—As to drawee's duty to know signature of drawer, see note to *Germania Bank v. Boutell* (Minn.) 27 L. R. A. 635.
41 L. R. A.

which the check is drawn, but has an account there as administrator, or in some other trust capacity, it is wrong for the bank to pay the check and charge it to the trust account.

7. The bank of Belmont purchased a check drawn on the bank of Barnesville, from the payee thereof, who was known to the cashier, and at his request the cashier wrote the payee's name on the back of the check as a blank indorsement. The cashier then indorsed the check "For collection" and forwarded it to its correspondent, which also indorsed it "For collection," and presented it to the drawee bank, which paid it, and charged it to the account of the drawer as administrator, as he had no individual account with the bank. About three months thereafter, the check was found to be a forgery, and the drawee bank caused it to be duly protested, and gave notice to the Belmont bank, and demanded repayment of the money. Held, that the drawee bank was bound to know the signature of its depositor, and was negligent in charging the check to his account as administrator, and that it had no right to recover the money.

(Minshall, J., dissents.)

(March 29, 1896.)

ERROR to the Circuit Court for Belmont County to review a judgment reversing a judgment of the Court of Common Pleas in favor of defendant in an action brought to hold defendant liable as indorser on a bank check. *Reversed.*

Statement by Burket, J.:

A jury was waived, and the case submitted

to the court upon the amended petition and answer thereto in the court of common pleas. Disregarding technicalities, the amended petition and answer concede the facts to be as follows: On the 19th day of June, 1893, during banking hours, Elwood Horner presented to the First National Bank of Belmont a check for \$105, purporting to be drawn by J. W. Horner on the First National Bank of Barnesville. At the request of Elwood Horner, the payee, the cashier of the Belmont bank wrote Mr. Horner's name on the back of the check, and, in the usual course of business, gave him \$105 in cash for the check. The Belmont bank then, and in the usual course of business, indorsed the check "For collection," and sent it to the People's National Bank of Barnesville; and that bank also, in the usual course of business, indorsed it "For collection," and presented it to the drawee, the First National Bank of Barnesville, and received payment during banking hours, in full, on June 21, 1893. The following is a copy of the check, with all indorsements:

No. ——— Barnesville, June 19, 1893.

First National Bank, pay to the order of Elwood Horner one hundred and five dollars. \$105.00.

J. W. Horner.

Indorsed: Elwood Horner.

For collection account of First National Bank, Belmont, Ohio.

William Kinney, Cashier.

For collection for account of People's National Bank of Barnesville, Ohio.

A. E. Dent, Cashier.

J. W. Horner, individually, had no account with the First National Bank of Barnesville, but had an account there as administrator, and the bank charged the check to his administrator account. Upon settlement and balancing his pass book, on October 6, 1893, J. W. Horner pronounced the check a forgery, and refused to allow it in his settlement with the bank. Thereupon the First National Bank of Barnesville caused the check to be duly protested on the 9th day of October, 1893, and caused notice to be served by due course of mail on the Belmont bank that the check was a forgery, and demanded payment of the check from that bank. About the 1st of October, 1893, said Elwood Horner died, leaving an estate wholly insolvent, of which facts the Belmont bank had knowledge when it received the notice of protest. None of the banks had any knowledge that the check was a forgery, and all believed it to be genuine. Upon these facts, the common pleas court rendered judgment in favor of the Belmont bank, defendant below. The circuit court reversed the judgment, and rendered judgment against the Belmont bank, and in favor of the First National Bank of Barnesville, for the full amount of the check, with interest and costs. Thereupon the Belmont bank filed its petition in error in this court, seeking to reverse the judgment of the circuit court, and asking an affirmance of the judgment of the common pleas.

Messrs. John Pollock and N. N. Kenyon, for plaintiff in error:

J. W. Horner was the customer of the 41 L. R. A.

Barnesville bank, the drawee of the check. The Barnesville bank was bound to know the signature of its customer, J. W. Horner.

Price v. Neale, 3 Burr. 1855; *Bank of United States v. Bank of the State of Georgia*, 10 Wheat. 883, 6 L. ed. 834; *Northwestern Nat. Bank v. Bank of Commerce*, 107 Mo. 402, 15 L. R. A. 102; *Germania Bank v. Boutell*, 60 Minn. 189, 27 L. R. A. 685; *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77; *Bank of St. Albans v. Farmers & M. Bank*, 10 Vt. 141, 38 Am. Dec. 188; *Levy v. Bank of United States*, 4 Dall. 234, 1 L. ed. 814; *Commercial & F. Nat. Bank v. First Nat. Bank*, 30 Md. 11, 96 Am. Dec. 554; *First Nat. Bank v. Yost*, 34 N. Y. S. R. 180; *Deposit Bank v. Fayette Nat. Bank*, 90 Ky. 10, 7 L. R. A. 49; *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296, 26 L. R. A. 289.

The Belmont bank placed a restrictive indorsement on the check, namely: "For collection." Such restrictive indorsement does not guarantee the signature of the drawer as between indorser and drawee, so as to relieve the latter of its obligation to know such signature.

Northwestern Nat. Bank v. Bank of Commerce, 107 Mo. 402, 15 L. R. A. 102; *Germania Bank v. Boutell*, 60 Minn. 189, 27 L. R. A. 685.

Messrs. Petty & Smith, for defendant in error:

Defendant, by indorsing the forged instrument gave to it the appearance of a genuine transaction, and plaintiff was entitled to recover the amount paid.

First Nat. Bank v. First Nat. Bank, 4 Ind. App. 355; *People's Bank v. Franklin Bank*, 88 Tenn. 299, 6 L. R. A. 724.

Where a loss which must be borne by one of two parties alike innocent of the forgery can be traced to the neglect or fault of either, it is reasonable that it should be borne by him, even if innocent of any intentional fraud, through whose means it has succeeded.

First Nat. Bank v. First Nat. Bank, 151 Mass. 280; *Glovers' Bank v. Salem Bank*, 17 Mass. 83; *National Bank of N. A. v. Bangs*, 106 Mass. 441, 8 Am. Rep. 849; *Selser v. Brock*, 8 Ohio St. 302; *Fullerton v. Sturges*, 4 Ohio St. 580; *Massachusetts L. Ins. Co. v. Eshelman*, 30 Ohio St. 659.

To entitle the holder to retain money obtained by mistake upon a forged instrument, he must occupy the vantage ground by putting the drawee alone in the wrong.

Ellis v. Ohio Life Ins. & T. Co. 4 Ohio St. 662, 64 Am. Dec. 610.

In a case of money paid upon a forgery, it is sufficient to give notice when the forgery is discovered.

Ellis v. Ohio Life Ins. & T. Co. 4 Ohio St. 629, 64 Am. Dec. 610; *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 899, 88 Tenn. 299, 6 L. R. A. 724.

The allegation of the answer that Elwood Horner, the payee, died insolvent, does not show any damage to the plaintiff in error by reason of delay; the answer does not show that he was solvent at any time after this check was presented.

See *Third Nat. Bank v. Merchant's Nat. Bank*, 76 Hun. 475; *Indiana Nat. Bank v. First Nat. Bank*, 9 Ind. App. 185.

Burket, J., delivered the opinion of the court:

Since the case of *Price v. Neale*, 8 Burr. 1854, decided by Lord Mansfield in 1762, the general rule has been, and is, that, when the drawee of a check or bill pays the same to a bona fide holder, such drawee cannot recover the money back upon discovering such check or bill to be a forgery. The drawee is presumed to know the signature of the drawer, and if, when the check or bill is presented to the drawee for payment, he pays the same, and it afterwards turns out to be a forgery, he cannot recover the money back from the person to whom he paid it. When the drawee is a bank, there is a much stronger reason for holding it to know the signature of its depositors and customers than in the case of a private individual, because banks keep a book in which are preserved the genuine signatures of their depositors, customers, and correspondents. That the general rule is as above stated is shown by the following authorities. *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77; *Smith v. Mercer*, 6 Taunt. 76; *Wilkinson v. Johnson*, 3 Barn. & C. 428; *National Bank of Commerce v. National Mechanics' Bkg. Asso.* 55 N. Y. 211, 14 Am. Rep. 232; *Frank v. Chemical Nat. Bank*, 84 N. Y. 209, 88 Am. Rep. 501; *Levy v. Bank*, 4 Dall. 284, 1 L. ed. 814; *Morse, Banks & Banking*, 3d ed. § 468; 2 Dan. Neg. Inst. 3d ed. §§ 1859, 1855; *Northwestern Nat. Bank v. Bank of Commerce*, 107 Mo. 402, 15 L. R. A. 102; *Commercial & F. Nat. Bank v. First Nat. Bank*, 80 Md. 11, 96 Am. Dec. 554; *Deposit Bank v. Fayette Nat. Bank*, 90 Ky. 10, 7 L. R. A. 49; *First Nat. Bank v. First Nat. Bank*, 151 Mass. 280; *National Park Bank v. Seaboard Bank*, 114 N. Y. 28; 5 Am. & Eng. Enc. Law, 2d ed. p. 1071; *Ellis v. Ohio Life Ins. & T. Co.* 4 Ohio St. 628, 64 Am. Dec. 610. This last case fully recognizes the general rule, but the majority of the court, two judges dissenting, held that as there was a local custom among banks at Cincinnati to the effect that, before purchasing bills or checks drawn upon other banks in that city, the purchasing bank should have the identity of the person offering to dispose of the paper fully shown, and make careful inquiry as to his right to the paper, and as to its being genuine, and that the purchasing bank in that case, having neglected the customary precautions, was guilty of such negligence as to make it liable to pay back the money received on the forged bills. The court was careful to say that it was dealing only with the case then under consideration; and the right to recover back the money in that case is founded upon the local custom, and the general rule is not modified further than to hold that in view of the local custom, known to both banks, the purchasing bank was guilty of such negligence in taking the bills from an unidentified stranger as to render it liable to pay back the money when the bills turned out to be forgeries.

It is urged that, as the check was presented for payment to the drawee bank by another bank in good standing, the drawee bank had a right to presume that the check was all right, and, relying upon such presumption, it was thereby thrown off its guard, and was less careful in scrutinizing the signature to the

check than if the same had been presented at its counter for payment by an individual. A holding to this effect has been made in a few cases wherein the indorsements were unrestricted, but, when the indorsement is "for collection" or "for account of," it is notice to the drawee that the bank presenting the check or bill for payment is not the owner, but only the agent of the owner, and that the money is to be remitted to the owner, back through the same channel through which the check or bill was received by the collecting bank. In such cases the collecting bank acts as the agent or servant of the owner, and the drawee bank is not justified in relaxing its vigilance. Some years ago the practice of indorsing checks "for collection" or "for account of" had become almost universal; and when it was decided in the above cases of *National Park Bank v. Seaboard Bank* and *Northwestern Nat. Bank v. Bank of Commerce*, that the drawee bank could not recover back the money, in the one case from the collecting bank, or in the other from the bank owing the draft, it startled the banks located in large cities, and awakened them to the dangers attending the payment of such drafts or bills; and the result was that in the year 1896 the clearing house in the city of New York adopted a rule to the effect that its members should not send through the exchanges any paper having any qualified or restrictive indorsements, such as "for collection" or "for account of," unless all indorsements were guaranteed by the bank sending such paper. This action was soon followed by the clearing houses in other cities, and in some of them all indorsements are required to be either in blank, or "pay to ——— or order." By this action of the clearing houses, indorsements "for collection" or "for account of" have fallen into disuse, and the banking business of the country is now done almost universally upon unrestricted indorsements. The decisions of the courts as to the rights and liabilities of the parties to paper with unrestricted indorsements thereon vary somewhat in different states; but in this state the general rule that the drawee bank is bound to know the signature of the drawer has not been modified further than as permitted by local custom, as in *Ohio Life Ins. & T. Co.'s Case*, above cited.

It is urged that the Belmont bank, having indorsed the check, thereby guaranteed that the signatures of the drawer and indorsers were genuine, and some cases are cited to that effect. *People's Bank v. Franklin Bank*, 88 Tenn. 299, 6 L. R. A. 724; *First Nat. Bank v. First Nat. Bank*, 151 Mass. 280. Other cases hold that an indorser does not guarantee that the name of the drawer is genuine, but that the drawee must determine that for himself, and at his own peril. *Germania Nat. Bank v. Boutell*, 60 Minn. 189, 27 L. R. A. 635, and cases there cited. In the cases in which it has been held that the indorsement is a guaranty, to the effect that the name of the drawer is genuine, the indorsements were unrestricted, and therefore indicated an absolute transfer and sale of the paper. But when the indorsement is for collection only, as in this case, it indicates on its face that the indorser remains the owner of the paper, and that his successive indorsees are only his agents for the sole pur-

pose of collecting the paper and remitting the proceeds to him. Such a restricted indorsement does not authorize a subsequent indorsee to negotiate the paper. His only power is to collect it, and the drawee bank is bound by the notice in the indorsement. Such an indorsement is not a guaranty that the name of the drawer is genuine, but only that the names of the indorsers then on the paper are genuine. *Mechanics' Bank v. Valley Pucking Co.* 70 Mo. 643, 4 Mo. App. 200; *Northwestern Nat. Bank v. Bank of Commerce*, 107 Mo. 402, 15 L. R. A. 102. In the case now under consideration the drawer's name was a forgery, but the name of the payee indorsed on the check was genuine, having been written by the cashier at the request of the payee.

It has been urged that, if the payee had been required by the cashier to write his name upon the check, it might have shown that his name in the body of the check had been written by himself, and thus lead to a detection of the forgery. But in the above case of *First Nat. Bank v. First Nat. Bank*, the payee indorsed the check, and the handwriting was the same in both names, payee and indorser; and yet the forgery was not thereby detected, and the court attaches no importance to the fact in its decision of the case. In that case, and in the above case in 4 Ohio St. 628, 64 Am. Dec. 610, and in nearly all the cases in which the money has been recovered back, the bank purchasing the check or bill took it from an unidentified stranger; and this has often, though not always, been held to be such negligence as would authorize a recovery of the money. But in the case at bar the facts do not show Elwood Horner to have been a stranger to the cashier of the Belmont bank, because, as soon as he was notified of the forgery, he pointed out that Mr. Horner had died only a few days before, and that his estate was wholly insol-

vent. He was therefore known, and required no identification, and the cases which turn upon the unidentified stranger have no application to this case.

Again, it is conceded that J. W. Horner had no individual account with the First National Bank of Barnesville, the drawee, and that the bank charged the check to his account as administrator. This was not only irregular, but wrong. The bank should have refused payment, and allowed the check to go to protest; or, if it desired to favor Mr. Horner, it should have notified him that his check was at the bank, and no funds with which to pay the same. Had this been done, the forgery would have been discovered at once, and notice would have been given to the Belmont bank, and that bank would then have had recourse on Elwood Horner, who indorsed and sold the check. Whether he was then solvent or not does not appear, and is of no importance. The bank would have had its recourse against him within three or four days after it parted with its money, and such recourse is regarded in commercial transactions as a valuable right; and of this right the Belmont bank was deprived by the acts of the Barnesville bank in not detecting that the name of its depositor was forged to the check, and in negligently charging it to his account as administrator. It is therefore clear that the Belmont bank was guilty of no negligence, and that the loss occurred by reason of the acts of the First National Bank of Barnesville, and that it would be unconscionable to permit it to recover the money back from the Belmont bank.

The judgment of the circuit court is therefore reversed, and that of the common pleas affirmed. Judgment accordingly.

Minshall, J., dissents.

WISCONSIN SUPREME COURT.

Elizabeth JOHNS *et al.*, *Repts.*,

v.

NORTHWESTERN MUTUAL RELIEF ASSOCIATION, *Appt.*

(90 Wis. 322.)

1. Judicial notice will be taken of the fact that no ordinary man could go through a hole 15x20 inches unless he went head first, or with both feet first, and that to do so by mere accident would be very improbable if not impossible.
2. The presumption against suicide is not sufficient to sustain a cause of action under an insurance policy against death brought about by "some external cause or accident, and not by disease or any voluntary act," where the insured, who went to bed as usual, was found next morning in a cistern underground back of the house, with underclothes, pants, and stockings on, but no coat, and the opening to the cistern was 15x20 inches.

(May 15, 1895.)

NOTE.—As to the presumption in respect to suicide of an insured person, see *Mutual L. Ins. Co. v. Wiswell* (Kan.) 35 L. R. A. 253, and note on page 252. 41 L. R. A.

APPEAL by defendant from a judgment of the Circuit Court for Waukesha County in favor of plaintiffs in an action brought to enforce payment of the amount alleged to be due on a policy of life insurance. *Reversed.*

Statement by Cassoday, J.:

Hubert Johns entered into a contract of insurance with the defendant in 1885. Said contract continued in force until October 1, 1890, when, by agreement of the parties, the old certificate of insurance was surrendered, and a new one issued, dated on that day to the effect that in consideration of the payment of assessments therein mentioned upon maturity of said certificate, and within ninety days after due proof and allowance of such claim upon presentation and surrender thereof, the defendant would pay the said Hubert Johns, or in case of his death, the beneficiaries therein named, if living, as therein mentioned, provided that said disability benefit should only apply and be paid in cases where the injury therein provided and contemplated should result from and be brought about by some external cause of accident, and not by disease, or any volun-

tary act of the member. That the same was to mature by limitation March 14, 1914, and then be paid as therein prescribed. That in case of maturity by death, there should be paid 80 per cent of an assessment of one table rate from each member, levied and collected therefor and applicable thereto, not exceeding \$4,000, less any payment before made on account of maturity by disability or limitation, or any indebtedness due or accrued to the association from such member, and that the certificate was issued, and accepted subject to the conditions, rules, and regulations printed on the back thereof. Among the rules and regulations so indorsed thereon is the following, to wit: "Suicide, or self destruction of the member herein named, whether voluntary or involuntary, sane or insane at the time thereof, is not a risk assumed by this association; provided, however, that in case of self destruction the association, within ninety days after due proof and allowance of such claim, and upon presentation of this certificate, shall return to the beneficiaries herein named, 80 per cent of all assessments paid by such member; provided, also, that the amount so returned shall not exceed 80 per cent of an assessment levied and collected therefor and applicable to the payment thereof." On June 1, 1893, the said Hubert Johns came to his death by drowning in a cistern. On September 25, 1893, this action was commenced in equity to enforce an assessment to pay such loss. The complaint alleges full performance on the part of said assured. The answer alleges in effect, the rule relieving the defendant from liability in case of suicide or self destruction, and that Hubert Johns came to his death by suicide or self destruction. At the close of the trial the court found, in effect, the facts stated, and that Hubert Johns got into the cistern in which he was found dead, accidentally, and did not commit suicide, and did not take his own life, either voluntarily or involuntarily. As conclusions of law the court found that the plaintiffs were entitled to judgment, ordering and directing the defendant to levy, assess, and collect and pay to the beneficiaries above named (the plaintiffs herein) 80 per cent of the assessment so made, not to exceed the sum of \$4,000, with interest thereon from September 20, 1893, and ordered judgment accordingly. From the judgment entered accordingly the defendant brings this appeal.

Messrs. T. W. Haight and Chynoweth & Fliegler for appellant.

Messrs. Ryan & Merton for respondents.

Cassoday, J., delivered the opinion of the court:

It appears that at the time of his death Hubert was a tailor by trade, and was living with his second wife; that he had two children by his former wife,—a daughter, who had been absent from home for a long time; and a son, thirteen or fourteen years of age, who had left home a few months before Hubert's death; that he felt bad about the son leaving as he did; that he had lived with the plaintiff, Elizabeth, his second wife, about eleven years; that they had six children, the oldest being about ten years of age, and the

youngest a few months of age; that Hubert and his second wife had always apparently lived happily together; that Hubert was always reserved, and during a few months immediately before his death was more or less melancholy; that he had a home with no liens thereon; that he was out of debt, and had \$235 in the bank, evidenced by certificates of deposit; that on the day prior to his death he worked as usual, his wife and some of his children being on a visit at Pewaukee; that they returned about 6 o'clock in the evening; that he then started a fire in the kitchen, and told his wife he would go down town, return a coat, pay his insurance, and when he got back would eat his supper; that he spent the evening with his family; that he went to bed with his wife, as usual; that she woke up early the next morning,—about daylight or before,—and missed him; that, after failing to find him, she went out the back door; that there was a beaten path on the earth leading from that door to the pump, and another branching off from it to the right, leading to the privy; that in going in that path from the house to the pump, and 8 or 4 feet to the left of that path, and 6 or 8 feet from the house, was a cistern, under ground; that the ground back of the house and up to the cistern curb was level; that the curb was of boards, and rose about 4 inches above the ground, and surrounded the opening to the cistern, which was 15 by 20 inches; that the board cover to the cistern was not fastened to the curb, but was loose; that upon discovering that the cover was off the cistern, she looked in, and there saw and felt of her husband in the water; that she at once gave the alarm, and the neighbors assembled, and took him out, and an inquest upon his body was held; that when so found he had his underclothes, pants, and stockings on, but no coat. The evidence is that he came to his death by drowning.

Counsel for the plaintiff is undoubtedly correct in contending that "when the dead body of the insured is found under such circumstances, and with such injuries, that the death may have resulted from [negligence], accident, or suicide, the presumption is against suicide, as contrary to the general conduct of mankind." *May, Ins. § 325*. Whether the death was accidental or intentional, whenever there is any evidence bearing upon the point, is a question of fact for the jury or court. *Ibid.* It is only essential that the evidence preponderates against the presumption of accident. *Bachmeyer v. Mutual Reserve Fund Life Assn.* 87 Wis. 337, 338. "A presumption of suicide cannot be indulged in as a mere presumption, without any fact or circumstance upon which it can be logically predicated." *Sorenson v. Menasha Paper & Pulp Co.* 56 Wis. 333. Counsel for the plaintiff seem to rely in part upon that case, but there were no facts or circumstances in that case from which suicide could be inferred. On the contrary, they were all harmonious with death by accident. The same is true with respect to *Cronkhite v. Travelers' Ins. Co.* 75 Wis. 116. Under the contract of insurance in the case at bar the plaintiff could only recover by showing that the death was the result of, or brought about by, "some external cause or accident, and not

by disease or any voluntary act of the member." The burden of proving such facts, subject to the presumption mentioned, was upon the plaintiff. *Travellers' Ins. Co. v. McConkey*, 127 U. S. 661, 32 L. R. A. 808. Under the contract of insurance, this defendant did not assume the risk in case Hubert Johns committed "suicide or self-destruction, . . . whether voluntary or involuntary, sane or insane at the time thereof." It is immaterial, therefore, whether at the time of his death he was sane or insane. *Bigelow v. Berkshire L. Ins. Co.* 93 U. S. 284, 23 L. ed. 918. In the absence of any evidence to the contrary, we must assume that Hubert was like other ordinary men; that he had two legs, and walked upon his feet; that in walking he stepped one foot at a time; that in taking a step with one foot the other necessarily remained upon the ground until the step was completed; that, if he accidentally stepped into the hole, it could only be with one foot, and that that foot would necessarily go down in the hole, while the other foot remained upon the ground, and his body and arms and hands would necessarily fall over and beyond the hole. It is conceded and found

that the hole was only 15 by 20 inches square by actual measurement. The size of an ordinary man is of common knowledge, and we take judicial notice that no ordinary man could go through such a hole, unless he went head first, or with both feet first; and that it is very improbable, if not impossible, for such a man, walking upon the ground, to fall into such a hole, either head first or with both feet first, by mere accident, and without any design or purpose of thus going down into the cistern. And if we assume that he intentionally thus went down into the cistern, at the time and under the circumstances mentioned, then the inference of "suicide or self-destruction," within the meaning of the contract, seems to be sufficient to overcome any presumption of accident that might otherwise be indulged. Whether the plaintiffs can, under the peculiar wording of this contract of insurance, recover in this action a percentage of all assessments paid by Hubert Johns was not argued, and is not here determined.

The judgment of the Circuit Court is reversed, and the cause is remanded for further proceedings according to law.

VIRGINIA SUPREME COURT OF APPEALS.

J. T. SMOOT, *Appt.*,

PEOPLE'S PERPETUAL LOAN &
BUILDING ASSOCIATION.

(95 Va. 696.)

A statute relieving from the imputation of usury all contracts made by a building and loan association under a charter of doubtful validity is not unconstitutional as to those contracts because it is retroactive.

(March 17, 1896.)

APPEAL by complainant from a decree of the Circuit Court for the City of Roanoke in favor of defendant in a suit brought to enjoin defendant from enforcing a loan association contract by proceeding to sell the mortgaged property for payment of dues and fines. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Scott & Staples*, for appellant:

A statute is never to be construed as retrospective in its operation, if any other construction can be fairly placed upon it.

Danville v. Pace, 35 Gratt. 1, 18 Am. Rep. 668; *Richmond v. Henrico County Supers.* 83 Va. 212; *Campbell v. Nonpareil F. B. & K. Co.* 75 Va. 291.

There is nothing in the act which enables or justifies any building and loan association, domestic or foreign, to violate the usury laws or any other laws in the commonwealth of Virginia.

NOTE.—As to the constitutionality of statutes making valid contracts which were invalid, see *note to Lowe v. Harris* (N. C.) 22 L. R. A. 379.

As to usury in loans by building associations, see 41 L. R. A.

See also 43 L. R. A. 689.

An act of legislature authorizing a building and loan association, or any other corporation, to charge premium and interest, and to fix the amount thereof, does not entitle them to fix an amount in excess of the interest allowed by the law of that state, unless there is a provision in the statute expressly suspending the operation of the usury laws as to contracts made by such companies.

Pfeister v. Wheeling Bldg. Asso. 19 W. Va. 676.

The testimony of all authority, civil and humane, ecclesiastical and profane, natural and moral; of all ages, old, new, middling; of all churches, primitive, superstitious, reformed; of all common creeds, Jewish, Christian, heathenish; of all lands, foreign and domestic,—are against usury.

See Tyler, *Usury*, chap. 2, p. 41; *Dunham v. Gould*, 16 Johns. 367.

A statute of the character of the act in question should be strictly construed.

Cooley, Const. Lim. ed. 1868, p. 893.

On petition for rehearing.

In construing the validating act, the court should resolve all doubts against the corporation.

Cooley, Const. Lim. ed. 1868, pp. 893, 594.

Messrs. Archer L. Payne and William Gordon Robertson, for appellee:

The appellee association belongs to the permanent class, and this type of association grew up under the English statute of 1836, which did not, in terms, say anything in regard to permanent societies, yet this form of society was upheld by the courts as being clearly

note to Reeve v. Ladies' Bldg. Asso. Perpetual (Ark.) 18 L. R. A. 129; *Pioneer Sav. & L. Co. v. Cannon* (Tenn.) 33 L. R. A. 113; *Post v. Mechanics' Bldg. & L. Asso.* (Tenn.) 34 L. R. A. 201.

within the scope of the act of 1836, and as being legal in every respect.

Ex parte Bath, L. R. 27 Ch. Div. 509, 32 Week. Rep. 808; Thompson, Building Associations, pp. 5, 6; 4 Am. & Eng. Enc. Law, 2d ed. pp. 1005, 1006.

Whatever the method adopted as to the repayment of the amount advanced, whether the time be uncertain or fixed, all societies which have for their object the main object of such societies, come within the definition of the building society.

4 Am. & Eng. Enc. Law, 2d ed. p. 1001.

The only decisions in regard to such associations which have been so far made in Virginia are authorities for sustaining the methods adopted by the People's Perpetual Loan & Building Association, independent of the question whether they are now authorized by legislation or not.

White v. Mechanics' Bldg. Fund Asso. 23 Gratt. 283; *Winchester Bldg. Asso. v. Gilbert*, 23 Gratt. 787.

The mere fact that a member subscribes for shares to get a loan is immaterial on the question of usury.

Selliff v. North Nashville Bldg. & Sav. Asso. (Tenn. Ch. App.) 89 S. W. 546. See also 4 Am. & Eng. Enc. Law, 2d ed. *Building Associations*; *Ward v. Cornett*, 91 Va. 676.

All taint of usury has now been removed from it by the passage of two acts of the legislature.

March 1, 1894 (Acts of Assembly 1893-94, p. 560; January 23, 1896 (Acts of Assembly 1895-96, pp. 170 *et seq.*).

There can be no doubt that the judge of the corporation court for the city of Roanoke, Virginia, had the right to grant a charter to the People's Perpetual Loan & Building Association for the purpose of enabling it to carry on the business of a building association.

Davies v. Creighton, 33 Gratt. 696.

There are unquestionably cases in which the state may grant privileges to specified individuals without violating any constitutional principle, because, from the nature of the case, it is impossible that they should be possessed and enjoyed by all; and if it is important that they should exist, the proper state authority must be left to select the grantees. Of this class are grants of the franchise to a corporation.

Cooley, Const. Lim. chap. 11, p. 894.

Where the charter of a corporation permitted the bank to take interest at the rate of 7 per cent per annum, and the general law prohibited anything in excess of 6 per cent, this was a valid contract between the state and corporation, and was inviolable by an act of the legislature or by an ordinance of the constitutional convention.

Hazen v. Union Bank, 1 Sneed, 115; Wade, Retroactive Laws, §§ 77, 78.

A special act of the general assembly of Alabama, whereby a charter was granted to a building association, was constitutional.

Montgomery Mut. Bldg. & L. Asso. v. Robinson, 69 Ala. 413; *Martin v. O'Brien*, 34 Miss. 21; *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508; 4 Am. & Eng. Enc. Law, 2d ed. pp. 1073, 1074.

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Keith, P., delivered the opinion of the court:

The only question to be considered in this case is whether the transactions between Smoot and the People's Perpetual Loan & Building Association were usurious. The circuit court held that they were not.

This association was organized under a charter granted by the judge of the corporation court of the city of Roanoke in 1887. By it the association was authorized to make loans to its members, or others, and to receive as security for loans thus made their shares, either by way of redemption or hypothecation, and to take deeds of trust or mortgages on any real or personal estate, or collateral security, for the repayment of the loans or advances in such instalments as might be agreed upon. In the case of a redemption, the shares so redeemed were to be canceled, but the members were in no wise relieved from their obligation to perform all the duties they had assumed to the association, and for their failure to discharge them could be subjected to like fines and penalties as though their shares of stock had not been redeemed. It was made lawful for the association to receive in advance interest on its loans, and to charge and deduct upon the redemption of shares such premiums for the privilege of having them redeemed as might from time to time be fixed by the board of directors, or agreed upon between the corporation and the parties so having their shares redeemed.

In the preamble to an act of the legislature approved January 23, 1895 (Acts 1896, p. 170), the charter granted by the court is set out in full, and it then proceeds as follows: "And whereas said charter was duly accepted and has been acted under by said association; and whereas some doubt has arisen as to the authority of the said corporation court of Roanoke to grant said charter upon the terms set forth in said certificate; therefore,

"Be it enacted by the general assembly of Virginia, that said charter be, and the same is hereby declared to be, as to all contracts entered into by said association in accordance with the provisions of the aforesaid certificate, as valid to all intents and purposes as if originally granted by the general assembly of Virginia."

The contention on the part of the appellant is that the dealings between himself and the association were usurious, that they cannot be maintained upon the theory that the relations existing between the company and its members were those pertaining to partnerships, that a charter granted by the court will not relieve transactions entered into under it of the imputation of usury, and that the act approved March 1, 1894 (Acts 1894, p. 560), entitled "An Act to Define the Powers and Limitations of Building and Loan Associations," has no retroactive effect.

All these positions are well taken, in the judgment of this court. In support of them we are content to refer to the cases of *Crabtree v. Old Dominion Bldg. & Loan Asso.* 95 Va. 670, and *Ware v. Bankers' Loan & Invest. Co.* 95 Va. 680 (just decided)

It is further contended on behalf of the appellant that the act of January 23, 1896, in the first place, does not undertake to validate the contracts under investigation; and, secondly, that, if such were the purpose of the act, it would be unconstitutional and void.

The charter granted by the corporation court confers power upon the association thereby created to receive in advance interest on loans, and to charge and deduct, upon the redemption of shares, such premiums for the privilege of having them redeemed as may from time to time be fixed by the board of directors, or agreed upon between the corporation and the parties so having their shares redeemed. The association was authorized to pass by-laws and create such fines and forfeitures as might be reasonable and proper to enforce the payment of all instalments and other dues on the part of those subscribing to its stock, or borrowing money from it.

These provisions in the charter seem sufficient to warrant the dealings which took place between Smoot and the association. A doubt was entertained as to the efficacy of the charter granted by a court to protect a transaction which could be questioned upon the ground of its usurious nature, and, in order to put that doubt at rest, resort was had to the legislature. The mischief which it was intended to remedy by the act under consideration is apparent. The purpose of those who sought legislative intervention was to remove the taint of illegality from contracts theretofore made by the People's Perpetual Loan & Building Association. The charter was recited in the preamble of the act. The motive of the act is declared upon its face to have been to quiet doubts that had arisen with respect to the powers conferred upon this association by the charter granted by the court. Therefore it was enacted that "the charter be, and the same is hereby declared to be, as to all contracts entered into by said association in accordance with the provisions of the aforesaid certificate, as valid to all intents and purposes, as if originally granted by the general assembly of Virginia." There are some things so clear that the attempt to elucidate them serves rather to obscure, and we find ourselves confronted by this difficulty in the endeavor to render more plain and certain the meaning and scope of this act. The charter, and all contracts made in accordance with its provisions, are declared to be as valid to all purposes and intents as if originally granted by the general assembly of Virginia. The question therefore resolves itself into one of power upon the part of the legislature, for the intent seems to be too manifest to be a subject of real controversy.

It is claimed by appellant that the construction which we have given to the act renders it unconstitutional, the legislature being without power to confer such privileges.

In support of this position, he relies upon § 6, art. 1, of the Bill of Rights, which declares "that no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary."

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This commonwealth on the 29th day of June, 1776, adopted a bill of rights and Constitution, and proclaimed herself a sovereign and independent state, five days before the birth of these United States,—a circumstance, it may be observed in passing, which should fix the date of our independence, and be kept in perpetual memory by being embodied in the writs of courts, and the formal acts of the various departments of our state government. In the paragraph quoted from that bill of rights, we have the statement of a general proposition, followed by an illustration which shows beyond peradventure the evil at which the provision under consideration was directed. Our forefathers were wise and practical men. They were neither political speculators nor dreamy enthusiasts. They did not strive for an impossible equality, such as has never existed in any society where men have ceased to be equally savage or equally wretched. They did not seek to establish a government theoretically perfect, but, guided by the light of experience, it was their aim to found institutions under which their descendants, secured in the enjoyment of life, liberty, and property, might be free, prosperous, and happy so long as they possessed the wisdom and virtue essential to the preservation of their glorious heritage. They knew the wrongs by which they had been oppressed, and the evils which they had endured, under a government of hereditary magistrates and rulers; and it was to shield themselves and posterity from their recurrence that the immortal bill of rights was adopted, which was, is, and will remain, the noblest and most comprehensive declaration of the rights of man.

For more than a century we have lived under that great charter of freedom. During that time corporations without number have been created, all of which have enjoyed privileges not conferred on the mass of citizens. Building associations have been formed, under which contracts have been made, obnoxious to the charge of usury, unless warrant for them is found in the statutes under which they were organized. See *White v. Mechanics' Bldg. Fund Assn.* 22 Gratt. 293; *National Mut. Bldg. & L. Assn. v. Ashworth*, 91 Va. 706; *Nichols v. People's Bldg. Loan & Sav. Assn.* 93 Va. 880, and many other cases. During all this period no such question has been raised. It is appalling to contemplate the consequences which might follow from the decision which we are asked to make. If this court ought, in the discharge of its duty, so to decide, then it is safe to say that all the courts of the Union should likewise so declare; for it is believed that there are few state constitutions without provisions similar to, and in many instances even more stringent than, ours. If it be the law, it applies with equal force to foreign and to domestic corporations; for it would scarcely be contended that the legislature of New York could confer upon corporations created under its authority a power to be exercised in Virginia which would be denied to a domestic corporation. If such be the law, however grave the consequences, it would be our duty so to declare. The supreme court of Kentucky so held in the case of *Gordon v. Winchester Bldg.*

& *Accumulating Fund Assn.* 12 Bush, 110, 23 Am. Rep. 713, and that decision has since been reaffirmed by that court.

A different view, however, has been taken by other courts. In *Montgomery Mut. Bldg. & L. Assn. v. Robinson*, 69 Ala. 413, it is said: "The general assembly ordained the statute against usury, and its power to designate the transactions which shall be deemed offensive to, or which shall be excepted from, the influence of the statute, cannot be questioned. When that body lends express sanction to a particular transaction, that transaction is withdrawn and excepted from the operation of the statute."

The court of appeals of Mississippi, in the case of *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508, held that "the clause of the Constitution" which declares "that 'no man or set of men are entitled to exclusive separate public emoluments or privileges from the community, but in consideration of public services,' . . . has no reference to the private relations of the citizens, nor to the action of the legislature in passing laws regulating the domestic policy and business affairs of the people, or any portion of them." See also *Bibb County Loan Assn. v. Richards*, 21 Ga. 592.

In *Danville v. Pace*, 25 Gratt. 1, 18 Am. Rep. 668, a statute was considered which took away from corporations the right to make the defense of usury. It was retroactive in its operation, but was held to be constitutional by this court, in a luminous and convincing opinion delivered by Judge Staples.

If a corporation may be denied the right to plead usury as to existing contracts, is it a greater stretch of authority upon the part of the legislature to create a corporation to which individuals may by their voluntary contracts bind themselves to pay more than the rate of interest allowed by law? In the one case the legislature was held to have the power to deprive corporations of a right conferred by existing law. In the other case the power of the legislature is invoked to remove a disability to contract which it had imposed.

Statutes which validate contracts otherwise invalid are sustained when "they go no further than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law." Cooley, Const. Lim. 6th ed. p. 460.

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We are of opinion that the act of January 23, 1896, is constitutional, that it suffices to remove any doubt that may have existed as to the authority of the association to contract and deal with its members in the manner disclosed by this record, and that, therefore, the transactions here complained of are not usurious.

The arguments which we have considered, when addressed to courts, call for a decision upon the constitutional powers of the legislature. With the policy or impolicy of an act of the general assembly the courts have no concern. Unless clearly repugnant to the Constitution of the United States or of the state, we have no choice but to construe and enforce them. Nor can we protect the improvident against the consequences of their own folly. And we cannot do better than to close this opinion by a quotation from the opinion of Judge Anderson in the case of *White v. Mechanics Bldg. Fund Assn.* 23 Gratt. 233: "It is contended on the one hand [that building associations, said he] . . . operate very beneficially to the man who has but small means, and who is destitute of a home that he can call his own, as it will enable him to acquire property in a home for himself and family, and pay for it in the course of six or eight years, at a cost very little exceeding what he would have to pay for a leasehold for the same period. On the other hand, it is contended that the exactions operate as a grinding oppression on those who find themselves unable to meet the requisitions. Which of these opinions is correct, we will not undertake to say. If the transactions and dealings of this association with its members are warranted by statute, and that statute is warranted by the Constitution, though they may operate harshly and oppressively, it is not the province of the courts to relieve. The fault is in the law, which the legislature alone can alter; or in the improvidence of the party, which neither the legislature nor the courts can remedy."

These wise and pregnant observations were delivered more than twenty-five years ago, and during all of the intervening period the legislatures and courts have continued to recognize and to foster building associations.

We find no error in the decree of the circuit court, and it is affirmed.

Riely and Cardwell, JJ., absent.

Rehearing denied.

GEORGIA SUPREME COURT.

BOARD OF EDUCATION OF CARTERSVILLE, *Plff. in Err.*,Mrs. John M. PURSE *et al.*

(101 Ga. 422.)

- *1. A board of education having the charge and control of a system of free schools established by law, and supported by taxation, has the right to suspend from attendance upon school children whose parent, whether father or mother, in undertaking to call in question or interfere with the discipline of a teacher over one of these children, enters the school room of such teacher during school hours, and, in the presence of the scholars there assembled, uses offensive or insulting language to such teacher.
2. This is true, though none of the children so suspended had in fact been guilty of any violation of the rules of school.

(Atkinson and Little, J.J., dissent.)

(August 5, 1897.)

ERROR to the Superior Court for Bartow County to review a judgment granting a writ of mandamus to compel defendants to admit petitioner's children to the public schools. *Reversed.*

The report sent up with the record was as follows:

Mr. and Mrs. John M. Purse, citizens of

*Headnotes by COBB, J.

NOTE.—Right to exclude, suspend, or expel pupils from school for misconduct of pupil or parent.

- I. Where the parent's action affects the child.
- II. For misconduct of pupil.
- III. For absence and tardiness.
- IV. For connection with secret societies.
- V. For failure to participate in certain studies and exercises.
- VI. For refusal to perform manual labor.
- VII. For failure to pay for injury to school property.
- VIII. Controlling conduct of pupil after the relation of teacher and pupil has ceased.
- IX. Questions of pleading and practice.

I. Where the parent's action affects the child.

IN CARTERSVILLE BOARD OF EDUCATION v. PURSE the suspension of a pupil for the misconduct of the pupil's mother in entering the school room and interfering with the discipline was sustained, although no question was made as to the pupil's conduct. The ground on which the decision is placed is that the parent owes the common-law duty to the child to educate him, and the statute of Georgia does not give the child any new right or remedy, and as at the common law the child is at the mercy of his parents in regard to his education, so the child has no recourse if he is prevented by his parent from obtaining an education. The decision also is upon the ground that the parent interfered in a matter involving the discipline of the school; but the headnotes made by the court put the decision on the ground that the right to expel exists without regard to the child's conduct, and the action of the mother is the same as though done by the father. This appears to be a novel question, and seems to stand alone.

In *Bourne v. State*, Taylor, 35 Neb. 1, it was held that under Neb. Comp. Stat. chap. 79, subd. 6, au-
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Cartersville, have three daughters attending one of the public schools of that city. On October, 1896, Mrs. Purse, went to the school during its regular exercises, and had some conversation with the teacher, the nature and purport of which seem to be in dispute, but as a consequence of which the teacher made a report to the superintendent of schools, who thereupon sent the following communication to Mr. Purse:

Dear Sir:

In consequence of your wife's having entered Miss Hall's room to-day during school hours, and having seriously interfered with the discipline of the school, I am in duty bound to suspend all your children. If this wrong is repaired as far as possible, the suspension will be only temporary; otherwise it will be in force until the end of the present school year.

Mrs. Purse appealed to the grievance committee of the board of education, charging the superintendent with suspending her children without cause and without authority, denying that she had seriously interfered with the discipline of the school or said anything unbecoming a lady, and asserting that the intention of her visit was for good, etc. The committee required that the matter be presented in writing, declining to have any oral hearing. Upon consideration of the charges presented,

thorizing the trustees to make such rules and regulations as they may think needful for the government of the schools, a mandamus to require a reinstatement of a pupil was denied the father, where he had refused to sign a monthly report card sent to him by the teacher showing the standing of his child, assigning as the reason that the standing was not as good as on prior reports, although he had on several prior occasions signed such card. In this case the school board had made a rule requiring that the teacher should send to the parent each month for signature a report card showing standing of the pupil, and if returned unsigned, that the pupil was to be sent home to get it signed.

In *King v. Jefferson City School Board*, 71 Mo. 628, 36 Am. Rep. 499, where a pupil was expelled for absence and tardiness, it was said that such absences without excuse are the fault of the parents, whose business it is to see that the attendance of their child is regular unless prevented by causes that will excuse.

And a suspension was sustained where the parent caused the child to be absent on account of a catholic holy day. *Ferriter v. Tyler*, 48 Vt. 444, 21 Am. Rep. 133.

Where absence was caused solely by the act of the parent without valid excuse, the suspension of the pupil was sustained, although it was contended that this would be a punishment of the pupil for his parents' offense. *Burdick v. Babcock*, 31 Iowa, 562.

But in the matter of selection of studies it seems that there is some conflict of authority as to the right to expel where the parent interferes and requests that his child shall be excused from such study, some cases denying the right to expel, as *State, Shelby, v. Dixon County School Dist. No. 1*, 31 Neb. 552; *Trustees of Schools v. People*, Van Allen, 87 Ill. 303, 29 Am. Rep. 55; *Hulison v. Post*, 79 Ill. 567; *Morrow v. Wood*, 35 Wis. 59, 17 Am. Rep.

a letter from Mrs. Purse, and a statement from the superintendent and from the teacher, the committee reported to the board that the conduct of Mrs. Purse in entering the school room, and unkindly criticising the teacher's conduct and methods in the presence of her pupils, was prejudicial to proper discipline; that it was the duty of the teacher to report the matter to the superintendent; and that the suspension was proper. Further, that Mrs. Purse visited the school the next day after the suspension, just as school was dismissed, and charged the teacher to her face that she was no lady, in consequence of having reported Mrs. Purse's conduct to the superintendent. The committee recommended that, if Mrs. Purse would make to the teacher such apology as would satisfy her on her own behalf and on behalf of her pupils, the suspension would end with November, 1896; otherwise that it would continue as per the order of the superintendent. This report was adopted by the board; whereupon Mrs. Purse, as next friend of her three children, brought her petition against the board of education and the superintendent of schools, praying for mandamus requiring them to receive the children in their former places in the public school, and that they be enjoined from further enforcing the order of suspension, and from doing any act of interference with the attendance of the children and their full enjoyment of the benefits of the school, and for general relief. The grounds of the petition are, in brief, that the children were suspended or expelled without cause, and not on account of any misconduct or violation of rules on their part, but solely on account of the charge made against Mrs. Purse individually; that the finding of the board of education was neither fair nor impartial, for sundry reasons stated; that the suspension is an injury which cannot be estimated in money, and is irreparable; and that under the rules and regulations of the board, the power of suspension is not vested in the superintendent, and his act in the premises is null and void. By amendment, the name of J. M. Purse was added as a party

plaintiff. To this amendment defendants demurred, on the ground that it adds a new and distinct party. The demurrer was overruled. Defendants further demurred to the petition on the following grounds: (1) No cause of action is set forth. (2) Defendants are improperly joined, it appearing that the superintendent of schools is merely the servant and agent of the board against whom the real complaint is lodged. (3) The right of action vests alone in the husband of Mrs. Purse. (4) No right to attend the public schools appears in the children, but the right is in J. M. Purse, for him and his wife only. He is not a party, nor is she in her personal capacity. (5) It does not appear that the board of education abused the discretion vested in them by law. (6) Plaintiffs had an adequate and complete remedy by certiorari, and mandamus is not allowable for the correction of an alleged error in the judgment of the board excluding the children from the schools. This demurrer also was overruled, and defendant answered, taking issue with all the material allegations of the petition; denying that the presence of these children at the school would not affect the school injuriously, but asserting, on the contrary, that its discipline had already been seriously affected and injured by the temporary restraining order granted by the court, and, if the same should be continued, the order and discipline of the public school system would be seriously and irreparably impaired; that the pupils, seeing that their parents might at pleasure interfere with and insult the teachers, invade the school room, and, in the presence of her pupils, accuse the teachers of partiality and favoritism, would no longer respect the teachers' authority or that of the board, and inexpressible harm would result, and the blow would be disastrous, if not fatal, to the schools; that the right to the benefit of the schools lies, not in the children, but in the parents, such right being to have the children educated free of tuition, provided the parent so conducts himself or herself as not to interfere with the order and conduct of the schools, or impair their

471: *Guernsey v. Pitkin*, 32 Vt. 224, 76 Am. Dec. 171; *Sewell v. Defiance Union School Bd.*, of Edu. 29 Ohio St. 89.

But other cases affirm the right to expel. *State, Andrew, v. Webber*, 103 Ind. 81, 58 Am. Rep. 30; *Kidder v. Chellis*, 59 N. H. 473.

As to the right to expel for actions of pupils after returning to their parents' control, see subd. VIII.

In *Roe v. Deming*, 21 Ohio St. 666, it was held that a parent was entitled to maintain an action for damages for wrongfully expelling his child.

But in *Spear v. Cummings*, 23 Pick. 224, 34 Am. Dec. 53, it was held that the father was not the injured party where his child had been expelled. In Massachusetts since this decision a statute has been passed giving to the pupil wrongfully expelled an action for damages.

II. For misconduct of pupil.

Where a pupil is guilty of such misconduct as to interfere with the discipline and government of the school, he may be suspended or expelled. *State, Crain, v. Hamilton*, 42 Mo. App. 24; *McCormick v. Burt*, 95 Ill. 263, 35 Am. Rep. 163; *Peck v. Smith*, 41 Conn. 442; *State v. Williams*, 27 Vt. 755; *State, Burpee, v. Burton*, 45 Wis. 150, 35 Am. Rep. 706; *Watson v. Cambridge*, 157 Mass. 561; *Hodgkins v. Rockport*, 41 L. R. A.

105 Mass. 475; *Sherman v. Charlestown*, 8 Cusb. 163; *Stephenson v. Hall*, 14 Barb. 222; *Board of Education v. Helston*, 32 Ill. App. 300; *Scott v. School Dist.* No. 2, 46 Vt. 456.

So, under Mo. Rev. Stat. 1879, § 7045, providing that the board shall have the power to suspend or expel a pupil whenever upon due examination they become satisfied that the interest of the school demands such expulsion, a pupil who had been in the habit of swearing and of encouraging fights between other boys and teaching them bad habits was properly expelled, although the board had failed to make a particular rule applying to such a case. It was held that such failure did not deprive them of the authority to enforce rules of conduct prescribed by a common sense of decency and propriety, and where the board failed to exercise its power a teacher might adopt such reasonable rules as were fit and proper. *State, Crain, v. Hamilton*, 42 Mo. App. 24.

In *McCormick v. Burt*, 95 Ill. 263, 35 Am. Rep. 163, it was said that under Ill. school laws, § 48, authorizing the directors to suspend or expel pupils for incorrigibly bad conduct, and that no action shall lie against them for such expulsion or suspension, the directors have the power to suspend or expel, and they may exercise that power as a means of

efficiency, and such right is forfeited by any parent who thus interferes; and that the practice, custom, and rule of the board, suspending pupils for their parents' interfering with the discipline or order of the schools, is reasonable and just, and is the only means of preventing such interference as would result in unmeasurable evil to the pupils themselves. It was admitted that Mrs. Purse's misconduct was the cause of the suspension of her children; but submitted that, though not entitled to have them restored at all, she was allowed to have them put back if she would make proper apology to the teacher to whom she had used insulting language, which she declined and still declines to do, and that thus it is by her own fault that she deprives her children of the benefit of the schools. Upon motion, the court granted a mandamus absolute, requiring the children be received to their former places in the school, under the rules for the government thereof. To this ruling, and to the others before noted, defendants excepted.

Mr. John W. Akin, for plaintiff in error: The board of education are public officers. *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429; *Donahoe v. Richards*, 88 Me. 379, 61 Am. Dec. 258.

Official acts, if authorized, are beyond judicial control.

Donahoe v. Richards, cited 88 Me. 379, 61 Am. Dec. 258; *Jenkins v. Waldron*, 11 Johns. 114, 6 Am. Dec. 359; *Sample v. Broadwell*, 87 Ill. 617; *Wilmarth v. Burt*, 7 Met. 257; *Orr v. Quimby*, 54 N. H. 590; *Mechem*, Pub. Off. § 661; *Sage v. Laurain*, 19 Mich. 137; *Eagle Trp. Highway Comrs. v. Ely*, 54 Mich. 178; *Baker v. State*, 27 Ind. 485; *Jones v. Locing*, 55 Miss. 109; *Freeport v. Marks*, 59 Pa. 253; *Buell v. Ball*, 20 Iowa, 282; *Cooley*, Torts, p. 376; *Downer v. Lent*, 6 Cal. 94; *Gregory v. Brooks*, 37 Conn. 365; *McCormick v. Burt*, 95 Ill. 263, 85 Am. Rep. 163; *Carter v. Harrison*, 5 Blackf. 138; *Elmore v. Overton*, 104 Ind. 548, 54 Am. Rep. 348; *Wasson v. Mitchell*, 18

Iowa, 153; *Chamberlain v. Clayton*, 56 Iowa, 331, 41 Am. Rep. 101; *Caulfield v. Bullock*, 18 B. Mon. 494; *Oakes v. Hill*, 10 Pick. 383; *Lilienthal v. Campbell*, 22 La. Ann. 600; *Sage v. Laurain*, 19 Mich. 137; *Edwards v. Ferguson*, 78 Mo. 686; *McDaniel v. Tebbetts*, 60 N. H. 497; *Williams v. Weaver*, 75 N. Y. 80; *East River Gaslight Co. v. Donnelly*, 93 N. Y. 557; *Burton v. Fulton*, 49 Pa. 151; *Steele v. Dunham*, 26 Wis. 393; *Fenwick v. Gibbs*, 2 De-sauss. Eq. 629; *Henderson v. Smith*, 26 W. Va. 829, 58 Am. Rep. 139; *Rail v. Potts*, 8 Humph. 225; *Wilson v. Marsh*, 84 Vt. 353; *Wilkes v. Dinsman*, 7 How. 89, 12 L. ed. 618; *People, Billings, v. Bissell*, 19 Ill. 229, 68 Am. Dec. 591; *Hawkins v. The Governor*, 1 Ark. 670, 33 Am. Dec. 346; *Mauran v. Smith*, 8 R. I. 192, 5 Am. Rep. 564; *State, Low, v. Towns*, 8 Ga. 360.

The act, in authorizing the board to prescribe the terms, i. e., the conditions, on which students should be received, enumerated the class which had the right to be received, namely, those who complied with the terms prescribed. This enumeration, therefore, did not include other persons "of a different grade or class," to wit, those who refused to comply with such terms and conditions; notwithstanding the "general expression" in a subsequent clause giving all school children the right of attendance.

Hill v. Decatur Comrs. 22 Ga. 207; *White v. Ivey*, 34 Ga. 199; *Torrance v. McDougal*, 12 Ga. 526. See *Perkins v. Perkins*, 21 Ga. 16; *Sedgw. Stat. & Constr. L.* 2d ed. p. 200; *Atty. Gen., McKay, v. Detroit & E. Pl. Road Co.* 2 Mich. 138; *Com. v. Duane*, 1 Binn. 601, 2 Am. Dec. 497; *Com. v. Alger*, 7 Cush. 58; *Aldridge v. Mardoff*, 33 Tex. 204; *McNamara v. Minnesota C. R. Co.* 12 Minn. 388; *Torreyson v. State Bd. of Examiners*, 7 Nev. 19; *Brooks v. Mobile School Comrs.* 31 Ala. 227; *San Francisco v. Hazen*, 5 Cal. 169; *Cochran v. Taylor*, 18 Ohio St. 382; *Leversee v. Reynolds*, 13 Iowa, 810; *People v. Burns*, 5 Mich. 114; *Ellison v. Mobile & O. R. Co.* 36 Miss. 572.

discipline for the causes mentioned in the statute.

Where a school committeeman removed a pupil from a school room before the school hour, for profanity, using no more force than was necessary, he was not liable in trespass for so doing. It was further held that the school board and teacher not having taken any action thereon, the pupil had been neither expelled nor excluded from the school privileges. *Peck v. Smith*, 41 Conn. 443.

So, where a teacher suspended a boy for insubordination and misconduct, and he returned, and one of the prudential committee attempted to eject him but was prevented by the pupil's brother, the latter was convicted of assault and battery, as the teacher had the right, whether the school was public or private, to enforce her discipline and government, and the party assisting her was justified in so doing. *State v. Williams*, 27 Vt. 755.

And a teacher has, in a proper case, inherent power to suspend a pupil from the privileges of his school for misconduct, unless such teacher has been deprived of the power by the affirmative action of the proper board. *State, Burpee, v. Burton*, 45 Wis. 150, 35 Am. Rep. 708.

And the exclusion of a child from a public school by the school committee was sustained where the child was too weak-minded to derive profit from instruction, and was troublesome to other children, 41 L. R. A.

making uncouth noises and pinching others. It was held under Mass. Pub. Stat. chap. 44, § 21, providing that the school committee shall have the general charge and superintendence of all the public schools, that if they act honestly in the effort to do their duty in deciding whether certain acts of disorder interfere with the school, a jury composed of men of no special fitness to decide educational questions should not be permitted to say that their answer is wrong. *Watson v. Cambridge*, 187 Mass. 551.

A school committee properly excluded from a school a pupil guilty of misconduct in whispering, laughing, acts of playfulness and rudeness to other pupils, inattention to study, and conduct tending to cause confusion and distract the attention of other scholars from their duties and recitation, where such conduct was persisted in after repeated admonitions. *Hodgkins v. Rockport*, 105 Mass. 475.

And a school committee had the power and properly excluded from school a female pupil guilty of gross immorality, manifested by licentious propensities, language, manners, and habits, amounting even to actual prostitution, although not manifested in the school. *Sherman v. Charlestown*, 8 Cush. 163.

So, a pupil was properly expelled because she interfered with a teacher who was punishing a child about five years of age, and because she was

Whenever a right is given and a tribunal created to control its mode of exercise, that tribunal, unless restricted, may make any rules regulating the same which are not so unreasonable as to defeat the general exercise of the right.

Sherman v. Charlestown, 8 Cush. 160; *Spear v. Cummings*, 28 Pick. 224, 84 Am. Dec. 58.

There may be dismissal for parental interference.

Ferriter v. Tyler, 48 Vt. 444, 21 Am. Rep. 183; *Guernsey v. Pitkin*, 32 Vt. 224, 76 Am. Dec. 171; *Spiller v. Woburn*, 12 Allen, 127; *Bourne v. State, Taylor*, 85 Neb. 1; *Fessman v. Seeley* (Tex. Civ. App.) 80 S. W. 268; *Bissell v. Davison*, 65 Conn. 183, 29 L. R. A. 251; *Duffield v. Williamsport School Dist.* 162 Pa. 476, 25 L. R. A. 152; *Stephenson v. Hall*, 14 Barb. 222.

Unquestionably no act either of parent or pupil, not affecting the welfare or discipline of the school, can justify the pupil's exclusion.

State, Bouve, v. Fond du Lac Bd. of Edu. 63 Wis. 234; *Holman v. School Dist. No. 5 Trustees*, 77 Mich. 605, 6 L. R. A. 584; *Perkins v. Independent School Dist. Bd. of Directors*, 56 Iowa, 476; *Bourne v. State, Taylor*, 85 Neb. 1.

No previous rule was necessary.

Guernsey v. Pitkin, 32 Vt. 224, 76 Am. Dec. 171; *Ferriter v. Tyler*, 48 Vt. 444, 21 Am. Rep. 183; *Lander v. Seacer*, 32 Vt. 114, 76 Am. Dec. 156; *Sherman v. Charlestown*, 8 Cush. 168; *Hodgkins v. Rockport*, 105 Mass. 476; *Hues v. Lowell*, 10 Allen, 150; *Kidder v. Chellis*, 59 N. H. 478; *Russell v. Lynnfield*, 116 Mass. 866; *State, Burfee, v. Burton*, 45 Wis. 150, 35 Am. Rep. 706; *Danenhoffer v. State*, 69

Ind. 295, 35 Am. Rep. 216; *Stephenson v. Hall*, 14 Barb. 222; *Spiller v. Woburn*, 12 Allen, 127.

Public school boards are courts whose judgments, unreversed, conclude.

Pierce v. Beck, 61 Ga. 418; *Cheney v. Newton*, 67 Ga. 477; *Donahoe v. Richards*, 88 Me. 379, 61 Am. Dec. 256; *People, Osborne, v. Gilon*, 24 Abb. N. O. 125.

Certiorari is the remedy to correct school boards' errors of law or fact.

Certiorari is a constitutional remedy, and lies though no legislative act provide therefor.

Livingston v. Livingston, 24 Ga. 379; *Marchman v. Todd*, 15 Ga. 26; *Taylor v. Gay*, 20 Ga. 77; *McDonald v. Cousins*, 23 Ga. 227; *Nichols v. Sutton*, 22 Ga. 389; *Hayden v. State*, 69 Ga. 781; *Maxwell v. Tumlin*, 79 Ga. 570; *Patillo v. State*, 49 Ga. 172; *Hart v. Taylor*, 61 Ga. 156.

If certiorari does not lie, the fact that no other remedy is provided does not authorize the superior court to interfere.

The board's finding is conclusive of the children's rights.

Persons not parties to the record are bound by judgments when their rights are in issue.

Duer v. Threault, 89 Ga. 578; *Smith v. Cook*, 71 Ga. 705; *Tucker v. Zimmerman*, 61 Ga. 599; *Pace v. Maxwell*, 62 Ga. 97; *Linton v. Harris*, 78 Ga. 265.

If the parties were not nominally, but really and substantially, in interest, the judgment concludes them.

Lowry v. McMurtry, Sneed (Ky.) 251; *Van Planck v. Van Buren*, 76 N. Y. 247; *Manly v. Kidd*, 38 Miss. 141; *Follansbee v. Walker*, 74 Pa. 306; *Johnston v. Churchills*, Litt. Sel. Cas. 177; *Wiswall v. Sampson*, 14 How. 52, 14 L.

charged with making up faces at the teacher and making a noise on a slate. The pupil insisted that she did not scratch the slate but was only ciphering, and on appeal she was reinstated, but was required to say that whatever she had done that was wrong to the school or the teacher she was sorry for, and that she would obey the orders of the school in the future. *Stephenson v. Hall*, 14 Barb. 222. In this case the father could not recover damages on account of the child having been excluded from instruction in the studies there taught. It was said that if any injury has arisen in consequence of the exclusion of the daughter it was personal to the daughter who had been deprived of the opportunity of improving herself. At that time in New York the statute did not require the parent to educate his children. The court said that the moral duty of a parent to his child is one owing to and for the benefit of the child, the omission or neglect of which is the personal loss of the child.

A parent could not recover expenses of an appeal incurred in having his daughter reinstated in a school from which she had been suspended, where the order of reinstatement imposed the same condition as the order suspending her. *Stephenson v. Hall*, 14 Barb. 222.

The suspension of a pupil was sustained where he refused to disclose the name given to him by another pupil who had been guilty of misconduct, under Ill. school laws, §§ 49, 53, authorizing the board to suspend or expel a pupil for gross disobedience or misconduct. *Board of Education v. Helston*, 32 Ill. App. 300.

A teacher was entitled to recover her salary where she was prevented from completing the term by reason of the school committee requiring 41 L. R. A.

her to retain a disobedient pupil whom she had properly expelled. It was held that she was not bound to teach the school without maintaining proper and necessary discipline. *Scott v. School Dist. No. 2*, 46 Vt. 456.

Although the master of a school has the same authority over a scholar as the parents would have, and therefore may impose reasonable restraint upon their persons either by way of prevention or punishment of disorderly conduct, yet he has not a discretionary power of expulsion but only for reasonable cause. In judging of the cause, however, great regard must be had as to his necessary discretion in enforcing discipline, and a wilful breach of reasonable rules may be sufficient cause, and a repetition of acts of disobedience, each in itself insufficient, may be sufficient as showing a persistent disregard of discipline and a habit of disobedience. But if the expulsion is justified on the ground of some particular act or conduct, not only as likely to be seriously injurious to the peace and good order of the establishment, but as committed with that object, it must appear that it was of that character or the justification would fail. *Fitzgerald v. Northcoote*, 4 Post. & F. 656.

But an action for damages could be maintained where a pupil was suspended by a teacher because he refused to disclose the name of a pupil who had thrown some gravel against a window of a building and because he was disrespectful. The committee refused to allow him to return to school until he should apply to some one of them for permission to return, and denied to the father a hearing upon the matter of the boy's alleged misconduct. It was said that if a school committee acts in good faith in determining the facts in a

ed. 322; *Taylor v. Cornelius*, 60 Pa. 187; *Rogers v. Haines*, 3 Me. 362; *Gill v. United States*, 7 Ct. Cl. 522.

Strangers promoting litigation are bound.

Conger v. Chilcote, 42 Iowa, 18; *Burns v. Gavin*, 118 Ind. 320; *Landis v. Hamilton*, 77 Mo. 554.

Persons not defendants, but assuming or aiding the defense in respect to some interest of his own, are likewise concluded.

Tyrrell v. Baldwin, 67 Cal. 1; *Estelle v. Peacock*, 48 Mich. 469; *Parr v. State, Cockey*, 71 Md. 220.

Those not parties who submit their interest to the tribunal's adjudication are bound.

Sevey v. Chick, 13 Me. 141; *Johnston v. San Francisco Sav. Union*, 75 Cal. 184; *Jay v. De Groot*, 2 Hun, 205; *McNamee v. Moreland*, 28 Iowa, 96; 2 Black, Judgm. §§ 537-541.

Mandamus does not lie here.

Savannah v. State, Green, 4 Ga. 26; *Manor v. McCall*, 5 Ga. 522; *Bonner v. State, Pitts*, 7 Ga. 481; *Gresham v. Pyron*, 17 Ga. 268; *Barksdale v. Cobb*, 16 Ga. 18; *Houston County Justices v. Felder*, 28 Ga. 212; *Davis v. Maxwell*, 27 Ga. 368; *Ex parte Law*, 35 Ga. 285; *Napier v. Poe*, 12 Ga. 170; *Tillman v. Thrasher*, 61 Ga. 15; *Starnes v. Tanner*, 78 Ga. 144; *Bank of State v. Harrison*, 66 Ga. 696; *Tyler Cotton Press Co. v. Chevalier*, 56 Ga. 496; *Koe v. Simon*, 78 Ga. 120; *Shannon v. Reynolds*, 78 Ga. 761; *Dyeon v. Pope*, 71 Ga. 205; *Steward v. Peyton*, 77 Ga. 668; *State, Malcolm, v. Thrasher*, 77 Ga. 671; *Cheney v. Newton*, 67 Ga. 477; *Broten v. Watterson*, 96 Ga. 598; *Central R. Co. v. Miller*, 91 Ga. 88; *Conwell v. McWhorter*, 98 Ga. 251; *Kaiser v. Berrie*, 85 Ga. 856.

Authorities outside Georgia are to the same effect.

Mobile & O. R. Co. v. People, 132 Ill. 559; *State, Wolfe, v. Kirke*, 12 Fla. 278, 95 Am. Dec. 814; *Reading v. Com.* 11 Pa. 196, 51 Am. Dec. 534; *State, Kelley, v. Bonnell*, 119 Ind. 494; *Swigert v. Hamilton County*, 130 Ill. 539; *Com., Northeastern Rapid Transit R. Co., v. Filler*, 136 Pa. 129; *State, Port Royal Min. Co., v. Hagood*, 30 S. C. 519, 8 L. R. A. 841; *People, Nichol, v. New York Infant Asylum*, 122 N. Y. 190, 10 L. R. A. 381; High, Extraordinary Legal Remedies, § 42; 2 Spelling, Extraordinary Relief, § 1869.

A distinction exists between ministerial and discretionary acts. The former are subject to mandamus; the latter, not.

2 Spelling, Extraordinary Relief, § 1834; *State, Lord, v. Washington County Supers.* 2 Chand. (Wis.) 250; *Post v. Sparta Twp. Board*, 63 Mich. 833; *State, Daboval, v. Police Jury*, 39 La. Ann. 759; *Peters v. Warner*, 81 Iowa, 335; *State, Boggs, v. Wood County Ct.* 33 W. Va. 589; *State, Shryer, v. Greene County Comrs.* 119 Ind. 444; *Brokaw v. Bloomington Twp. Highway Comrs.* 130 Ill. 482, 6 L. R. A. 161; *State, McClenny, v. Baker County Comrs.* 23 Fla. 29; *Sansom v. Mercer*, 68 Tex. 488; *State, Lilienthal, v. Deane*, 23 Fla. 121; *State, Emerson, v. Hamilton County Comrs.* 49 Ohio St. 301; *People, Bliel, v. Martin*, 181 N. Y. 196; *People, Osborn, v. Gilon*, 24 Abb. N. C. 125; *Smith, State, v. Somerset*, 44 Minn. 549.

The Federal courts uniformly refuse mandamus to Federal officers as to acts involving the exercise of judgment and discretion, though granting it to compel the performance of

particular case, its decision cannot be revised by the court. But the court held that the power of exclusion could not be exercised without ascertaining the facts. *Bishop v. Rowley*, 165 Mass. 460.

And a teacher could not recover his salary for teaching after he had been discharged, where he was known to have a rule that "pupils must abstain from the common use of tobacco and ardent spirits," and it was understood when he was employed that he would not enforce the rule outside of the school building, and he afterwards suspended two pupils for using tobacco on the school grounds, and was discharged for refusing to modify his rule at the request of the directors. It was held that the power to dismiss a pupil is alone given to the directors, and their decision must control, under Tenn. act 1873, chap. 26, § 20, subsec. 3, making it the duty of the school directors to employ teachers and to dismiss them, and subsec. 4, authorizing them to suspend or dismiss pupils where the prosperity or efficiency of the school requires it, and § 29, providing that any teacher might for sufficient cause suspend pupils until the case was decided by the board of school directors, which should be with as little delay as possible. *Parker v. School Dist. No. 33*, 5 Lea, 525.

And a teacher could not recover on a contract to take a pupil into his academy and family for a year, where the boy had on his own accord left the academy pending an investigation as to who had been guilty of misconduct, and the principal had refused to receive the pupil back until after the investigation, but made no provision as to the maintenance of the pupil. The court said that in the absence of express stipulation to that effect, the principal could not, as a punishment for a transgression of a rule of his school or the order of

his family actually ascertained, expel a pupil from the protection and shelter of his home, and refuse to receive him back at his father's request after he had voluntarily left, and still claim the compensation stipulated in the contract. *Starr v. Lift-child*, 40 Barb. 541.

Where a child was excluded from a public school in a city by a teacher acting without authority from the school committee for the refusal to receive corporal punishment for an alleged offense, the remedy of such child was an appeal to the committee. It was held that such child could not maintain an action against the city under Mass. Gen. Stat. chap. 41, § 11; Pub. Stat. chap. 47, § 12, providing that a child unlawfully excluded from a public school shall recover damages against the city or town by which such school is supported. *Davis v. Boston*, 133 Mass. 103.

III. For absence and tardiness.

A rule authorizing expulsion for absence or tardiness where sufficient excuse is not given therefor is reasonable, and its enforcement will be sustained. *Russell v. Lynnfield*, 116 Mass. 306; *King v. Jefferson City School Board*, 71 Mo. 623, 36 Am. Rep. 499; *Churchill v. Fewkes*, 13 Ill. App. 520; *Ferriter v. Tyler*, 48 Vt. 444, 21 Am. Rep. 138; *Burdiack v. Babcock*, 31 Iowa, 562.

So, a recovery of damages was denied where a pupil was expelled by a teacher under the direction of one member of the school committee for violation of a rule relating to tardiness. It was held that Mass. Gen. Stat. chap. 38, §§ 16, 22, requiring the school committee to keep a record of their proceedings, did not imply that all rules and orders relating to discipline and good conduct should be a matter of record, or that a formal vote should be

a merely ministerial act where the petitioner's right is clear.

Ex parte De Groot, 6 Wall. 497, 18 L. ed. 887; *Secretary v. McGarrahan*, 9 Wall. 298, 19 L. ed. 579; *Brashear v. Mason*, 6 How. 97, 12 L. ed. 859; *United States, Goodrich, v. Guthrie*, 17 How. 284, 15 L. ed. 102; *Reeside v. Walker*, 11 How. 272, 13 L. ed. 693; *United States, Murray, v. Edmunds*, 5 Wall. 563, 13 L. ed. 692; *Kendall v. United States, Stokes*, 12 Pet. 524, 9 L. ed. 1181; *Decatur v. Paulding*, 14 Pet. 497, 10 L. ed. 559.

Every consideration of public policy demands that all such questions should be determined by the board of education. If they act unwisely and against public interests, the elective power will soon substitute others. Such bodies are generally responsive to public opinion.

Public schools, compelled to receive all who conform to school regulations, having no choice of either pupils or parents, are compelled *ex rei necessitate* to seek protection in reasonable rules, which must govern both pupils and parent.

Effingham v. Hamilton, 68 Miss. 523; 2 Beach, Pub. Corp. § 1548; 2 Spelling, Extraordinary Relief, § 1872.

Messrs. J. M. Neel and A. M. Foute also for plaintiff in error.

Mr. Albert S. Johnson, for defendants in error:

The granting of the mandamus absolute was right. Equity, law, and justice demanded it. *Heard v. Sill*, 26 Ga. 809.

There was no misjoinder of injunction and mandamus.

taken, and that the teacher reasonably exercised his power. *Russell v. Lynnfild*, 116 Mass. 306. In this case the committeeman made a rule that, being tardy twice, the scholar should be sent to him, and the scholar, instead of going to him as she was sent, went directly home, and in consequence of disobedience the teacher suspended her until she should conform to the rule.

So, a rule that any pupil absent six half days in four consecutive weeks without a satisfactory excuse shall be suspended from school was reasonable, and was enforced, under Mo. Rev. Stat. 1879, § 7045, providing that the board shall have the power to make all needful rules and regulations for the government of the schools in their district. It was said that such absences, when without excuse, are the fault of the parents whose business it is to see that the attendance of their child is regular unless prevented by causes that constitute a satisfactory excuse. *King v. Jefferson City School Board*, 71 Mo. 628, 35 Am. Rep. 499.

And where a pupil was absent for two weeks, and on notification to the parents no excuse was given for such absence, and the scholar was suspended, the directors and teachers were not liable in an action on the case in the absence of malice, under rules providing that any pupil who shall be absent six half days without a valid excuse will be liable to suspension, and shall not be restored without permission from the board, and that all pupils will be required to bring written excuses from their parents to teachers for absence. *Churchill v. Fewkes*, 13 Ill. App. 620. It was held that this rule was not a hard or harsh one.

And a prudential committee of a school district may exclude children from further attendance upon a term of school for absence contrary to the 41 L. R. A.

Acts 1887, p. 64; *De Lacy v. Hurst*, 83 Ga. 229.

It makes no difference whether or not the mother of petitioners may or may not act as their next friend.

If the next friend sue as the next friend of the minors it is the same in substance as if the minors sue by their next friend.

Lasseter v. Simpson, 78 Ga. 61.

If the mother may not bring suit as the next friend of the minors, then it is a suit by the minors without a next friend.

Such a suit is not void, but may be amended by adding a proper person as next friend, as was done in this case.

Code 1882, § 3263.

The public schools of Georgia were established for the benefit of the children of the state, and the right to this benefit is in the child, and not in the parent.

Acts 1887, p. 78, § 36; Acts 1888, p. 323, § 9; *Donahoe v. Richards*, 88 Me. 379, 61 Am. Dec. 257; *Stephenson v. Hall*, 14 Barb. 222.

Mandamus is the proper remedy to compel a board of education to reinstate a pupil in the public schools when the pupil has been unjustly excluded therefrom.

High, Extr. Legal Rem. § 332, note 5; 14 Am. & Eng. Enc. Law, p. 175, and authorities cited in note 3; *State, Sheibley, v. School Dist. No. 1*, 81 Neb. 552; *Morrow v. Wood*, 35 Wis. 59, 17 Am. Rep. 471; *Trustees of Schools v. People, Van Allen*, 87 Ill. 303, 29 Am. Rep. 55; *People, Ulrich, v. Board of Education*, 4 N. Y. Supp. 102; *State, Clark, v. Osborne*, 32 Mo. App. 536; *Board of Education v. Helston*, 32 Ill. App. 301; *Perkins v. Independent School*

rules thereof, although such absence is caused by command of the parents for the purpose of attending religious services on a catholic holy day. *Ferrier v. Tyler*, 48 Vt. 444, 21 Am. Rep. 123.

In *Burdick v. Babcock*, 81 Iowa, 522, it was held that a rule suspending pupils for absence six half days in four consecutive weeks, two times tardy counting as one absence, was reasonable and should be enforced, although the tardiness or absence was brought about solely through the act of the parent but without valid excuse. It was held that Iowa Acts, 9th Gen. Assem. chap. 172, § 27, authorizing the dismissal of a pupil for gross immorality, or for persistent violations of the regulations of the school, gave the power to establish reasonable rules and to enforce them. It was contended that the power to regulate only extended to the school as it was assembled, and not to conduct outside, and that the regulations could not trench upon the rights of the parent to the services of the child. But it was held that the parent could not interfere with the order of the school by sending his child at such time and in such conditions as to retard others. It was contended that the rules visited punishment upon the child for the parent's offense, but it was held that the good of the whole school required uniformity of prompt attendance, and there was no other way of enforcing it except by such rule.

Board and tuition paid in advance to the proprietor of a private school could not be recovered by the father of a pupil where his son persisted in truancy and was expelled. In this case the father refused to permit his boy to be punished although notified that if he did not restrain his son the latter would be expelled. It was held that advance payments should be liquidated damages under the

Dist. Bd. of Directors, 56 Iowa, 476; *Stephenson v. Hall*, 14 Barb. 222; *State, Clark, v. Osborne*, 24 Mo. App. 309; *Murphy v. Independent Dist. Bd. of Directors*, 30 Iowa, 429.

Mandamus is a discretionary remedy granted where the right is clear and plain, although the petitioners may have another remedy if that remedy is not so speedy, adequate, and complete as is the remedy by mandamus.

Merrill, Mandamus, §§ 52, 54.

Mandamus being a discretionary remedy, a judgment absolute will not be reversed unless the court below has abused its discretion.

Savannah & O. Canal Co. v. Shuman, 91 Ga. 402.

Where a party has more than one remedy he may resort to either, and especially to the most speedy one.

Merrill, Mandamus, §§ 52, 54; *Archie v. State*, 99 Ga. 28; *Western & A. R. Co. v. Voile*, 98 Ga. 446, 35 L. R. A. 655.

A city school board of education is not such a court that it is beyond control by mandamus.

School Dist. No. 23 v. McCoy, 30 Kan. 268, 46 Am. Rep. 92.

While the board of education may make rules for the suspension or expulsion of pupils, the rules must not be subversive of the rights of the pupils.

King v. Jefferson City School Board, 71 Mo. 628, 36 Am. Rep. 490; *Dritt v. Snodgrass*, 66 Mo. 286, 27 Am. Rep. 348; 21 Am. & Eng. Enc. Law, pp. 771-776; *State, Bowe, v. Fond du Lac Bd. of Edu.*, 63 Wis. 284; *Holman v. School Dist. No. 5 Trustees*, 77 Mich. 605, 6 L. R. A. 534, 20 Cent. L. J. 425; 21 Cent. L. J. 26; 25 Cent. L. J. 842.

contract and catalogue, in case of withdrawal or exclusion. *Fessman v. Seeley* (Tex. Civ. App.) 30 S. W. 268.

But looking out tardy children on a cold day until after the general exercises are over will be held unlawful, unless ample provision is made to keep the children comfortable while the door is barred.

In *Fertich v. Michener*, 111 Ind. 472, 60 Am. Rep. 709, where a pupil was locked out of the school room, when the thermometer stood at 18 degrees below zero, and returned home one fourth of a mile distant through the snow, causing her feet to become frosted, it was held that a rule requiring tardy pupils to remain in the hall until the opening exercises are concluded is a reasonable rule. But if the weather is unusually severe it would be unreasonable to enforce such rule, unless proper steps have been taken to render the pupil comfortable.

In *Thompson v. Beaver*, 68 Ill. 353, it was said that a rule that would bar the doors of a school-house against little children who had come a great distance in cold weather for no other reason than that they were a few minutes tardy was unreasonable and unlawful.

IV. For connection with secret societies.

A pupil cannot justly be excluded from school for being connected with a secret society, where it is not shown that the interests or government of the school are affected thereby.

So, a requirement of the board of trustees and the faculty of a state university, that in order to become a student the applicant shall renounce his membership and refuse to be an active member of a Greek fraternity, was held to be *ultra vires* and unreasonable. *State, Stallard, v. White*, 32 Ind. 286, 42 Am. Rep. 496.

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Even if the board of education had made a rule suspending pupils for the alleged misconduct of another, such a rule would have been unreasonable and void.

Mr. J. W. Harris, Jr., also for defendants in error.

Cobb, J., delivered the opinion of the court:

The official report states the facts. When a parent goes to the school room of a lawfully established public school, and, in the presence of his or her children and other pupils, publicly calls in question the justice or correctness of a decision made by the teacher in a matter of discipline relating to such children, uses offensive and insulting language to such teacher, and acts in such a manner as to interrupt the exercise of the school, and conducts himself or herself in such a manner as to bring the teacher and the discipline of the school into contempt in the eyes of the pupils, it is not only lawful, but it is the duty of the authorities of the school, in the protection of the teacher whom they have placed on duty, as well as to sustain the character and discipline of the school, to exclude from the school room the children of such parent, and this, too, although those thus excluded had not been guilty of a violation of any rule of the school. The Constitution of the state provides that "there shall be a thorough system of common schools for the education of children in the elementary branches of an English education only, as nearly uniform as practicable, the expenses of which shall be provided for by taxation or otherwise. The schools shall be

And where a student was taken to a room, and a private memorandum book taken from him supposed to contain a list of students and matters pertaining to a society formed for the purpose of exciting ill feeling between lay and clerical students, and the student was locked in his room for about two hours in order that he might not communicate with others until he should leave through expulsion, it was held in an action for false imprisonment that it was incidental to the authority of a head master to expel from the school over which he presides any scholar or student whose conduct is such that he could no longer be permitted to remain without danger to the school. The court said that this, however, is not a power to be exercised arbitrarily. It may be questioned, and although no doubt a large discretion must be allowed, it must not be exercised wantonly or capriciously. It was found by the verdict of the jury that there had been an assault and imprisonment and that there was no such society as stated, and that the imprisonment was not justified. It was held that while the action was not for expulsion the right to expel entered into the question of false imprisonment and affected it. *Mitsgerald v. Northcote*, 4 Fost. & F. 656.

V. For failure to participate in certain studies and exercises.

There is some conflict as to the power to suspend or expel pupils for failure to participate in certain required studies or exercises, if the parent of the pupil requests that his child be excused.

Thus, it was held in the following cases that a pupil could not be required to pursue a study that the parent objected to, if the omission did not affect the other scholars: *State, Shibley, v. School Dist. No. 1*, 31 Neb. 532; *Trustees of Schools v. Peo-*

free to all children of the state, but separate schools shall be provided for the white and colored races." Civil Code, § 5906. The general assembly in the act intended to carry out this mandate of the Constitution, and provide a system of common schools outside of incorporated towns and cities, declared that "admission to all common schools shall be gratuitous to all children between the ages of six and eighteen years, residing in the subdistricts in which the schools are located." Pol. Code, § 1878. It is also provided in the Constitution that "authority may be granted . . . to municipal corporations, upon the recommendation of the corporate authority, to establish and maintain public schools in their respective limits, by local taxation; but no such local law shall take effect until the same shall have been submitted to a vote of the qualified voters in each . . . municipal corporation and approved by a two thirds vote of persons qualified to vote at such election; and the general assembly may prescribe who shall vote on such question." Civil Code, § 5909. By an act approved December 24, 1888, the general assembly, under the authority of the section last quoted, made provision for the establishment of a system of public schools in the city of Cartersville, to be maintained by local taxation. Acts 1888, p. 823. The election which the Constitution required having resulted in favor of the establishment of the schools, the act went into effect, and the schools thus established went into operation. The government of the schools was vested in a board of commissioners, who had authority to establish, and from time to time modify, a system of public schools for said city of Cartersville, to be open "not less than six nor longer than ten scholastic months in each year," and also "to purchase, build, enlarge, and rent build-

ings, appurtenances, and furniture for school purposes, to employ a superintendent or principal and other teachers, to suspend or discharge them for good causes, to prescribe the terms upon which students are to be received into said schools, and to establish such rules, regulations, and by-laws as they may deem right and proper in maintaining a system of public schools in said city: provided, the same are not inconsistent with the Constitution and laws of this state." It was declared that "all children between the ages of six and eighteen years, whose parents, guardians, or natural protectors bona fide reside within the corporate limits of said city, shall be entitled to the benefit of said schools." That municipal schools thus established are a part of the common school system provided for by the Constitution there can be no question, and they must therefore conform in all respects to the requirements of the Constitution. It follows that the act creating the school system for the city of Cartersville must be construed as establishing schools which shall be free to all children who may lawfully enter the same in that municipality. *Irrin v. Gregory*, 86 Ga. 605.

The board of commissioners of the city of Cartersville (hereafter referred to as the board of education) adopted the following rule in reference to the admission of children into such schools: "All children residing within the limits of the city, who are not otherwise disqualified by these regulations, and who are between the ages of six and eighteen years, shall be entitled to attend the public schools of the city, the parents or guardians furnishing to the principals evidence of their citizenship, giving name and age of pupil and name of street on which they reside." Under such a system as that above outlined, beginning with the constitutional provision for a system

ple, *Van Allen*, 87 Ill. 303, 29 Am. Rep. 55; *Rullison v. Post*, 79 Ill. 567; *Morrow v. Wood*, 35 Wis. 59, 17 Am. Rep. 471; *Guersey v. Pitkin*, 33 Vt. 224, 76 Am. Dec. 171; *Sewell v. Defiance Union School Bd.* of Edu. 29 Ohio St. 89.

But in other cases it was held that the pupil had been properly suspended, although the parent had requested that such pupil be excused from the particular study in question. *State, Andrew, v. Weber*, 108 Ind. 81, 58 Am. Rep. 30; *Kidder v. Chellis*, 59 N. H. 473.

And such a remedy was suggested as proper in *State v. Mizner*, 50 Iowa, 153, 32 Am. Rep. 123.

And in the following cases an expulsion for failure to participate in certain recitations was upheld where the parent's interference was not shown: *Guersey v. Pitkin*, 33 Vt. 224, 76 Am. Dec. 171; *Sewell v. Defiance Union School Bd.* of Edu. 29 Ohio St. 89; *People, McHugh, v. School Officers*, 18 Abb. Pr. 165, note.

And in the following cases expulsion for not participating in religious exercises was sustained; but in none of them was it shown or discussed that the parent requested that his child be excused. *Donahoe v. Richards*, 38 Me. 376; *Spiller v. Woburn*, 12 Allen, 127; *McCormick v. Burt*, 95 Ill. 263, 35 Am. Rep. 163.

The board of trustees were not justified in expelling a pupil from their school for failure to study a prescribed branch against the protest of the parents, that the child should not pursue such study. *State, Shelbley, v. School Dist. No. 1*, 31 Neb. 552.

And an expulsion for the failure to pursue a particular study where the parent requested that the

pupil should be excused, was illegal, under Neb. Comp. Stat. chap. 79, subd. 6, § 3, providing that the trustees shall have power to prescribe courses of study and text-books for the use of said schools, and to make such rules and regulations as they may think needful for the government of the schools. It was held that any rule or regulation that requires a pupil to continue a particular study against the request of the parent is arbitrary and unreasonable. *State, Shelbley, v. School Dist. No. 1*, 31 Neb. 552.

A refusal to admit a pupil to pursue other branches, omitting grammar, was unreasonable where the father of the pupil requested that grammar be omitted and the pupil was sufficiently proficient in all other studies. It was held that such rule could not be sustained under Ill. Rev. Stat. 1874, pp. 962, 963, § 48, providing that the school directors may adopt and enforce all necessary rules and regulations for the management and government of the schools, to direct what branches of study shall be taught and what text-books shall be used, and to enforce uniformity of text-books. *Trustees of Schools v. People, Van Allen*, 87 Ill. 303, 29 Am. Rep. 55.

So, an expulsion by force employed by a principal teacher under the direction of the directors of a common-school district, for declining to study bookkeeping, where the parent of the pupil objected to her pursuing that study, was illegal. It was held that Ill. School Laws 1865, and *Sess. Laws*, p. 119, § 13, providing that the school directors may direct what branches of study shall be taught, and

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of common schools and ending with the rule of the local school board, is the right to attend school inherent in the child? or is the purpose of the law simply to provide a place where parents may discharge the obligation which they owe to their children to give them an education? At common law it was the duty of parents to give to their children "an education suitable to their station in life,—a duty pointed out by reason, and of far the greatest importance of any." 1 Bl. Com. p. 450. "The education of children in a manner suitable to their station and calling is another branch of parental duty, of imperfect obligation generally in the eye of the municipal law, but of very great importance to the welfare of the state. Without some preparation made in youth for the sequel of life, children of all conditions would probably become idle and vicious when they grow up, either from the want of good instruction and habits and the means of subsistence, or from want of rational and useful occupation. A parent who sends his son into the world uneducated, and without skill in any art or science, does a great injury to mankind as well as to his own family; for he defrauds the community of a useful citizen, and bequeaths to it a nuisance. This parental duty is strongly and persuasively inculcated by the writers on natural law." 2 Kent, Com. pp. 195, 196. In the case of *Rulison v. Post*, 79 Ill. 567, Mr. Justice Walker in the opinion says: "Parents and guardians are under the responsibility of preparing children intrusted to their care and nurture for the discharge of their duties in after life. Lawgivers in all free countries, and, with few exceptions, in despotic governments, have deemed it wise to leave the education and nurture of the children of the state to the direction of the parent or guardian. This is, and has ever been the

spirit of our free institutions. The state has provided the means, and brought them within the reach of all, to acquire the benefits of a common-school education, but leaves it to parents and guardians to determine the extent to which they will render it available to the children under their charge." While the common law recognizes this as a duty of great importance, there was no remedy provided for the child in case this duty was not discharged by the parent. The child, at the will of the parent, could be allowed to grow up in ignorance, and become a more than useless member of society, and for this great wrong, brought about by the neglect of his parents, the common law provided no remedy. Not only no remedy was given to the child, but no punishment was inflicted upon the parent. In attempting to give a reason for this defect in the common law, Sir William Blackstone says: "Perhaps they thought it punishment enough to leave the parent, who neglects the instruction of his family, to labor under those griefs and inconveniences, which his family, so uninstructed, will be sure to bring upon him." 1 Bl. Com. p. 781. While the common law provided for apprenticing poor children, and thereby giving them some of the advantages of an education, "the rich, indeed," says the same writer, "are left at their own option whether they will breed up their children to be ornaments or disgraces to their family." This part of the common law became a part of the law of this state. Civil Code, § 2501. The section cited declares that the father shall provide for the maintenance, protection, and education of his child, but relatively to the matter of education, no provision is made for the punishment of a parent who fails to discharge this duty, or for the relief of the child who is the victim of such failure. It will be seen, from an examination

may suspend or expel pupils for disobedience, refractory or incorrigible bad conduct, did not give the right to suspend or expel pupils for any cause not therein enumerated. It was also held that § 19, providing for adopting the common-school branches providing that nothing herein contained shall prevent the teaching of other or higher branches than those enumerated, did not confer the power to compel pupils to pursue such studies without the consent of their parents or guardians, or their own consent. *Rulison v. Post*, 79 Ill. 567.

In *Trustees of Schools v. People*, Van Allen, 87 Ill. 303, 29 Am. Rep. 55, the court said: "Whether fortunate or unfortunate to him, however, it is for the parent, not the trustees, to direct the branches of education he shall pursue, so far as they are taught, and he [the pupil] is by necessary preliminary education qualified to pursue them, in the high school."

In *Morrow v. Wood*, 85 Wis. 59, 17 Am. Rep. 471, where it was held that a parent's right to dictate what studies his child shall pursue was superior to that of the teacher, it was said that "the statute gives the school board power to make all needful rules and regulations for the organization, graduation and government of the school, and power to suspend any pupil from the privileges of the school for noncompliance with the rules established by them or by the teacher with their consent; and it is not proposed to throw any obstacle in the way of the performance of these duties. But these powers and duties can be well fulfilled without denying to the parent all right to control the education of his children."

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But a scholar was properly expelled from a district school for failure to comply with a rule requiring that the pupils in grammar shall write English compositions, where the parents made no request that such pupil should be excused from so doing. *Guernsey v. Pitkin*, 32 Vt. 224, 78 Am. Dec. 171.

And in *Sewell v. Defiance Union School Bd.* of Edu. 29 Ohio St. 89, it was held that a pupil was properly suspended where he failed to comply with a rule which provided that if any pupil shall fail to be prepared with a rhetorical exercise at the time appointed therefor he or she shall be immediately suspended from such department unless excused for reasonable cause. This rule was held reasonable under an Ohio act authorizing the board of education to make and enforce all the necessary rules and regulations for the government of teachers and pupils therein, and to determine the various studies and parts of studies in which instruction shall be given.

Where a pupil was suspended by a principal of a school for alleged insubordination for refusing to sing the chorus of a school song called "The Battle Hymn of the Republic," a mandamus was refused on the ground that the board of trustees were vested with the power to conduct and manage the schools in their respective wards; that in this conduct and management the discipline of the state schools is exclusively under their control; that to their direction consequently and necessarily is confided the power to decide questions relating to the violation of discipline, and that their judgment was conclusive. *People, McHugh, v. School Officers*, 18 Abb. Pr. 165, note.

of our statutes in reference to the subject of education at the public expense, that they contain nothing which expressly or impliedly alters the common-law rule, that education is a duty owed by the parent to the child. The Constitution of 1777 provided: "Schools shall be erected in each county and supported at the general expense of the state, as the legislature shall hereafter point out and direct." Article 54, Marbury & C. Dig. p. 12. The Constitution of 1798 provided: "The arts and sciences shall be promoted in one or more seminaries of learning, and the legislature shall, as soon as conveniently may be, give such further donations and privileges, to those already established, as may be necessary to secure the objects of their institution; and it shall be the duty of the general assembly at their next session to provide effectual measures for the improvement and permanent security of the funds and endowments of such institutions." Article 4, § 13. The Code of 1861 provided for an educational fund and officers in whose hands its management should be placed, and the plan of its distribution among the several counties. Code 1861, §§ 1189, 1218. The beneficiaries of this fund were children between the ages of six and eighteen years within the several counties, but "children of parents who are unable to educate them, children discarded by their parents, and indigent orphan children," were to be first provided for. *Id.* § 1219. A study of the history of the school law in this state from 1785, when the legislature provided for a complete system of state education with a central seat of learning, down to the adoption of the Code of 1861, will disclose occasional efforts to provide a system of free schools which would educate the entire population of the state, without regard to the ability of the parent to furnish the

child with education at his own expense. Prince, Dig. pp. 866, 869. While the act of 1785 was primarily for the purpose of establishing "a public seat of learning," and did result in the establishment of the university of the state, the plan of the framers of the act was much broader than this, and it was distinctly provided that "all public schools instituted or to be supported by funds or public moneys, in this state, shall be considered as parts or members of the university, and shall be under the foregoing directions and regulations." An effort was made at a later day to provide a system of county academics and free schools to carry out the intention of the framers of the act of 1785. Prince, Dig. p. 17. In 1819 and 1821 appropriations were made amounting to \$675,000, the principal of which was required to be invested in bank stock, and the interest to be used for the support of academics and free schools throughout the state. Hotchkiss' Stat. Law, Ga. p. 178, and note. By the act of 1837 (Acts 1837, p. 94) the academic and poor-school funds were consolidated, and set apart for the support of a general system of education by common schools. It is interesting to notice in this connection that one of the purposes for which this fund was to be expended was to purchase books and stationery for children whose parents were unable to furnish the same. This act, with its amendments, remained in force until 1840, when it was repealed. Acts 1840, p. 61. The common-school system was abandoned, and the fund set apart for that purpose became a poor school fund. These efforts, made from time to time to establish a system of free schools for all the children of the state, were not successful; the result in each instance being either a repeal of the appropriation or a return to the poor-school system.

And the suspension of a pupil was proper where he failed to comply with a rule made by the board of trustees of a high school, requiring that the pupil shall study music and provide a book for that purpose, although the father had arbitrarily requested that his son be excused from that study. It was also held that such rule was authorized under Ind. Rev. Stat. 1881, § 4497, providing that the trustees shall provide to have taught in the common schools orthography, reading, arithmetic, geography, English grammar, physiology, United States history, and such other branches of learning and other languages as the advancement of pupils may require and the trustees from time to time direct. *State, Andrew, v. Webber*, 108 Ind. 31, 58 Am. Rep. 30.

So, where a pupil acting in accordance with the direction of his parent refused to comply with a rule requiring him to take part in declamation, and was suspended by the teacher, an action of trespass could not be maintained for assault and battery. It was held that the power of each parent to decide what studies the scholar shall pursue, and what exercise he shall perform, would be a power of disorganizing the school and practically rendering it substantially useless. *Kidder v. Chellis*, 59 N. H. 473.

The fact that the teacher in this case had not obtained his certificate until after the pupil had been suspended for failing to comply with a reasonable rule did not give a right of action for damages to the pupil. *Kidder v. Chellis*, 59 N. H. 473.

In *State v. Mizner*, 50 Iowa, 152, 32 Am. Rep. 128, where a pupil was cruelly beaten for not having an

algebra lesson when the parent and the pupil both had requested that that study be dropped, it was said that the proper remedy would have been expulsion.

In *Dunahoe v. Richards*, 38 Me. 376, where a pupil was expelled for noncompliance with a rule requiring a scholar to take part in the Bible exercises although the pupil was willing to read from the Douay version, and the parent brought an action on the case for such expulsion, it was held that the parent could not recover as there was no act done by which the ability of the child to render service was diminished; that the school was for the benefit and instruction of the pupil. It was said that if the pupil's rights have been violated she alone is entitled to compensation.

Damages could not be recovered where a pupil was excluded from a public school for refusing to comply with the regulations requiring the pupils to bow their heads in morning prayer exercises, unless the parent of a pupil should request that such pupil be excused therefrom, and the parent declined to make any request and directed his child not to obey the rule. It was held that the regulation was a reasonable one in the interest of quiet and decorum, and did not infringe on the religious liberty of the pupil. *Spiller v. Woburn*, 13 Allen, 127.

The expulsion of a pupil for nonobedience of a rule requiring pupils to lay aside their books during the opening exercises while the Bible is being read did not authorize an action on the case for damages where there was no allegation that the suspension was either wantonly or maliciously done. In this

The Constitution of 1865 provided that "the general assembly shall have power to appropriate money for the promotion of learning and science, and to provide for the education of the people, and shall provide for the early resumption of the regular exercises of the University of Georgia, by the adequate endowment of the same." Code 1868, § 4937. The Constitution of 1868 provided that "the general assembly, at its first session after the adoption of this Constitution, shall provide a thorough system of general education to be forever free to all children of the state, the expense of which shall be provided for by taxation, or otherwise." Code 1878, § 5132. The various acts of the general assembly, passed from time to time to carry into effect these constitutional provisions, upon examination will be seen to be entirely consistent with the scope of the Constitution, which seems to provide a system of public education which should be free to all the children of the state. The common-law rule being clear and unequivocal, that, while the duty rested upon the parent to educate his child, the law would not attempt to force him to discharge this duty, the child, so far as education is concerned, is completely at the mercy of the parent. Therefore at common law the child had no right to demand an education at the hands of the parent. This being a common-law rule, no law of this state, either constitutional or statutory, will be held to alter or abolish it, unless the terms of such law imperatively demand such construction. Every Constitution that has been of force in this state, and every statute passed thereunder, from the first Constitution adopted in 1777 to the one now in force, adopted 100 years later, will be found to be in all of their varying provisions on the subject of education entirely consistent with the common-law rule which de-

clares that it is the duty of the parent to educate his child, but at the same time leaves the child remediless if the duty is not discharged. The laws now in force only provide means for the parent to discharge the natural and moral duty which is upon him, and do not confer upon the child any right which he did not have at common law. At common law the child's right to an education was dependent, not only upon the will, but upon the pecuniary ability, of the parent. Under the present law in this state, the right of the child to an education is still dependent upon the will of the parent, but no longer dependent upon his pecuniary ability. It would be contrary to the policy of our law, based, as it is, upon the common law, to bestow upon the child, in the matter of its education, any right independent of the parent. It needs no argument to sustain the proposition that the father is, and ought to be, the head of the family, and the public has the right to look to him to control his children. A law which would take from him this control, and deprive the public of the benefits to be derived from such control, would be in conflict with our established institutions. A child, in Georgia, has the same right to an education at the hands of his parent that he had at common law, but no more. He could not at common law require his parent to educate him; he cannot, in Georgia, compel his parent to provide an education for him. At common law, if his parent was willing, but had not the means to carry out this will, the child must go without an education; in Georgia, if the parent is willing, the state provided a fund which is available to him, whether he be pecuniarily able to discharge the expense incident to an education or not. If the parent in Georgia, notwithstanding the fund provided for the purpose of educating his children, is not will-

school no one was required to be present at such exercises unless he chose to do so, but this pupil insisted that the rule interfered with the religious convictions of himself and his father. *McCormick v. Burt*, 96 Ill. 203, 35 Am. Rep. 163.

VI. For refusal to perform manual labor.

Under Wis. Rev. Stat. § 429, Laws 1883, p. 423, chap. 162, subchap. 15, § 10, authorizing a school board to make all needful rules for the government of schools, and to suspend any pupil from the privileges of the school for noncompliance with the rules established by them or by the teacher with their consent, a school board was not authorized to expel a pupil for refusal to comply with a rule requiring pupils on returning from recess to bring with them a stick of wood to be used in the school stove. It was held that such rule was unreasonable, and especially so in this case where the boy's health made it injurious for him to comply with the rule, of which the teacher had been informed by the parent, and had been requested to excuse the pupil from complying with such rule. *State, Bowe, v. Fond du Lac Bd. of Edu.* 63 Wis. 234.

VII. For failure to pay for injury to school property.

The suspension of a pupil for failure to pay for property accidentally or negligently injured is illegal.

So, where a pupil accidentally broke a pane of glass and was suspended it was held that the directors of a school district had no power to make or enforce a rule providing that any scholar who shall be

guilty of injuring or defacing any school property shall be required to pay for all damages, and that such scholar shall not be allowed to attend until payment of damages shall have been made. *Perkins v. Independent School Dist. Bd. of Directors*, 56 Iowa, 478.

And in such case it was held that this rule was unreasonable, and could not be enforced in that manner. *Perkins v. Independent School Dist. Bd. of Directors*, 56 Iowa, 478.

And the suspension of a pupil for accidentally, carelessly, and negligently breaking a window pane under a rule providing that a pupil defacing or injuring the school building or anything else belonging to the school shall be suspended until full satisfaction is made, was unlawful. It was held that a pupil should not be excluded if by negligence property is injured beyond its power or that of its parent to make compensation, which would be the result if carried out, and would be contrary to the statute making education compulsory. It was also held that, under Mich. How. Stat. § 5009, providing that the district board shall make and enforce suitable rules and regulations for the government and management of the school and for the preservation of the property, said board may authorize the suspension or expulsion of any pupil guilty of gross misdemeanor or persistent disobedience. The pupil must be guilty of some wilful or malicious act of detriment to the school, and the misconduct must be gross, or he must be persistent in his disobedience of reasonable and proper rules. *Holman v. School Dist. No. 5 Trustees*, 77 Mich. 605, 6 L. R. A. 524.

ing to discharge the duty, even at the expense of the state, there is no power, under the law, to compel him to discharge it, and the doors of the courts are closed against the child, whether he comes in his own name, or comes in the name of another as his next friend. The parent in Georgia owes the duty to his child to educate him, and the state has furnished the means for the payment of the expense incident to the discharging of such duty, but the child is as completely at the mercy of the parent as he was at common law.

The law providing for a public school system was not intended to create any new right in, or give any new remedy to, a child. It being settled that the presence of the child in school depends absolutely upon the consent and will of the parent, the school authorities are justifiable in dealing with the child in the light of this fact. As it is the purpose of the state to aid the parent in discharging a duty by furnishing a fund to pay the expenses incident to discharging such duty, it is the right of the state, through its constituted authorities, to require of the parent that he shall do nothing inconsistent with the peace, good order, and authority of the system which is provided for his benefit. While it is hard upon the child to be deprived of the benefit of an education because his parent will not submit himself to the reasonable rules, regulations, practices, and customs incident to the system providing for the education of his child, it is no harder than the rule at common law, which left the child completely at the mercy of the parent's will, so far as obtaining an education was concerned; in fact, the status of the child is the same. At common law he was at the mercy of an arbitrary parent whether he should be placed at school or not; placed at school in Georgia he is still at the mercy of an arbitrary parent, who may so conduct himself as to deprive the child of the benefits to be derived from an educa-

tion. There is no law which requires a parent to send his children to the public schools. A child who is entered at a public school must be required to conduct himself so as to not interfere with the discipline of the school. If this duty is incumbent upon the child it would seem that, for a stronger reason, a similar duty would rest upon the parent, who is the real beneficiary of the system. Public education which fails to instill in the youthful mind and heart obedience to authority, both private and public, would be more of a curse than a blessing; and the parent who in the school room, or in the vicinity of the school, in the presence of the children, so acts as to create the impression that the true way of life, is lawlessness and utter disregard of the rights of other people, should not only receive the punishment which the penal laws of the state would inflict upon him (Penal Code, § 427), but should also be deprived of the benefit of the fund which is provided to pay an expense which natural and moral duty would otherwise require him to bear. We must not be misunderstood. We do not intend that the argument should go to the length that the school authorities would have the right to exclude the child from the benefits of the school because of improper conduct on the part of the parent as to matters which are entirely disconnected with the school, or the attendance of the child, or the conduct or behavior of the parent with reference thereto. This right, as we have seen, would only arise where the parent interferes in a matter involving the discipline or conduct of such child. That the parent is guilty of acts which are unlawful and immoral would not necessarily have the effect of forfeiting his right to participate in the public school fund, and justify the authorities in excluding the child. The right of the child to attend a public school is dependent upon the good conduct of the parent as well as

And in this case a mandamus was granted in favor of the father requiring the restoration of his son. *Holman v. School Dist. No. 5 Trustees*, 77 Mich. 606, 6 L. R. A. 534.

VIII. *Controlling conduct of pupil after the relation of teacher and pupil has ceased.*

A pupil cannot be expelled for violating a rule forbidding pupils to attend social gatherings, where such pupil returns home and attends such gathering with the consent of his parent. A pupil cannot be expelled for newspaper articles reflecting on the school officers where no rule exists forbidding such conduct. After a pupil is expelled he has the same right as the public to enter the buildings at public entertainments.

The faculty of the state normal school had no right to make or enforce a rule suspending a pupil for attending a social gathering, where such pupil had returned to her parent's house and control, and having her father's consent had gone to the party with her brother. It was held that Mo. Rev. Stat. § 7166, authorizing the faculty to suspend or expel a pupil for "contumacy, insubordination, or immoral conduct," and providing the same appeal to the board of regents as is given a teacher, did not prevent a mandamus requiring the faculty to admit the pupil suspended for the violation of an unreasonable rule. *State, Clark, v. Osborne*, 24 Mo. App. 309, 32 Mo. App. 536.

And the directors of a school district had no right to enforce a rule authorizing the expulsion

of a pupil for attending social parties, where such pupil had returned to his home, and his parents approved of his attending such party. But the directors were held not liable in an action by such pupil for damages in the absence of an allegation in the petition that such directors were moved by malice, oppression, and wilfulness. *Dritt v. Snodgrass*, 68 Mo. 286, 27 Am. Rep. 343.

A pupil expelled from a state normal school has a right thereafter with other members of the public to enter the school grounds and buildings for the purpose of attending a school exhibition given by a literary society in the building. An expulsion by force from the audience room of such person holding a ticket entitled him to damages, where immoral character or anticipated breach of the peace was not the cause of the expulsion. *Hughes v. Goodell*, 3 Pittsb. 264.

A school board had no right to suspend a pupil for writing a newspaper article holding up the members of the board to ridicule, where there was no regulation of the school made in regard to such matters. This right was claimed under Iowa Rev. Stat. § 2054, authorizing the directors to dismiss pupils from school for gross immorality, or for persistent violations of the school regulations. *Murphy v. Independent Dist. Bd. of Directors*, 30 Iowa, 429.

IX. *Questions of pleading and practice.*

"The father of a child entitled to the benefits of the public school of the subdistrict of his residence

of the child. Both must submit to the reasonable rules and regulations of the school, and the parent must so conduct himself as not to destroy the influence and authority of the school management over the children whenever he comes in contact with the school authorities, whether commissioners, officers, or teachers, under circumstances where his conduct would be likely to influence the conduct of his children. The schoolmaster has always stood *in loco parentis* for certain purposes, and, notwithstanding the change from private schools into public schools, the schoolmaster of the present system is, and ought to be, in the place of the parent in a great many particulars. It is therefore a duty which the parent owes, not only to the master, but to the pupil himself,—his child,—that he who stands in the parent's shoes should not be impeded in discharging a duty which the parent has voluntarily placed upon him. Therefore it necessarily follows that when the parent has taken advantage of the school fund to discharge the burden which he would otherwise have to carry himself, and has placed his child under the control of the schoolmaster thus provided, any misconduct on his part which would interfere with the master in discharging the duty which he owes to such child would result, under the present system, as it always did under the old system, in the exclusion of the child from the benefits to be derived through the services of the master.

There was read in the argument of this case a letter written by Ex Chief Justice Bleckley to counsel for plaintiff in error, which contained an expression of his opinion upon the subject now under consideration. The words used by him so aptly express our views that we embody them herein as a part of our opinion: "Without having studied the question thoroughly, I have a strong impression that you are right in the fundamental merits of the

case. If we had a compulsory school system, the right of the child would probably not be affected by the conduct of the parent; but our system looks to voluntary co-operation by the parent in carrying out the system, and, where that is withheld in a matter vital to some discipline, the child has no more right to remain in the school than it would have if the parent objected to its remaining. Neither the school authorities nor any court could compel the child for its own interest to enter the school, or remain in it, without the parent's consent, and, where that consent is not given on the terms rightly prescribed by the school board, it is the same as withheld, or not given at all. It is certain that parental discretion can be exercised in keeping the child out of school. Can it also be exercised in keeping it in, irrespective of the considerations of sound discipline, though the invasion of discipline may be by the parent, and not by the child? If so, the whole field of discretion is covered by the parent's will, and a very limited part of it by public authority. Where a scheme of work contemplates joint effort, if one of the parties refuses to co-operate on reasonable terms the other may decline to continue the work on any other terms. So it seems to me." The reasons which have brought us to the conclusion that the misconduct of the father might be such as to deprive the child of the benefit of the public schools will also apply where the father is dead, and the obligation rests upon the mother, and she is guilty of such misconduct.

The question to be now considered is: What will be the effect of such misconduct by the mother in the lifetime of the father? While the obligation is upon the father to educate the child, and does not, in the lifetime of the father, in any manner rest upon the mother, still there is an obligation growing out of the relation of husband and wife and parent and

may maintain an action against the teacher of the school and the local directors of the subdistrict for damages for wrongfully expelling the child from the school." *Roe v. Deming*, 21 Ohio St. 468.

In an action by a pupil against individuals for damages for expelling and excluding her from a school without cause, it was held that if the defendants were the school committee and had acted by virtue of their authority, the remedy would be under Mass. Gen. Stat. chap. 41, § 11, providing that a child unlawfully excluded from any public school shall recover damages therefor in an action of tort against "the city or town" by which such school is supported. *Learock v. Putnam*, 111 Mass. 499.

Where a pupil was refused admission into the grammar department of the school on the ground that he was not qualified, and was also refused admission into the primary department because he had graduated and had been dismissed to make room for others, a mandamus requiring his admission was denied. It was held that his remedy was by appeal from the principal's decision of the board of trustees and from that board to the board of education. *People, Ulrich, v. Board of Education*, 4 N. Y. Supp. 102.

And an action could not be maintained against a teacher of the public schools by a parent for refusing to receive and instruct his child, as the remedy, if any, was by appeal to the school committee, who could enforce their authority and compel the teacher to accept the pupil if unjustly excluded. *L. R. A.*

cluded. (The reasons for refusing the pupil are not disclosed in this case.) *Spear v. Cummings*, 23 Pick. 224, 34 Am. Dec. 52.

In *Sherman v. Charlestown*, 8 Cush. 160, it was said that one reason why the action failed in *Spear v. Cummings*, 23 Pick. 224, 34 Am. Dec. 52, which was an action by a father for the failure to receive and instruct his children and for excluding them, was that the father is not the person injured, and was not entitled to recover damages in his own right without consideration of on what grounds, if any, a pupil could be excluded from the school, and that probably the legislature thought that children's rights were not sufficiently guarded, and passed Mass. Stat. 1845, chap. 214, providing for an action by a child against the town or city where he has been unlawfully excluded. And the court says that the act proceeds on the assumption that the pupil wrongfully excluded is the party injured, that the town is the body responsible for affording such instruction.

In an action by two pupils against two persons for forcibly ejecting them from school, it was held that the defendants could not justify by showing their authority where the only plea was the general issue, although plaintiffs had proved that one of the defendants was one of the committee and the other was the teacher. *Mack v. Kelsey*, 61 Vt. 399.

See *Yale v. West Middle School Dist. (Conn.)* 13 L. R. A. 161, note, *Common-school privileges are regulated by statute,—as to residence qualifications of pupils.* V. T.

child, resting upon the wife and mother, demanding her co-operation with the husband in everything that is necessary for the welfare of the child. If the father is, by a good reason, required to abstain from conduct which would injure, and possibly destroy, the entire benefits of the system, the mother, for like reasons, must be required to desist, and her conduct may be a good reason for causing both the child and the father to lose the benefits of the school fund. This is especially true when we take into consideration the provisions of the law of force in this state which declares that the "husband is the head of the family, and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her separately, either for her own protection, or for her benefit, or for the preservation of public order." Civ. Code, § 2478. It is neither for her protection, nor for her benefit, nor for the preservation of public order, that an act of the character above referred to should be declared to be her separate and independent act; but, on the other hand, public policy demands that the husband should be held responsible for her conduct, and be required to submit to the penalty which it would produce. The same reasons which require that there should be thrown around the father a restraining influence to prevent him from interfering with the operation and discipline of schools require that like restraints should be placed upon the mother. In a case where the child is free from fault, and the father is obedient to the law, it does look extremely hard that the wilful misconduct of the mother should thus bring distress upon two innocent persons; but it is better that they should suffer than that an institution in operation for the public good should be entirely subverted and destroyed, as would certainly be the result if the mother of every child in attendance on the schools was permitted, whenever disposed, to enter the school room, and upbraid the teacher in the presence of the pupils.

In the case of *Spear v. Cummings*, 23 Pick. 224, 84 Am. Dec. 53, Chief Justice Shaw, in referring to the power and authority of the school committee under the law of Massachusetts, which corresponds to the board of education in this case, uses the following language: "The general charge and superintendence, in the absence of express legal provisions, includes the power of determining what pupils shall be received and what pupils rejected. The committee may, for good cause, determine that some shall not be received, as, for instance, if infected with any contagious disease, or if the pupil or parent shall refuse to comply with regulations necessary to the discipline and good management of the school." In the case of *Ferriter v. Tyler*, 48 Vt. 444, 21 Am. Rep. 133, it was held that children might lawfully be excluded from public schools for absence contrary to the rules of the school, notwithstanding such absence was by the authority and command of the parents, who were Roman Catholics, and by the direction of the priest, and for the purpose of attending religious services on one of the "holy days" of such church. In the case of *Sherman v. Charlestown*, 8 Cush. 160, it was held 41 L. R. A.

that a child of licentious and immoral character could be excluded from the school, although such character was not manifested by any acts of licentiousness or immorality within the school. In the opinion Chief Justice Shaw says: "On general principles, it would seem strange if, in the establishment of such a great public institution as that of the public schools, in the benefits of which the whole community has so deep and vital an interest, there were no power vested anywhere, sufficient to protect the schools thus established from the noxious influence of anyone whose presence and influence would be injurious to the whole, and subversive of the purposes manifestly contemplated by their establishment. . . . There is no express provision in the law authorizing such exclusion; it results by necessary implication from the provisions of the law requiring good discipline. It proves that the right to attend is not absolute and unqualified, but one to be enjoyed by all under reasonable conditions." In the case of *Spiller v. Woburn*, 12 Allen, 127, it was ruled that a school committee of a town may lawfully pass an order that the school shall be opened each morning by reading from the Bible and prayer, and that during the prayer each scholar shall bow the head, unless his parents request that he shall be excused from doing so; and may lawfully exclude from the school a scholar who refuses to comply with such order, and whose parents refuse to request that he be excused from so doing. In the case of *Bourne v. State, Taylor*, 85 Neb. 1, a rule which made it the duty of the teacher to keep a record of the standing of each pupil in the studies pursued by him, his attendance and deportment, and to send each month by the pupil a written report of the same to his parent or guardian, and which required such parent or guardian to sign and return the same to the teacher, was held to be reasonable, and the wilful refusal on the part of the parent to sign and return the same to the teacher was held to be a sufficient reason for excluding the child from school. In the case of *Fessman v. Seely* (Tex. Civ. App.) 80 S. W. 268, it was held to be a sufficient reason to exclude a child from school that the father refused to permit the teacher to whip him for misconduct, and took no steps himself to correct him. It is true that the school in this case was a private, and not a public, school, and the right of the plaintiff was predicated upon the contract with the teacher; but it would seem that the same reasons which would constrain the courts to hold that such conduct would be a violation of a contract entered into between a parent and a schoolmaster providing for the education of a child would also require them to hold that such conduct would justify the school authorities in refusing to carry out the agreement impliedly made with the patrons of a public school through the medium of the public-school law. In the case of *Bissell v. Davison*, 65 Conn. 188, 29 L. R. A. 251, it was held that a requirement that all children attending the public school should be properly vaccinated was a reasonable exercise of the public power of the state, and that the validity of the action taken by the school committee did not depend upon the actual existence of small-pox in the town, nor upon a reasonable

apprehension of an epidemic of that disease; and that a child who had not been vaccinated was properly excluded from the school, and would not be reinstated by the courts upon the application of the parent. In the opinion, Torrance, J., says: "The duty of providing for the education of the children within its limits through the support and maintenance of public schools has always been regarded in this state in the light of a governmental duty resting upon the sovereign state. It is a duty not imposed by constitutional provision, but has always been assumed by the state; not only because the education of youth is a matter of great public utility, but also, and chiefly, because it is one of great public necessity for the protection and welfare of the state itself. In the performance of this duty the state maintains and supports at great expense, and with an ever watchful solicitude, public schools throughout its territory, and secures to its youth the privilege of attendance therein. This is a privilege or advantage, rather than a right in the strict technical sense of the term. This privilege is granted and is to be enjoyed upon such terms and under such reasonable conditions and restrictions as the lawmaking power, within constitutional limits, may see fit to impose; and within those limits the question what terms, conditions, and restrictions will best subserve the end sought in the establishment and maintenance of public schools is a question solely for the legislature, and not for the courts." In the case of *State, Andrew, v. Webber*, 108 Ind. 81, 58 Am. Rep. 30, the school authorities of the city of Laporte adopted a rule requiring each pupil of the high school at stated intervals to employ a certain period of time in the study of and practice of music, and for this purpose to provide himself with a prescribed book. The superintendent, notwithstanding a request from the parent that his child might be excused from this exercise, required the pupil to take part in the musical exercises of the school, and, upon his refusal to obey, suspended him from school. The only cause or reason assigned by the parent for requiring his son to disobey the rule was that he did not believe it for the best interest of his son to participate in the musical exercises of the school, and did not wish him to do so. The suspension of the pupil was sustained as lawful and authorized, the court using the following language: "The important question arises, Which should govern the public high school of the city of Laporte, as to the branches of learning to be taught and the course of instruction therein,—the school trustees of such city, to whom the law has confided the direction of these matters, or the mere arbitrary will of the relator, without cause or reason in its support? We are of opinion that only one answer can or ought to be given to this question; the arbitrary wishes of the relator in the premises must yield and be subordinated to the governing authorities of the school of the city of Laporte, and their reasonable rules and regulations of the government of the pupils of its high school." In the case of *Duffield v. Williamsport School Dist.* 162 Pa. 476, 25 L. R. A. 152, where a rule of the school board required that pupils should undergo vaccination, the exclusion

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from the school of a pupil whose parents refused to have him vaccinated was held to be lawful, the rule requiring vaccination being enforced during the prevalence of an alarm over the report that there was a case of small-pox in the city. In the case of *Guernsey v. Pitkin*, 82 Vt. 224, 76 Am. Dec. 171, a requirement by the teacher of a district school that the pupils in grammar should write English compositions was held a reasonable one, and expulsion of a pupil who refused to comply with this requirement and produced no request from his parents asking that he be excused was held to be authorized. In the case of *Lander v. Seaver*, 82 Vt. 114, 76 Am. Dec. 156, it was held that a schoolmaster has, in general, no right to punish a pupil for misconduct committed after his dismissal from school for the day and return to his home, yet he may, on the pupil's return to school, punish him for any misbehavior, though committed out of school, which has a direct and immediate tendency to injure the school, and to subvert the master's authority. In the case of *King v. Jefferson City School Board*, 71 Mo. 628, 36 Am. Rep. 490, the court had under consideration the legality of the suspension from the public school of a pupil who had become amenable to a rule which required that "any pupil absent six half days in four consecutive weeks without satisfactory excuse shall be suspended from school." In the opinion, Napton, J., says: "It is said that occasional absences from school on the part of the pupil, or truency, as it is familiarly termed, is of no importance to anyone except the pupil, or his parents, and its indulgence is, therefore, not to be attended with such punishment as suspension or expulsion from the school entirely; that every child has a right to the public school, and that right cannot be taken away by a rule of the board; that such rule is subversive of the object of our system of common schools, which was designed to throw open . . . the doors of the school to all children of the proper age, and give them an opportunity of acquiring such education as will fit them for the after-duties of life. This is true, but this right of attending school necessarily requires, when the school is joined, and whilst such attendance continues, a submission to the regulations of the school. . . . The pupil, it is urged, is at liberty to be absent when he pleases, and such absence is a matter solely between him and his parents. . . . Such absences when without excuse are the fault of the parents, whose business it is to see that the attendance of their child is regular, unless prevented by causes which will, of course, be an excuse under the rule now in question."

It is true that in all of the cases cited some act was done by the child himself, and therefore they are not exactly identical in their facts with the case under consideration. But the act of the child was generally in obedience to a command of the parent, and the exclusion or suspension of the child from school was brought about by the wrongful conduct of the parent in commanding the child to do the act which was illegal, or directing the child to refrain from doing that which was lawfully required. So that it may be fairly said that in

the cases cited the child was deprived of the benefit of the school by the act of the parent. It will be also gathered from these cases that it is not absolutely essential that there should be a rule which has been in terms violated either by the child or by the parent. If the act complained of is such that in itself it would be subversive of the good order and discipline in the school, then the mere failure of the board of education to declare that unauthorized which every intelligent man knew could not be authorized would not prevent the school authorities from dealing with a person who was guilty of such an act. If, however, the act in itself be harmless, but may be harmful on account of the peculiar conditions surrounding the school and its authorities, then there should be a prescribed rule before the act could be complained of as one which would forfeit the right to patronize the school. It would seem to require no argument to sustain the proposition that an act of disorder in the school room, calculated to bring into contempt the authority of the school as well as the individual in charge for the time being, should be met with such punishment as would be calculated to impress the pupils with the importance of obedience and respect to constituted authority. Children are too much disposed naturally to look with contempt upon authority, especially when represented by a schoolmaster; and parents should be restrained from encouraging this tendency, so dangerous in its nature to private and public welfare. It is admitted by all that in such a case prosecution under the criminal laws of the state would be justified and proper. This would satisfy the public wrong growing out of the violation of the penal laws, but another, and it may not be unwise to say, a greater, wrong has been done than the mere infraction of the criminal law. The only adequate remedy for such a wrong is one which will cause the parents of the state to understand that that which is given to them for their benefit primarily, and for the benefit of their children secondarily, will be withdrawn from them and their children whenever they do an act which, in its effect, will be prejudicial to the system which is maintained for their benefit. We are aware that it has been held that where a child is excluded unlawfully from a public school, he has, in some cases, a right of action against the public officers, and that the right of action is not in the parent. *Donahoe v. Richards*, 38 Me. 376 and 379, 61 Am. Dec. 256; *Stephenson v. Hall*, 14 Barb. 222. The right to recover in such action is limited to cases where the public officials acted wantonly or maliciously. *McCormick v. Burt*, 95 Ill. 263, 35 Am. Rep. 163, *Dritt v. Snodgrass*, 66 Mo. 286, 27 Am. Rep. 343. In cases, however, where application was made for reinstatement of the child in the school, it will be generally found that the application was made in the name and in behalf of the parent or guardian. *Rutison v. Post*, 79 Ill. 567; *State, Bowe, v. Fond du Lac Bd of Education*, 63 Wis. 234; *Holman v. School Dist. No. 5 Trustees*, 77 Mich. 605, 6 L. R. A. 584; *Binde v. Klinge*, 30 Mo. App. 285; *Trustees of Schools v. People, Van Allen*, 87 Ill. 303, 29 Am. Rep. 55. That the child should have a right of action for being maliciously and wan-

tonly deprived of an education after the parent has entered him in the school is not in conflict with the principle which we contend for in this case. If the child is wantonly and maliciously excluded from the school, his right of action is entirely consistent with the right which exists in the parent to compel his reinstatement. That the child is damaged, there can be no question. His parent is under a duty to educate him. His parent has lawfully placed him at the place provided by law for this education. The parent, therefore, and no one but the parent, will be considered by the law when the question of entering the school, and being kept therein, is under consideration. The state will not allow anyone except the parent to decide the question as to whether the child shall be educated. If the parent decides that the child shall be educated, and the school authorities refuse to admit, or wrongfully exclude him from the benefits of the system provided, the courts will entertain an application to compel admission or reinstatement from no one except the parent or guardian, or some other person occupying a like relation to the child. While it is the act of the parent or guardian which places the child in the school, and puts him in a position where he can obtain the benefits of the system, this does not prevent a duty from arising on the part of the school authorities towards the child to abstain from unlawful conduct which would deprive the child of the benefit which the act of the parent has secured to it. The moment the child is placed in the school, this duty arises. A breach of this duty will be a tort for which the child can recover in a proper action against the person wantonly and maliciously depriving him of the benefits which he would receive from the school. Civil Code, 3807. The authorities of the public schools under the law owe a duty to the public to admit and keep within the schools all children who come within the lawfully prescribed rules, and whose parents or guardians see fit to enter them. When, therefore, such school authorities willfully, wantonly, and maliciously refuse to admit such children, a public wrong is committed, which may be remedied, so far as the public is concerned, by indictment for malpractice, or other appropriate remedy. Out of this breach of duty damage arises to the parent as well as to the child. The parent therefore has the right to appeal to the courts to compel the child to be admitted or reinstated, as the case may be, and also to appeal to the courts by his action for damages for the amount which he would be required to expend in the education of this child. The child would also have a right against the individuals thus wantonly and maliciously depriving him of the benefit which is secured to him by the law in the event the parent sees proper to enter him in the school. Broom, Com. Law, 19th London ed. pp. 757-759. When the law requires one to do an act for the benefit of another, or to forbear the doing of that which may injure another, though no action be given in express terms, upon the accrual of damages the party may recover. Civil Code, § 3809. It follows, therefore, that when a parent enters his child in the public schools, the law requires that the authorities of the school

shall do each and every act required by the law which will be for the benefit of the child, and also that the authorities shall refrain from doing any act which will injure the child. If the school authorities wantonly and maliciously refuse to discharge the duty thus imposed upon them, the child will have a right of action against the individuals who commit the wrongful act. Our conclusion is that the board of education, either in the absence of a rule or in furtherance of a prescribed rule, had the right to exclude from the schools under its control any child whose parent, in the school room, or its vicinity, in the presence of such child and other pupils, conducted himself or herself in such manner that their acts were calculated to produce disorder in the school, and break down and destroy its discipline. Under the facts set up in the answer of the board of education in this case, it was not only authorized, but it was its duty, to suspend the children of the defendants in error from the school. The trial judge erred in granting the mandamus and reinstating the children.

Cases and authorities which, though not in all respects pertinent to the matter dealt with in the above opinion, relate to questions arising out of "school laws:" *Learock v. Putnam*, 111 Mass. 499; *Roe v. Deming*, 21 Ohio St. 666; *Anderson v. State*, 3 Head, 455; *Fertich v. Michener*, 111 Ind. 472, 60 Am. Rep. 709; *State, Clark, v. Osborne*, 24 Mo. App. 809; *Cincinnati Bd. of Edu. v. Minor*, 23 Ohio St. 211, 13 Am. Rep. 235; *Davis v. Boston*, 133 Mass. 103; *Churchill v. Fewkes*, 13 Ill. App. 520; *Burdick v. Babcock*, 31 Iowa, 562; *King v. Jefferson City School Board*, 71 Mo. 628, 36 Am. Rep. 499; *Sewell v. Defiance Union School Bd. of Edu.* 29 Ohio St. 89; *Peck v. Smith*, 41 Conn. 442; *Board of Education v. Helston*, 32 Ill. App. 300; *Mack v. Kelsey*, 61 Vt. 399; *Perkins v. Independent School Dist. Bd. of Directors*, 56 Iowa, 476; *Patterson v. Nutter*, 78 Me. 509, 57 Am. Rep. 818; *State v. Mizner*, 45 Iowa, 248, 24 Am. Rep. 769; *Stevens v. Fassett*, 27 Me. 266; *Heritage v. Dodge*, 64 N. H. 297; *Deskens v. Gose*, 85 Mo. 485, 55 Am. Rep. 387; *Hutton v. State*, 23 Tex. App. 886, 59 Am. Rep. 776; *Balding v. State* (Tex. App.) 4 S. W. 579; *Com. v. Seed*, 5 Clark (Pa.)

78; *Danenhofter v. State*, 69 Ind. 295, 35 Am. Rep. 216; *Vanvactor v. State*, 113 Ind. 276; 2 Kent, Com. p. 203; *Morrow v. Wood*, 35 Wis. 59, 17 Am. Rep. 471; *Reeve, Dom. Rel.* 4th ed. pp. 357, 358; *Russell v. Lynnfield*, 116 Mass. 366; *Hodgkins v. Rockport*, 105 Mass. 476; *Scott v. School Dist. No. 2*, 46 Vt. 452; *Sheeham v. Sturges*, 53 Conn. 481; *Thompson v. Beaver*, 63 Ill. 356; *Trustees of Schools v. People, Van Allen*, 87 Ill. 803, 29 Am. Rep. 55; *Murphy v. Independent Dist. Bd. of Directors*, 30 Iowa, 429; *Parker v. School Dist. No. 38*, 5 Lea, 525; *Cooper v. McJunkin*, 4 Ind. 290; *Hathaway v. Rice*, 19 Vt. 102; *Wurd v. Flood*, 48 Cal. 36, 17 Am. Rep. 405; *Huse v. Lowell*, 10 Allen, 150; *Kidder v. Chellis*, 59 N. H. 473; *Meisolf v. State*, 21 Tex. App. 174; *Roberson v. Troutt*, 17 Ill. App. 386; *State, Bowe, v. Fond du Lac Bd. of Edu.* 63 Wis. 234, 53 Am. Rep. 282; *Abel v. Clark*, 84 Cal. 226; *Com. v. Cooke* (Mass.) 7 Am. L. Reg. 417; *Moore v. Monroe*, 64 Iowa, 367, 52 Am. Rep. 444; *Bishop, Noncont. L. §§ 593-596*; *Weaver v. Devendorf*, 3 Denio, 120; *Reed v. Conway*, 20 Mo. 52; *Tift v. Tift*, 4 Denio, 175; *State, Sheibley, v. School Dist. No. 1*, 81 Neb. 552; *Wilkes v. Dinaman*, 7 How. 89, 12 L. ed. 618; *State v. Burton*, 45 Wis. 155, 35 Am. Rep. 706; *Norton v. Tinmouth School Dist. No. 7*, 37 Vt. 521; *Blanchard v. Stearns*, 5 Met. 339; *Griffin v. Rising*, 11 Met. 339; *Stewart v. Southard*, 17 Ohio, 402, 49 Am. Dec. 463; *Downer v. Lent*, 6 Cal. 94, 65 Am. Dec. 489; *Hines v. Lockport*, 50 N. Y. 236; *Re Church Street*, 49 Barb. 455; *Jordan v. Hanson*, 49 N. H. 199, 6 Am. Rep. 508; *Gregory v. Brooks*, 37 Conn. 365; *Wilson v. New York*, 1 Denio, 599, 43 Am. Dec. 719; *Kendall v. Stokes*, 3 How. 87, 11 L. ed. 506; *Roberts v. Boston*, 5 Cush. 198; *People, Workman, v. Detroit Bd. of Edu.* 18 Mich. 400; *Allen v. Blunt*, 3 Story, 742; *Lincoln v. Hapgood*, 11 Mass. 350; *Wheeler v. Patterson*, 1 N. H. 88, 8 Am. Dec. 41; *Jenkins v. Waldron*, 11 Johns. 114, 6 Am. Dec. 359; *Rail v. Potts*, 8 Humph. 225; *Capen v. Foster*, 12 Pick. 485, 23 Am. Dec. 632; *Gates v. Neal*, 23 Pick. 308.

Judgment reversed.

All concur except **Atkinson and Little, JJ.**, who dissent.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

DENNEHY & COMPANY *et al.*, *Appts.*,
v.

John McNULTA *et al.*

(86 Fed. Rep. 825.)

1. The facts that a corporation as one of the contracting parties may constitute an unjust monopoly, and that its general business is illegal, cannot serve *ipso facto* to create default or liability on its contracts generally; nor can such facts be invoked collaterally

NOTE.—On the question of contracts for a monopoly, see also *Lovejoy v. Michels* (Mich.) 13 L. R. A. 770, and *note*.
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to affect in any manner its independent contract obligations or rights.

2. An agreement by a manufacturing corporation that, subject to conditions named and for the purpose of securing the continuous patronage of a purchaser, the company will, in six months, pay to the purchaser a certain amount, being a rebate on a purchase that day made, to be valid and payable only on condition that the purchaser, his successors and assigns, shall have bought their supply of such goods as are produced by the company exclusively from one or more dealers named,—cannot be enforced, even in equity, without the performance of the condition, unless waived or excused upon the ground

that the condition is affixed as a means of carrying out the illegal purposes of a monopoly, as the condition is the sole consideration of the promise, and if illegal the promise falls with it.

3. One who voluntarily and knowingly deals with parties combined to monopolize trade and arbitrarily control prices cannot accept and retain the goods and have a right of action against the seller for the money paid or any part of it, either upon the ground that the combination was illegal, or that its prices were unreasonable, however urgent the need of dealing with such combination may have seemed for preservation of business interests, as such need cannot change the payment made from its voluntary character.

(May 2, 1898.)

APPPEAL by claimants from a decree of the Circuit Court of the United States for the Northern District of Illinois disallowing their claims against funds in the hands of the court in the case of *Empire Distilling Company v. McNulta*. *Affirmed.*

Before Woods and Jenkins, Circuit Judges, and Seaman, District Judge.

Statement by Seaman, District Judge:

The appellants filed claims for allowance against the funds in court in the consolidated causes against the Distilling & Cattle Feeding Company, of which sufficient description appears in the case of *Empire Distilling Co. v. McNulta* (decided by this court January 4, 1897), 46 U. S. App. 578, 77 Fed. Rep. 700, and 23 C. C. A. 415.

(1) The claims of Dennehy & Co. were presented by petition in their name, and consisted of ninety-one written instruments, called rebate certificates or vouchers, issued by the Distilling & Cattle Feeding Company to Charles Dennehy & Co., aggregating the sum of \$5,238.28. The instruments are of various dates, numbers, and amounts, and in form as follows, with appropriate insertions in the blank spaces, respectively:

Peoria, Ill., ———, 189—. No. ———

Subject to the conditions named herein, and for the purpose of securing the continuous patronage of the within-named purchaser, the successors and assigns of the same, for its products, the ——— Distilling & Cattle Feeding Co., six months from the date of this purchase voucher, will pay to Charles Dennehy & Co., of Chicago, purchaser, ——— dollars (\$——), being a rebate of seven cents per proof gallon on ——— proof gallons of the Distilling and Cattle-Feeding Company's product purchased this day. This voucher will be valid and payable only upon condition that the above-named purchaser, the successors and assigns of the same, from the date of this voucher to the time of its payment, shall have bought their supply of such kinds of goods as are produced by the Distilling and Cattle-Feeding Company, and all compounds thereof, exclusively of one or more of the dealers named on the back thereof, until further notified, and shall also have subscribed to the certificate on the back hereof.

Distilling and Cattle-Feeding Co.,

By J. B. Greenhut, President.

Not transferable nor negotiable.

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When due, forward to the German American National Bank of Peoria, Ill., where this voucher is payable without exchange or other charge.

Printed upon the back is the following indorsement: "It is hereby certified that from the date of this voucher to the maturity thereof the within-named purchaser, and the successors and assigns of the same, have purchased all of their supply of such kind of goods, and their compounds, as are produced by the Distilling and Cattle-Feeding Co., exclusively from one or more of the dealers named hereon." Appended thereto is a list of sixty-one dealers or distillers referred to, variously located throughout the United States.

(2) The petition of Moses Salomon sets up that he is the assignee of sundry judgments rendered in justices' courts against the Distilling & Cattle-Feeding Company, and also the holder of vouchers on which said judgments were rendered; but it appeared, and was undisputed, that appeals from the judgments were perfected and pending, whereby the judgments became ineffective; and thereupon the petitioner introduced forty-seven certificates or vouchers issued to Stein Bros., of various dates, numbers, and amounts, aggregating the sum of \$3,604.64, and similar in form and tenor to the instrument above described, except that in a portion thereof the rebate was named at "5 cents per proof gallon," instead of 7 cents, as recited in the sample form, and the words, "Not transferable nor negotiable," do not appear, from the record, to have been printed or stamped thereon.

It is not claimed that the payees or holders in either case complied in any respect with the conditions named in the voucher. On the contrary, it appears, and is conceded, that there was neither compliance nor attempt to perform the condition. It further appears that no interest is in fact asserted by either of the payees named in the vouchers; but that (1) the Dennehy & Co. vouchers were indorsed in blank, without recourse, by that corporation, delivered to the United States Distilling Company, and were subsequently delivered to one G. E. Jones, for whose benefit, as finally divulged, the claim was filed in the name of the original payees; and (2) that the vouchers issued to Stein Bros. were by them indorsed payable to the order of one Joseph Wolf, without recourse, and by the latter indorsed in blank, and delivered to the petitioner, Salomon, an attorney at law, under an arrangement that Salomon should bear all expenses, and receive one half of any amount realized.

The hearing upon the claims was before a special master, who reported to the circuit court "the testimony and evidence, with his conclusions thereon." Aside from the matters above recited, voluminous testimony was introduced on behalf of the claimants, directed to showing that the Distilling & Cattle-Feeding Company, as organized and conducted, was a combination of a large percentage of the distillers of the country,—asserted to be 85 per cent thereof,—constituting an illegal trust, monopolizing and controlling the product of the country in that line to the extent of nearly 90 per cent; that the system of rebate

vouchers in evidence was entered into and designed to carry out and secure the purposes of the monopoly; that, through this control of the major share of distillery products, it was deemed a business necessity on the part of Dennehy & Co., Stein Bros, and other dealers throughout the country, to make all their purchases in that line from the distributors of the combination; or, as stated in the argument of their counsel, it became "impracticable and detrimental to their trade to buy liquors elsewhere," in the face of the monopoly; but it also appears that an independent and accessible supply existed in fact. The conclusions of the special master were against the allowance of the claims in both cases. Exceptions filed by each claimant were subsequently heard and overruled in the circuit court, the report of the special master in each case was confirmed, and final decree entered accordingly. The opinion thereon, by Showalter, Circuit Judge, is reported in 77 Fed. Rep. 265.

Mr. Moses Salomon for appellants.

Mr. Levy Mayer for appellees.

Seaman, District Judge, delivered the opinion of the court:

Passing technical objections to consider this controversy upon the merits, it is manifest that no liability is chargeable against the Distilling & Cattle Feeding Company, except upon one or the other of the following propositions: (1) That the conditions contained in the vouchers may either be ignored or set aside for illegality, and the promise thus segregated may be enforced without performance of the conditions; or (2) that in the original transactions money was paid to this corporation under circumstances from which the law raises an implied promise of repayment, within the doctrine of money had and received, which *ex æquo et bono*, belongs to the party by whom it was so paid. Under either head, the mere fact that the corporation, as one of the contracting parties, may constitute an unjust monopoly, and that its general business is illegal,—a status apparently held in *Distilling & Cattle Feeding Co. v. People, Moloney*, 156 Ill. 448, cannot serve, *speo facto*, to create default or liability on its contracts generally; nor can such fact be invoked collaterally to affect in any manner its independent contract obligations or rights. *National Distilling Co. v. Cream City Importing Co.* 86 Wis. 852, 855.

1. Can a cause of action be predicated upon the written agreement? In substance, the instrument promises that, "subject to the conditions named," and "for the purpose of securing the continuous patronage" of the purchaser as payee thereof, the Distilling & Cattle-Feeding Company will, in six months after date, pay to the purchaser the amount named, "being a rebate of 7 [or 5] cents per proof gallon" on a purchase that day made, and to be "valid and payable only on condition" that the purchaser named, his successors and assigns, from date of the voucher to the time of payment, "shall have bought their supply of such goods as are produced" by the promisor corporation "exclusively from one or more of the dealers named on the back," and "shall also have subscribed to the

certificate on the back." The terms are unequivocal that the promise was not to bind the corporation unless the promisee performed the acts stated. In other words, the obligations of the contract are dependent upon a condition precedent; and there can be no default by the promisor without performance of the condition, unless waived or excused by acts or conduct on the part of the promisor. Under the contract in question, compliance with the conditions was neither obstructed on the one side, nor attempted on the other, and it is manifest that no right of action at law has accrued in favor of the promisees. In view of this status, the appellants contend that the claims are entitled to equitable consideration, because (1) they are presented in the course of a proceeding in equity; and (2) this condition is affixed to the contract as a means by which to carry out the illegal purposes of a monopoly operating in restraint of trade, and for that reason a court of equity should either disregard the condition or strike it out. But assuming, for the argument, that both promises are well taken, no relief can then be granted for enforcement of the contract, as no consideration is left to support the promise. The condition is the sole consideration for the promise, and, if that is illegal, the promise falls with it. Even if the consideration were invalid only in part, the same result would follow, the promise being indivisible. *Bishop, Contr. §§ 74, 497; 3 Am. & Eng. Enc. Law, p. 886; Greenwood, Pub. Pol. rule 24.* No element of the contract as actually made between the parties remains to be enforced. A court of equity cannot make a new contract for them, nor can it destroy the substance of the one which they have entered into, and at the same time preserve the contract obligation. Recovery upon the vouchers in question, with the conditions unfulfilled, would have that effect, and it must be denied in equity as well as in law. *Klein v. New York L. Ins. Co.* 104 U. S. 88, 91, 26 L. ed. 662, 668.

2. The second and final proposition calls for the application of the equitable doctrine on which assumpsit may be maintained as for money had and received, and the right to this remedy must be found in the original transactions and circumstances under which the payments were made to the Distilling & Cattle-Feeding Company. These were, on their face, simple contracts of bargain and sale, and the only payments referred to were made upon distinct purchases of supplies at stipulated prices. The goods were legitimate subjects of trade, and there was no illegality in the nature of the contract of purchase. There is no pretense that the purchaser was either deceived or mistaken. On the contrary, his purchase, so far as appears, was in exact compliance both with his expectations and his bargain. It is not asserted that fraud entered directly into any of these transactions; nor is there impeachment for any cause, except upon the hypothesis for which the appellants contend, by way of collateral attack, namely: (1) That an unlawful combination enabled the seller to control and arbitrarily fix prices upon nine tenths of the distillery products of the country; (2) that the exigencies of business on the part of the purchasers constrained them to deal with this com-

bination; (3) that the amount named in the vouchers as rebate was beyond the fair price, and a distinct addition to the price which was imposed and withheld to secure continuance of the trade. And upon the line of testimony introduced as tending in some measure to show this state of facts the appellants rest their right to recover the alleged excess in the prices paid, as money paid under constraint or duress. Without considering whether the testimony referred to was either admissible under the issues, or of the effect alleged, and conceding, for the purposes of the case, the truth of each of the above propositions of fact, there can be no recovery of the money so paid, for the reason that no actual duress is shown, and no element exists to make the payment involuntary or compulsory. *Radich v. Hutchins*, 95 U. S. 210, 218, 24 L. ed. 409, 410; *Loneragan v. Buford*, 148 U. S. 581, 590, 37 L. ed. 569, 572; 6 Am. & Eng. Enc. Law, p. 57, title *Duress*, and cases cited. In *Radich v. Hutchins*, 95 U. S. 210, 218, 24 L. ed. 409, 410, it is said:

"To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary, . . . there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment, over the person or property of another, from which the latter has no other means of immediate relief than by making the payment. As stated by the court of appeals of Maryland, the doctrine established by the authorities is that 'a payment is not to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid.' *Baltimore v. Lefferman*, 4 Gill, 425, 45 Am. Dec. 145; *Brumagim v. Tillinghast*, 18 Cal. 265, 79 Am. Dec. 176; *Mays v. Cincinnati*, 1 Ohio St. 268."

In the case at bar neither the persons nor the property of the purchasers were within the physical control of the sellers when the

contracts of purchase were entered into, or when the payments were made thereupon, and in the eye of the law the transactions were voluntary. At the utmost, the circumstances here assumed show an urgent need for the goods to keep up their stock, and continue in trade, and to that end a business necessity to make their purchases from the illegal combination, because it so far controlled the market that they had reason to fear disastrous results if supplies were sought elsewhere. However urgent this need may have seemed for preservation of business interests, it cannot operate to change the payment made upon such purchases from the voluntary character impressed by the contract into the involuntary payment which may be reclaimed. *Emery v. Lowell*, 127 Mass. 138, 140; *Oustin v. Viroqua*, 67 Wis. 314, 320, and cases cited; 6 Am. & Eng. Enc. Law, p. 71. As the purchaser elected to take the goods upon the terms fixed, and with all the circumstances in mind, his rights must be measured by the contract, and not by the motives which influenced either party to enter into it. If the seller took advantage of his necessities, and made the price excessive, it would be subversive of the well-established rules which govern contract rights to receive testimony of such circumstances, to so modify the terms agreed upon, and allow recovery of the excess in price. In the case of an injurious combination of the nature asserted here, the remedy is by well-recognized and direct proceedings; but one who voluntarily and knowingly deals with the parties so combined cannot, on the one hand, take the benefit of his bargain, and, on the other, have a right of action against the seller for the money paid, or any part of it, either upon the ground that the combination was illegal, or that its prices were unreasonable.

We are of opinion that no foundation is established for either set of claims, and the *decrees thereupon* is affirmed.

INDIANA SUPREME COURT.

Elizabeth MOZINGO, *Appl.*,

v.

Moses M. ROSS *et al.*

(.....Ind.)

1. A partial payment by a principal debtor will not suspend the running of the statute of limitations in favor of his surety.
2. The absence from the state of a principal debtor does not suspend the running of the statute of limitations in favor of his surety.

(June 17, 1898.)

APPEAL by plaintiff from a judgment of the Circuit Court for Hamilton County in favor of defendant in an action brought to

enforce payment of a promissory note. *Affirmed.*

The facts are stated in the opinion.

Messrs. Fippen & Purvis for appellant.

Messrs. Fertig & Alexander for appellees.

Jordan, J., delivered the opinion of the court:

This action was commenced by appellant on March 2, 1897, to recover a judgment on a promissory note, and also to set aside an alleged fraudulent conveyance of land by the appellee Moses M. Ross, to his coappellee Martha Price, and to subject the lands so conveyed to the payment of the judgment sought to be recovered upon the note. The note in suit appears to have been executed on December 20, 1882, by one Francis M. Ross, together with the appellee Moses M. Ross, to appellant, for the sum of \$150, due in twelve months after the date thereof. The following partial payments seem to have been made on the note, and

NOTE.—As to the power of a partner to interrupt the statute of limitations after dissolution, see note to *Kerper v. Wood* (Ohio) 15 L. R. A. 658.
41 L. R. A.

indorsed thereon, as shown by a copy filed as an exhibit with the complaint, to wit: September 26, 1888, §13; January 6, 1887, §20, as interest; December 24, 1887, §15; November 27, 1889, §57.57; December 18, 1889, §20. Among other defenses interposed by the appellee Moses M. Ross, under his separate answer, against a recovery upon the note, was the statute of limitations of ten years. Appellant replied to this answer in three paragraphs, but subsequently dismissed the first and second. The third paragraph of the reply, in avoidance of the defense of the statute of limitations set up by the appellee Moses M. Ross, averred that said Ross had executed the note in suit as the surety for one Francis M. Ross, and alleged the truth to be that said Francis M., the principal, had made the various partial payments on the note, as set out in the exhibit filed with the complaint, and that long before ten years had elapsed after the execution of the note, to wit, within six years after its execution, said principal, Francis M., with the knowledge and consent of the defendant Moses M. Ross, his surety, but without the knowledge or consent of the plaintiff, removed from the state of Indiana, and became a nonresident of said state, and has so remained and continued to be a nonresident up to the present time; and, by reason of his being such nonresident, it is alleged that the plaintiff could not proceed against him as the principal for a judgment on the note. A demurrer was sustained to this paragraph, and, appellant refusing to further plead, judgment was rendered that she take nothing by her action, and that the defendants recover of her their costs. The sustaining of the demurrer to the third paragraph of reply is the only error assigned. Appellant insists that the facts alleged in the reply were sufficient to avoid the defense of the statute of limitations set up in the answer. The questions presented for decision are: First. Will a partial payment of a principal debtor suspend the running of the statute of limitations in favor of his surety? Second. Will the absence of the principal debtor from the state suspend the statute in favor of such surety? Passing the consideration of the infirmities that are urged against the pleading in controversy, to the effect that it pleads evidence instead of facts, and that it is deficient in not setting out the partial payments made, instead of referring to them only, as shown by the exhibit filed with the complaint, we proceed to determine the real questions discussed by the counsel of both parties to this appeal.

Burns's Rev. Stat. 1894, § 302 (Rev. Stat. 1881, § 301, Horner's Rev. Stat. 1897, § 301), relative to the statute of limitation, provides: "No acknowledgment or promise shall be evidence of a new or continuing contract, whereby to take the case out of the operation of the provisions of this act, unless the same be contained in some writing signed by the party to be charged thereby." Burns's Rev. Stat. 1894, § 303 (Rev. Stat. 1881, § 302; Horner's Rev. Stat. 1897, § 302), provides that "the acknowledgment or promise of one joint contractor or executor or administrator shall not render any other joint contractor, executor, or administrator liable under the provisions of this act." The next section—304 (303)—declares that

"nothing contained in the preceding sections shall take away or lessen the effect of any payment made by any person," etc. It is the settled rule that an admission of continued indebtedness may be inferred from the fact of part payment by a debtor. Such inference, however, is not one of law, but of fact. The payment is only prima facie evidence of the acknowledgment or admission of the debtor, and is subject to be rebutted by other evidence and the circumstances under which it was made. *Carlisle v. Morris*, 8 Ind. 421; *Willey v. State, Brown*, 105 Ind. 453. The statute, as we have seen, declares that no acknowledgment or promise shall be evidence of a continuing contract to take the case out of the operation of the statute, unless it be in writing signed by the party to be charged thereby. It is further provided that the promise or acknowledgment of a joint contractor shall not have the effect to render any other joint contractor liable. It is expressly declared, however, that these provisions of the law shall not take away or lessen the effect of any payment made by any person; consequently, they leave the effect of a partial payment untouched. The rule applicable to a payment, in taking a case out of the provisions of the statute of limitations, or, rather, extending the time during which the action may be commenced, does not depend on any provisions of the statute of limitations, but is the result of judicial decisions, and the reason of the rule depends wholly upon such decisions. The reason upon which the rule is said to rest is that a partial payment, voluntarily made by a debtor, upon a claim or debt, is in the nature of an acknowledgment or admission by him of his liability for the whole demand; and from the fact that he made the payment a new promise on his part to pay the remainder of the debt may be implied, and, under this legal inference, such new promise arises at the time the partial payment is made. The origin of the rule is fully considered and set forth in *Van Keuren v. Parmelee*, 2 N. Y. 523, 51 Am. Dec. 322. It must be evident, we think, that, to bring the case within the reason of the rule, the payment should be made by the party to be charged with its effect, or by his agent duly authorized to so charge him. A partial payment being treated by the law as nothing more than prima facie evidence of an admission or acknowledgment that the debt is due, it would seem in reason, that it could and should only affect the party that makes it, unless he has authority to speak for others as well as himself. This doctrine finds support in the well-affirmed rule that the acknowledgment of a debt made by one partner after the dissolution of a partnership is not sufficient to take the case out of the operation of the statute of limitations as to the other partners. *Yandes v. Lafavour*, 2 Blackf. 371; *Kirk v. Hiatt*, 2 Ind. 322. In the case of *Bottles v. Miller*, 112 Ind. 584, it is held that a payment upon a promissory note by one joint and several maker will not defeat the operation of the statute of limitations as to any other maker, nor deprive the latter of his right to avail himself of the statute as a defense. While the question in that case does not appear to have been fully considered, the decision thereof seemingly being controlled by the construction

which the learned judge, speaking for the court, placed upon the statute of limitations, we are, however, satisfied, in view of the authorities, that the conclusion reached by the court upon the question in that appeal was correct.

The statute, as heretofore said, in effect declaring that the acknowledgment or promise of one joint contractor will not take the case out of its operation as to any other joint contractor, no sufficient reason can be given, nor would any seem to exist, that would make a partial payment more potent in its effect than an express acknowledgment or promise by a debtor. Especially ought this to be true in view of the fact that such payment is treated by the law as evidence only of a new promise to pay the remainder of the debt. We are of the opinion, and so hold, that the correct and better rule is that a partial payment can serve only to suspend the running of the statute of limitations as against the party making the payment, by himself or duly authorized agent; and the fact that the one making the payment is the principal debtor does not alter nor change the rule as to other debtors who executed the note or obligation as his sureties. We are aware that there are decisions of the higher

courts of sister states which hold that the payment by one or more parties jointly and severally liable upon a note or other obligation made before the limitation attaches, will suspend the running of the statute in favor of the others; but the great trend of the decisions of courts of other states sustains the conclusion we have reached, among which are the following: *Van Keuren v. Parmerlee*, 2 N. Y. 523, 51 Am. Dec. 322; *Shoemaker v. Benedict*, 11 N. Y. 176, 62 Am. Dec. 95; *Winchell v. Hicks*, 18 N. Y. 538; *McLaren v. McMartin*, 36 N. Y. 88; *Harper v. Fairley*, 53 N. Y. 442; *Graham v. Selover*, 59 Barb. 813; *Voorhies's Succession*, 21 La. Ann. 659; *Hunter v. Robertson*, 30 Ga. 479; *Smith v. Coon*, 22 La. Ann. 445; *Marienthal v. Mosler*, 16 Ohio St. 586; *Hance v. Hair*, 25 Ohio St. 849; *Steele v. Souder*, 20 Kan. 89; *Davis v. Clark*, 58 Kan. 454.

The absence from the state of the principal debtor in this case did not suspend the running of the statute in favor of the appellee, his surety. *Bottles v. Miller*, 112 Ind. 584; *Davis v. Clark*, 58 Kan. 454; 2 Wood, Limitation of Actions, § 246.

It follows that the court did not err in sustaining the demurrer to the reply, and the judgment is therefore affirmed.

KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, Appt.,

v.

WHITLOW, Admr., etc., of T. P. Whitlow.
Deceased.

(.....Ky.....)

The effect of contributory negligence to defeat or limit a right of action for an injury received in another state is to be determined by the law of the place of the injury, and not by the law of the forum.

(December 10, 1907.)

APPEAL by defendant from a judgment of the Circuit Court for Warren County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. H. W. Bruce and William Lindsay, with *Mr. J. A. Mitchell*, for appellant:

In matters *ex contractu* the *lex loci contractus*, or the place where the contract was made, governs the construction and validity of the contract, and the *lex fori*, or the place where the contract is sought to be enforced, governs the remedy and all matters pertaining thereto.

Story, Conf. Laws, § 571; Whart. Conf. Laws, §§ 747-749; 3 Am. & Eng. Enc. Law, pp. 575 et seq.; *Scudder v. Union Nat. Bank*, 91 U. S. 406, 28 L. ed. 245.

NOTE.—On the question whether the law of the forum or that of the place in which the injury occurred is to govern in respect to the defense of contributory negligence, there does not seem to be any authority except what is referred to in the above case.

On principle there is no reason why the doctrine of the *lex fori* should not be applied to actions *ex delicto* as well as to actions *ex contractu*.

Nonce v. Richmond & D. R. Co. 33 Fed. Rep. 434; *Herrick v. Minneapolis & St. L. R. Co.* 81 Minn. 11, 47 Am. Rep. 771; *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 968.

The right to plead and rely upon a counterclaim or set-off is governed by the *lex fori*.

3 Am. & Eng. Enc. Law, p. 579; *Davis v. Morton*, 5 Bush, 161, 96 Am. Dec. 345.

Contributory negligence is purely a matter of defense in the nature of a plea of confession and avoidance, and must be affirmatively pleaded.

Depp v. Louisville & N. R. Co. 12 Ky. L. Rep. 366; *Owen & McKinney v. Louisville & N. R. Co.* 10 Ky. L. Rep. 56; *Faure v. Louisville & N. R. Co.* 91 Ky. 541.

The doctrine of comparative negligence prevailing in the state of Tennessee is not a creature of statute, but is the common law as expounded by the courts of that state, and is chiefly distinguished from the common-law rule of this state in that in the former state contributory negligence of the plaintiff can only be taken in mitigation of damages, whereas in Kentucky the plaintiff's contributory negligence is a complete defense to the action and bars the right of recovery for any sum without regard to quantum of negligence of the respective parties to the action.

The plea of limitation pertains to the remedy,

and must be governed by the *lex fori*, except only in those cases where the time within which the action must be brought forms apart of the statute giving the right of action.

Munos v. Southern P. Co. 2 U. S. App. 222, 51 Fed. Rep. 188; *Theroux v. Northern P. R. Co.* 27 U. S. App. 508, 64 Fed. Rep. 84, 12 C. C. A. 52.

The defensive plea of contributory negligence is no part or element of the right of action, but pertains exclusively to the remedy, and must be governed by the law of the Kentucky forum.

To establish a contrary doctrine would result in a discrimination against a citizen of this state in the bestowal of a favor upon citizens of other states, thereby violating the spirit, if not the letter, of that constitutional provision which declares that "no state shall deny to any person within its jurisdiction the equal protection of the laws."

Story, Conf. Laws, § 57; *Williams v. Haines*, 27 Iowa, 251, 1 Am. Rep. 268; *Johnson v. Chicago & N. W. R. Co.* 91 Iowa, 249; 3 Am. & Eng. Enc. Law, p. 579; *Bank of Gallipolis v. Trimble*, 6 B. Mon. 601; *Davis v. Morton*, 5 Bush, 161, 96 Am. Dec. 345; Parsons, Notes & Bills, p. 876; 2 Kent, Com. p. 462.

The supreme court of Tennessee in the case of *East Tennessee, V. & G. R. Co. v. Hull*, 28 Tenn. 38, decided October 13, 1889, a few weeks before the action at bar arose, expressly and emphatically held that the doctrine of "comparative negligence" has never prevailed in that state.

Messrs. B. F. Procter, Edward W. Hines, and W. S. Pryor for appellee.

Paynter, J., delivered the opinion of the court:

While T. P. Whitlow was in the service of the appellant as brakeman on one of its trains he is alleged to have been killed by gross and wilful negligence of the servants and employees of the appellant in charge of the train. At the time of his death he was a resident of this state, and his father qualified as his personal representative in the Warren county court. That the personal representative had the right to maintain the action, if the liability existed under the laws of Tennessee, cannot be questioned. *Bruce v. Cincinnati R. Co.* 83 Ky. 174; *Wintuska v. Louisville & N. R. Co.* 14 Ky. L. Rep. 579. He seeks to recover by virtue of the statute of Tennessee authorizing a recovery when death results from the wrongful act, fault, or commission of another, and the law as settled in that state in the administration of the statute. It is a well settled principle in all civilized countries, so far as we are aware, that in matters *ex contractu* the *lex loci contractus* governs the construction and the validity of the contract, and that the *lex fori* governs the remedy. This principle is so familiar it would be waste of time to cite elementary authorities or adjudged cases in support of it. As an amplification of the doctrine, it may not be inappropriate to quote from *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245; wherein it is said: "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made." 41 L. R. A.

Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought. A careful examination of the well considered decisions of this country and of England will sustain these positions." We can see no reason why the doctrine as established as to actions *ex contractu* may not be applied to actions *ex delicto*. There seem to be but few decisions on the question. In the case of *Nonce v. Richmond & D. R. Co.* 33 Fed. Rep. 431, it was held that there is no distinction on the subject between actions *ex contractu* and *ex delicto*. *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771, was an action *ex delicto*, and the court held that the law of the place where the right was acquired or the liability incurred governs as to the right of action, while all that pertains merely to the remedy is controlled by the law of the state where the action is brought, thus recognizing the principle as the same where the right of action is *ex contractu* or *ex delicto*. The question presented to the court is whether the Kentucky or Tennessee law as to contributory negligence applies. Under the Tennessee law, if the intestate was himself guilty of negligence that contributed to his injury and death, yet if the defendant was guilty of negligence which was the direct and proximate cause of the intestate's injuries and death, then the plaintiff is entitled to recover, but the damages recoverable should be reduced or mitigated by reason of the intestate's contributory negligence. Under our law, if the intestate was guilty of such contributory negligence except for which his injuries and death would not have occurred then there can be no recovery. Contributory negligence, under our rule, is never applied to the mitigation of damages. The question is whether the contributory neglect relates to the right or to the remedy. The right to plead a counterclaim or a set-off relates to the remedy. In *Davis v. Morton*, 5 Bush, 160, 96 Am. Dec. 345, it was held that the defendant was allowed to plead a set-off to a note, although not allowed by the laws of Tennessee, where the note was executed. Under our system of pleading, counterclaims in certain cases are allowed. A counterclaim, under our system of pleading, is a cause of action against the plaintiff, or against him and another, which arises out of the contract or transaction stated in the petition. A set-off is a cause of action upon a contract, judgment, or award in favor of the defendant against plaintiff, or against him and another, and it cannot be pleaded except in an action upon a contract, judgment, or award. The defendant who pleads a counterclaim admits the contract or transaction, and seeks a recovery on his counterclaim growing out of it. The defendant who pleads a set-off admits his liability on the cause of action stated in the petition, but claims he is entitled to a credit by way of set-off. The plea of the statute of limitations generally relates to the remedy. In pleading the statute of limitations, the defendant admits that the cause of action or liability existed, but says that the plaintiff has slept too long on his rights, and

his right to recover is barred. This is a defense which arises after the liability is incurred. The existence of the right to plead a counterclaim, a set-off, or the statute of limitations does not show that the cause of action did not exist, but, on the contrary, admits its existence. When we say that a counterclaim or a set-off is a matter relating to the remedy, we mean that if they exist they may be relied upon as a defense to the action. Suppose, however, that, under the *lex loci contractus*, they did not exist, we could not say that, had the transaction occurred in the state, the liability therefor would have existed. Therefore they are available as defenses in this state. To do this would be to utterly disregard the *lex loci*. It would be creating a liability or cause of action when none existed in the place where the transaction or contract took place. To make our meaning clear, suppose that the set-off pleaded was a note which was void under the laws of the place where executed, or for some cause did not impose any liability on the plaintiff; the court would not adjudge that it was binding on the payor because it would have been so had it been executed in this state.

From all the facts attending the injury, it must be determined whether the defendant has incurred a liability for damages and the extent of it. The law of Tennessee must govern in fixing the liability and the *quantum* of recovery. It would be strange to apply the law of Tennessee in determining the question of liability, and take the law of the forum to fix the measure of recovery. It would be stranger still for the court to hold that the law of Tennessee should govern in fixing the liability; then apply the law of Kentucky, which would prevent a recovery, although a recovery is authorized by the law of Tennessee. It would be in one breath declaring the Tennessee law should determine the liability, and in the next instant adjudging that Kentucky law shall determine the liability and defeat a recovery. Suppose that, under the laws of this state, contributory negligence was not available in an action for the negligent killing of a human being, but in Tennessee it was. Could it be said, in an action brought in this jurisdiction for the negligent killing in Tennessee, that the law in that state allowing such a plea was not available as a defense because it related, not to the right of action, but to the remedy? It could not be said it pertained to the remedy. It would be a fact that would in part determine the question of liability or of the right of action. The conduct of the intestate is part of the facts from which the liability of the defendant is fixed, and measures the relief to which the personal representative is entitled. *Bruce v. Cincinnati R. Co.* was an action under the Tennessee statute. The court said: "We are of the opinion the action can be maintained and recovery had in this state in the same manner, for the same cause, and to the same extent as if the action had been brought and prosecuted in the state of Tennessee, where the cause of action arose." If contributory negligence is available to defeat a recovery in this case, then the plaintiff cannot recover in the same manner and to the same extent as if the action had been brought in Tennessee. *Louisville & N. R. Co. v. Graham*, 41 L. R. A.

98 Ky. 688, was an action under the statute of Alabama for negligent killing. The court held that the measure of damages, as determined by the decisions of the Alabama supreme court, should be applied in the case. The case of *Johnson v. Chicago & N. W. R. Co.* 91 Iowa, 248, is cited by counsel for appellant to sustain his contention that the Kentucky law of contributory negligence should prevail. The injury in that case occurred in Illinois, and the action was brought in Iowa. The doctrine of comparative negligence prevailed in Illinois, and the Iowa court refused to follow the rule. The court disposed of the question in a few lines as to whether the doctrine of comparative negligence which had been established by the decisions of the courts of Illinois should prevail in that case. Kinne, J., took no part in the decision. Robinson, J., expressed no opinion on the question, but said that it was not necessarily involved in a determination of the case. *Knight v. West Jersey R. Co.* 103 Pa. 250, 56 Am. Rep. 200, and *Herrick v. Minneapolis & St. L. R. Co.* 81 Minn. 11, 47 Am. Rep. 771, are cited by the court to sustain its conclusion. In neither of these cases cited was the same question involved which the Iowa court adjudged, nor was there a similar question involved in them. The question in *Knight v. West Jersey R. Co.* presents the right to maintain an action against a foreign corporation to recover damages in an action *ex delicto* for negligence causing the death in another state. The court held that such an action could be maintained. The Pennsylvania court recognized the correctness of the doctrine of *Herrick v. Minneapolis & St. L. R. Co.*; and the court in the latter case said: "Whenever, by either common law or statute, a right of action has become fixed and a legal liability incurred, that liability, if the action be transitory, may be enforced, and the right of action pursued, in the courts of any state which can obtain jurisdiction of the defendant, provided it is not against the public policy of the laws of the state where it is sought to be enforced. . . . The statute of another state has, of course, no extraterritorial force, but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, will govern as to the right of action; while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought. And we think the principle is the same, whether the right of action be *ex contractu* or *ex delicto*." Of course, there is no question of public policy involved in the case, because we have a statute of the same general import of the statute of Tennessee. *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439, was an action for injuries resulting in death, and the court held it was transitory. The court said: "It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common-law right. Wherever, by either the common law or the statute law of a state, a right of action has become fixed, and a legal liability incurred, that liability may be

enforced, and the right of action pursued, in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties." At the time the injury was inflicted the right of action became fixed, and a legal liability was incurred. The liability which the plaintiff seeks to enforce was incurred by virtue

of the law of Tennessee. The law of contributory negligence, as adjudged in this state, cannot be applied so as to alter or affect the right of action which arose in Tennessee.

For these reasons *the judgment is affirmed.*

Rehearing denied May 10, 1898.

MASSACHUSETTS SUPREME JUDICIAL COURT.

SHEPARD & MORSE LUMBER COMPANY

v.

Albert R. ELDRIDGE.

(.....Mass.....)

1. **Negligence of the holder of an undorsed check** payable to his own order, in intrusting it to a clerk who, he might have known by the exercise of due care, was dishonest, and who put it in circulation by forging an indorsement thereon, does not deprive the holder of his remedy against the drawer.
2. **The fact that checks are taken in absolute extinguishment of debts** does not relieve the drawer from his legal obligations to the payee as drawer, when the checks have been stolen from the payee and collected upon a forged indorsement.
3. **A payee of checks is not charged with knowledge that they have been stolen or embezzled** and collected upon forged indorsements by his clerk, either because the clerk had that knowledge, or because the means of such knowledge were in books of account from which the discovery would have been made if monthly trial balances had been made by an honest clerk.
4. **Notice of the loss of a check which has been stolen and collected** upon a forged indorsement is not required to be given by the payee to the drawer and drawee or to the public, if he is honestly ignorant of the facts, and incorrectly, but honestly, assumes that the check has been collected in the regular course of business.
5. **The receipting of subsequent bills without mention of previous checks** does not estop the payee, who took the checks as payment, from setting up the forgery of indorsements thereon and collecting them, if it was not done with the intent to mislead, or with any expectation or reason to believe that the drawer would in consequence thereof do or omit to do anything with reference to the checks.
6. **A payee of a check which is stolen from him and put in circulation by forgery is estopped** from collecting the check, if, with knowledge of these facts, he misleads the drawer to his prejudice, and thereby places him in a worse position than he otherwise would be in with reference to the assertion or protection of his rights, resulting from what has been done with the check.
7. **The situation of the drawer of checks who has paid them on forged indorse-**

ments of the payee's name, and holds them as vouchers, is changed to his prejudice so as to estop the payee from collecting them, when the latter has procured them as paid checks without giving notice of his intent to collect them, though stating that the indorsements are forged,—especially when in consequence of this the drawer does not give immediate notice to the drawee of the forgery.

(June 20, 1896.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action to enforce the drawer's liability on a check, which resulted in a verdict in plaintiff's favor. *Sustained.*

The facts are stated in the opinion.

Messrs. L. S. Dabney and H. P. Harri-
man, for defendant:

If the plaintiff had actual knowledge in February, 1895, that the check mentioned in the first count had been taken from it, indorsed and collected by Fowle without authority and with this knowledge remained silent until February, 1896, such conduct would either have amounted to an adoption or ratification of the indorsement, or would have estopped the plaintiff from disputing the payment made by the Wareham Bank; and the same is true if it had actual knowledge in August, 1895, of the appropriation by Fowle of the check described in the second count, and with that knowledge remained silent until February 10, 1896.

Foster v. Rockwell, 104 Mass. 167; *Leather Mfrs. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811; *Metcalf v. Williams*, 144 Mass. 452.

The plaintiff was the payee of the checks of which the defendant was the maker; and these checks came to the possession of Fowle, and he was thereby enabled to perpetrate the fraud, which he did perpetrate if the indorsement and collection of them was unauthorized, by the act of the plaintiff in intrusting him with the possession of the checks.

Putnam v. Sullivan, 4 Mass. 45, 3 Am. Dec. 206; *Wade v. Wilmington*, 1 Allen, 561; *Belknap v. National Bank*, 100 Mass. 376, 97 Am. Dec. 105.

The defendant had a right to believe and to rely upon the belief that the plaintiff's business would be conducted with ordinary prudence and under ordinary safeguards; and that if so conducted checks which had duly come to its possession and had been by it in-

NOTE.—For forged indorsements on checks or drafts, see *Chism v. First Nat. Bank* (Tenn.) 82 L. R. A. 778.

41 L. R. A.

For the duty of a depositor in respect to forged checks charged to him by a bank, see *note to First Nat. Bank v. Allen* (Ala.) 27 L. R. A. 423.

trusted to its clerks, could not be lost or stolen from it and the loss remain undiscovered for many months.

Leather Mfrs. Bank v. Morgan, 117 U. S. 96, 29 L. ed. 811.

The plaintiff owed a duty to one who was its regular customer, and was the drawer of the checks of which it was payee,—one to whom its authorized receipts had been thus sent,—to so conduct its business, and to use ordinary care in availing itself of the means and information in its possession, to ascertain whether said checks were duly collected for its account, and was bound to know it at any time when, by the use of ordinary care, it had the means of knowledge in its possession.

Heaven v. Pender, L. R. 11 Q. B. Div. 503; *Ingham v. Primrose*, 7 C. B. N. S. 82.

If actual knowledge of the appropriation of the checks would have cast upon the plaintiff the obligation of promptly repudiating the indorsements if unauthorized, it is difficult to see upon what principle means of knowledge shall not have the same effect. Means of knowledge where knowledge is material is ordinarily regarded by the law as the equivalent of actual knowledge.

Dana v. National Bank of the Republic, 132 Mass. 156; *Leather Mfrs. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811; *Coles v. Bank of England*, 10 Ad. & El. 487; *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *Combs v. Scott*, 12 Allen, 493; *Murray v. C. N. Nelson Lumber Co.* 143 Mass. 250; *Dole Bros. Co. v. Cosmopolitan Preserving Co.* 167 Mass. 481.

Taken in connection with the evidence, which the court rejected, of the means of knowledge all the time in the plaintiff's possession, and of the warnings to its treasurer, the extent and amount of Fowle's takings would be evidence from which the plaintiff's knowledge can be inferred.

Bragg v. Boston & W. R. Corp. 9 Allen, 54; *Harrod v. McDaniels*, 126 Mass. 418.

Delay in giving notice to the defendant is a conclusive adoption and ratification, so far as he is concerned, of Fowle's indorsements in the name of the plaintiff, and constitutes a complete estoppel.

Charles River Nat. Bank v. Davis, 100 Mass. 418; *Harrod v. McDaniels*, 126 Mass. 418; *Traders' Nat. Bank v. Rogers*, 167 Mass. 315, 36 L. R. A. 589.

Where one of two innocent parties is to bear a loss it must fall on him who employed a dishonest agent and carelessly furnished him with the means of committing the fraud.

The defendant has been deceived and defrauded by an abuse of the confidence which the plaintiff reposed in Fowle, when it allowed the check to come into his possession without precautions to see that it was not diverted from the plaintiff's use; to see that it was restored to the treasurer for proper indorsement; or to see that it was duly deposited to the plaintiff's credit, or collected for the plaintiff's benefit. It was not delivered over to Fowle unaccompanied by any trust or confidence.

Lickbarrow v. Mason, 2 T. R. 70; *Wade v. Withington*, 1 Allen, 561; *McGrath v. Clark*, 56 N. Y. 34, 15 Am. Rep. 372; *Bridges v. Garrett*, L. R. 5 C. P. 451; *Sage v. Burton*, 84 Hun, 41 L. R. A.

267; *Kansas City, M. & B. R. Co. v. Ivy Leaf Coal Co.* 97 Ala. 705.

Messrs. W. C. Loring and Clapp & Glover for plaintiff.

Barker, J., delivered the opinion of the court:

The plaintiff sues upon two checks drawn by the defendant upon his banker,—one for \$446.24, dated January 25, 1895; the other for \$561.97, dated July 20, 1895. Both were written to the plaintiff's order, and were mailed by the defendant to the plaintiff, in payment of bills for goods bought by the defendant of the plaintiff. Each check was duly received by the plaintiff, and the bills for which the checks were sent in payment were duly receipted by the plaintiff, and returned to the defendant,—one on January 26, 1895, and the other on July 24, 1895. The check of January 25, 1895, was presented at the bank on which it was drawn on January 30, 1895. It then purported to bear the indorsement of the plaintiff and other indorsements, one of which was that of the cashier of the Merchants' National Bank of New Bedford, by which it was presented; and on that day the amount of the check was paid by the National Bank of Wareham, on which it was drawn, to the Merchants' National Bank of New Bedford, and the same amount was charged to the defendant's account by the National Bank of Wareham. This check was returned to the defendant by his bank on June 25, 1895, and remained in his possession until January 30, 1896. The check of July 20, 1895, was drawn upon the National Bank of Wareham, and was presented to that bank on July 29, 1895, purporting to bear the plaintiff's indorsement and other indorsements, one of which was that of the cashier of the Merchants' National Bank of New Bedford; and on that day the amount of the check was paid by the National Bank of Wareham to the Merchants' National Bank of New Bedford, and was charged to the defendant's account by the National Bank of Wareham, and this check was returned by that bank to the defendant on November 29, 1895, and remained in this possession until January 30, 1896. The evidence tended to show that the indorsements purporting to be those of the plaintiff upon these checks when they were paid by the Wareham National Bank were forgeries, made by a clerk in the employment of the plaintiff, which clerk had feloniously converted the checks to his own use, had forged upon them the plaintiff's indorsements, and had deposited the checks with the forged indorsements to his own credit in the Old Colony Trust Company, by which they were collected of the Wareham National Bank through the Merchants' National Bank of New Bedford. It appeared that the plaintiff, on January 29, 1896, was informed of these forgeries, and of the misappropriation by its clerk of these checks. Thereupon the plaintiff sent one Gray to the defendant to procure the checks, and the defendant handed them to Gray on January 30, 1896, under circumstances which the defendant offered to show, but evidence of which was excluded. On the same day or the next day, the plaintiff notified the indors-

ers of the checks that the plaintiff's indorsements upon them were forgeries. The plaintiff gave no such notice to the National Bank of Wareham, and no other notice except the oral statements of Gray made in obtaining the checks from the defendant on January 30, 1896, was given by the plaintiff to the defendant until February 10, 1896, when the plaintiff wrote to the defendant a letter which stated that the checks bore forged indorsements of the plaintiff. On February 12, 1896, the plaintiff indorsed the checks upon allonges, and forwarded them to its bankers for collection from the Wareham National Bank. Payment was refused by that bank, and the checks were protested by a notary public for nonpayment on February 14, 1896, after which his suit was brought upon them by the plaintiff, the payee, against the defendant, the drawer of the checks. The National Bank of Wareham is solvent. The case was tried by a judge of the superior court without a jury, and, after a finding for the plaintiff, the defendant's exceptions are before us for consideration. It appears from the bill of exceptions that at the trial much evidence was admitted *de bene* which was afterwards stricken out at the plaintiff's request, and also that much evidence offered by the defendant was excluded. Two findings of specific facts were made in connection with the refusal of the court to give rulings asked by the defendant at the close of the evidence. The questions for decision will be better understood after a statement of the facts which the evidence introduced or offered tended to prove in addition to those already recited.

The plaintiff is a dealer in lumber, with its place of business in Boston. The defendant is a dealer in lumber, with his place of business in Bourne. The defendant had been dealing with the plaintiff for some ten years, buying lumber of the plaintiff once in three or four months. When he bought lumber, the plaintiff sent him a bill, and he usually paid it by mailing back the bill with a check for the amount. A receipted bill was then returned to him, in which payment was usually acknowledged for the plaintiff by Harry M. Fowle, who had authority so to do, and who was the clerk who forged the plaintiff's indorsements upon the checks in suit, and converted them to his own use. Fowle entered the plaintiff's employment in January, 1889, at the age of seventeen or eighteen in answer to an advertisement, and was set to do office boy's work. In 1893, when twenty-one years old, he became the ledger clerk, and so continued until his arrest, in January, 1896. There were ten or more persons in the plaintiff's office, including its president, treasurer, and directors. Its treasurer was H. B. Shepard, and its cashier was H. S. Shepard, who took care of the money, kept the cash accounts, and made entries on the cash books. Fowle's duties were to receive and open letters, look over checks, statements, and settlements of accounts as they came in, and see that they were proper and in accordance with the ledger, to receipt and return to customers their paid bills, to post the ledger, and to take off trial balances. Accounts of the plaintiff's business were kept in ledgers, cash book, bill books, journals, and check books, and a trial balance which was

taken by Fowle each month of the business of the last preceding month. The treasurer had his desk in the office, and at his pleasure had access to all the books, and he occasionally examined the books and the trial balances. The letters received were often opened by Fowle, and, when not opened by him, those which contained checks in payment for merchandise were placed with the bills upon his desk, for him to examine the bills and the ledger with the checks, and see if the proper settlement had been made, and to receipt the bills, and return them receipted to the customers. It was Fowle's duty after the examination to pass the checks to the cashier, and at the close of the day to give him a list of the payments; and this course of business was known to the treasurer, and was pursued with the authority and assent of the plaintiff.

The checks sued upon, with the accompanying bills, were received by mail at the office, each within a day or two after its date, and, in the usual course of business, were placed upon Fowle's desk, and intrusted to him for the usual examinations, and to be thereafter handed to the cashier as usual. A receipted bill for the payment by each of these checks was sent to the defendant, the acknowledgment of payment being stamped upon the bill with a stamp furnished for that purpose by the plaintiff, and which Fowle had authority to use in receipting bills. The plaintiff's name, as it appears in the forged indorsements, was stamped upon the backs of the checks with a stamp which the plaintiff provided to be used in making indorsements, and which was kept with other stamps in the office in the cashier's desk. The words, "H. B. Shepard, Treas.," following the plaintiff's name in the indorsements, were written by Fowle. He also sometimes stamped the checks which were to be deposited by the plaintiff with a stamp provided by the plaintiff, and to which Fowle had access, and which stamped on them the words, "For deposit only, to the credit of the Shepard & Morse Lumber Company." After the receipt by the plaintiff of the check of January 25, 1895, and the return to the defendant of the receipted bill acknowledging payment, and before the giving of the check of July 20, 1895, the defendant bought of the plaintiff two other invoices of lumber, and paid for them in the same way, with his checks mailed to the plaintiff with the bills which had been sent out by the plaintiff; and neither of these bills contained any reference to any other unpaid bill, and he received in due course receipts acknowledging the payment of both of the intervening bills. The two bills for which the checks sued upon were given appeared by the plaintiff's ledger to have been paid, and in each instance the amount of the check was credited to the defendant in the ledger account in Fowle's handwriting, with a reference in each instance to a page which should have been a page of the cash book, but the cash book had no corresponding item. An examination of the books after the credit of the check of January 25, 1895, to the defendant's account in the ledger, would have shown that no such payment appeared upon the cash book. The trial balance made by Fowle at the end of January, 1895, was forced by him by omitting from the entry of sundries credited

to merchandise on January 31, a sum equal to the amount of the check. If this trial balance had been made up by an honest clerk, the loss of the check of January 25, 1895, would have been discovered; and in like manner, if the plaintiff's trial balance for July, 1895, had been made up by an honest clerk, the loss of the check of July 20, 1895, would have been discovered in August, 1895. Fowle had been defrauding the plaintiff for two or three years before January, 1896, by taking checks sent in by its customers in payment, falsely indorsing them as he indorsed the checks in suit, collecting them for his own benefit, and concealing these frauds by crediting the checks upon the ledger to the persons who sent them in payment, deducting the amounts from the monthly credits to merchandise, and forcing the trial balances, so that, if the monthly trial balances made before January, 1895, had been made by an honest clerk, the stealings of Fowle would have been discovered before that time. During the same period he had defrauded the plaintiffs in other ways. The whole amount which he had taken from the plaintiff, by misappropriating about one hundred checks of customers, was more than \$40,000. He kept a complete list of all the checks and money which he had taken. From some time in 1893 he had a deposit with the Old Colony Trust Company, and he deposited to his credit in that account the checks in suit, and also most of the other checks belonging to the plaintiff, and payable to its order, on which he forged its indorsement, and which he converted to his own use in a similar way. He also deposited to his own credit, in the same account, from time to time, other funds; and from time to time he drew checks upon the Old Colony Trust Company against this account. Through February and March and August and September, 1895, he had money to his credit on deposit in the Old Colony Trust Company, and also in January, 1896.

In December, 1895, and two or three times before that, the plaintiff's treasurer had its attention called to the fact that Fowle was spending more than his salary; and, in consequence, the treasurer, in December, 1895, looked over the journal and the ledger to some extent, but he made no other examination of the books, and had no one else make any examination. On January 27, 1896, the plaintiff's treasurer was told by one of the plaintiff's clerks that Fowle had deposited to his own credit in the Old Colony Trust Company checks payable to the plaintiff's order. The treasurer thereupon ascertained from the trust company that Fowle had deposited with it such checks, and requested the trust company to have the banks upon which the checks were drawn return to them, so that he could see the indorsements. He then consulted an attorney. Fowle owed the plaintiff a bill for lumber; and on January 28, 1896, the plaintiff, through its treasurer, took from Fowle a check for \$193.20, upon the Old Colony Trust Company, in payment of the lumber bill, which was for lumber used in building a house of Fowle, in Clifton. This check was paid by the trust company on January 29, 1896. On that day, Fowle was arrested at the instance of the plaintiff; and upon that day he gave to the plaintiff's treasurer a

complete list of all the plaintiff's checks which he had misappropriated by forgery, including the checks now in suit. On the same day, the plaintiff brought suit against Fowle in an action of tort or contract, in which the damages were laid at \$10,000; and, on the writ, real estate belonging to Fowle was attached. The declaration was for money obtained by false pretenses, or wrongfully taken or embezzled, but did not include the checks now in suit. A judgment for the plaintiff had been entered in the suit, upon which execution has issued. Before Fowle's arrest, and after the plaintiff's treasurer knew that checks payable to the plaintiff's order had been deposited by Fowle to his own credit in the Old Colony Trust Company, another check drawn for \$140 by Fowle upon that company was, on January 29, 1896, with the consent of the plaintiff, paid by the Old Colony Trust Company, and charged against Fowle's deposit. On the same day, after obtaining from Fowle the full list of misappropriated checks, including the checks in suit, the plaintiff sent one Gray to the defendant to obtain the checks in suit. Gray got them and brought them to the plaintiff's treasurer, on January 30 or 31. To obtain the checks, Gray told the defendant that the plaintiff wanted the two checks to see whether the indorsements were forgeries. The defendant, after finding the checks among the vouchers returned from his bank, said he did not think they were forgeries, that the signatures looked like Mr. Shepard's; and the defendant got out some letters with Mr. Shepard's signature, and compared them, and thought the indorsements were not forgeries, and so stated. Gray asked to have the checks, telling the defendant that the purpose for which he wanted them was for a prosecution for forgery, and that, if they turned out to be forged, no harm should come to the defendant in letting them go out of his possession. On the faith of these assurances, and on the further statement of Gray that the checks should be returned to the defendant when the prosecution for forgery should be finished, and on the faith of a written receipt, the defendant allowed Gray to take the checks. The receipt was of the following tenor:

Bourne, Mass., Jan. 30, 1896.

Received of A. R. Eldridge paid checks, no number, dated Jan. 25th and July 20, 1895, amounting to \$446.24 and \$561.97, respectively. To be returned when the case is finished.
Shepard & Morse L. Co., per Geo. F. Gray."

When the plaintiff's treasurer, on January 30 or 31, got these checks from Gray, he immediately saw that the indorsements of his signature thereon were forgeries; and he immediately gave notice to all the indorsers except Fowle that those indorsements were forgeries, but he gave no notice at that time to the National Bank of Wareham, and he gave no notice to the defendant until February 10, 1896, when he sent a letter of the following tenor:

Boston, February 10, 1896.

Mr. A. R. Eldridge, Bourne, Mass. —

Dear Sir: The Shepard & Morse Lumber Company desires to acknowledge the receipt from your concern of the following checks,

drawn by you on the National Bank of Wareham, Mass., payable to the order of the Shepard & Morse Lumber Company, and all bearing forged indorsements 'Shepard & Morse Lumber Co., H. B. Shepard, Treas.': Date Jan. 25, 1895, amount \$446.24; date July 20, 1895, amount \$561.97.

Shepard & Morse Lumber Co.,
by H. B. Shepard, Treas.

The first notice of the forgeries which is shown to have been given to the Wareham National Bank is that which was contained in the plaintiff's indorsements upon the allonges, stating that the checks were for the first time indorsed by the Shepard & Morse Lumber Company by those indorsements, dated February 12, 1896, and that no prior indorsements were recognized, which allonges annexed to the checks were presented to the Wareham Bank on February 14, 1896, when payment of the checks was demanded and refused. Besides his pay from the plaintiff, which was \$20 a week, and his deposit in the Old Colony Trust Company, Fowle had other property. Soon after he became the ledger clerk, he told the plaintiff's treasurer that he had inherited considerable property from his father, who had been a partner in Fowle, Torrey & Co., carpet dealers in Boston, and that he was not obliged to work. In December, 1895, the treasurer, after hearing that Fowle was spending more than his salary, inquired of a gentleman who might be supposed to know how much Fowle had inherited from his father. The reply was that Fowle did inherit, but that the gentleman did not know how much; that he judged from his style of living that he had inherited considerable property, but did not know or have any means of knowing how much; and the treasurer made no further inquiry. On February 10, 1896, Fowle was absolutely insolvent, and has been so ever since.

The evidence offered by the defendant to prove many of the facts above recited was excluded at the trial, and, at the close of the evidence, so much of it as had been admitted *de bene*, and tended to prove lavish expenditure on the part of Fowle, and to show the extent of the plaintiff's losses by Fowle's depredations, was stricken out. The defendant's requests for rulings, however, were framed as if all the evidence were in; and, in refusing them, the judge made two special findings of fact, which were, in substance, that the defendant's position had not been changed to his prejudice after the misappropriation of the checks by Fowle, and that Fowle was not permitted by the plaintiff's negligence to obtain payment of either check. The requests for rulings were, in substance, that the plaintiff could not maintain the action; that the plaintiff's neglect, after the discovery of the forgery of the indorsements, to give notice of the same to the defendant until February 10, was an unreasonable delay, which of itself discharged the defendant; that it was an unreasonable delay, which discharged the defendant if his position had in the meantime been changed to his prejudice; that the assurances given by the plaintiff through Gray on January 30, 1896, to induce the defendant to give up the checks then in his possession, and the receipt then given by Gray, are an

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adoption and ratification of the indorsements and of the payment of the checks thereon, so that the defendant cannot be held liable on the checks; also, that those assurances and the receipt estop the plaintiff from maintaining the action if the defendant's position was changed to his prejudice by giving up the checks; and that his position was so changed. There were also requests with reference to the trial balances for February and July, 1896, to the effect that if the examination of the books for making up the trial balances would have disclosed to an honest clerk the loss of the checks, and brought to the plaintiff's knowledge facts which, by the exercise of due care and diligence, would have disclosed the forgeries, the plaintiff cannot escape the knowledge to be thereby imputed to it, because the examinations and trial balances were made by Fowle; that the plaintiff must be deemed to have had knowledge of the first forgery in February, 1895, and of the second in August, 1895, and cannot recover, because it did not give notice of the forgeries to the defendant at those times, and because of unreasonable delay after those dates in giving notice to the defendant, and because of the delay since those dates, if the defendant's position has been changed to his prejudice. There were also requests to the effect that if Fowle was permitted, by the negligence of the plaintiff, to get possession of the checks, and to obtain payment on them, the plaintiff could not recover, and that if, in the month after each check was given, the plaintiff had means of knowledge that the check had been taken from it, and collected by Fowle, and remained ignorant of those facts by reason of its want of ordinary care, the plaintiff could not recover on the check, and that in those circumstances it could not recover on the check if in the meantime the defendant's position had been altered to his prejudice. There was also a request to the effect that if the plaintiff knew that the defendant was its regular customer, and that he had been buying lumber of it for years, paying for it with his checks sent to the plaintiff by mail, and that Fowle, on the receipt of such checks, was in the habit of receipting the bills, and returning them to the defendant as paid, and that he was authorized so to do; and if the plaintiff knew or had reason to believe that the defendant relied upon the return of the receipts as evidence that his checks had been duly received by the plaintiff, and had been duly honored, and had been collected by it,—it was the plaintiff's duty to take reasonable care of such checks, and to use ordinary care in availing itself of the means of information in its possession to ascertain whether such checks were duly collected for its account, and it was bound to the defendant to know at any time when, by the use of ordinary care, it had the means of knowledge in its possession, that it had lost, without receiving payment, any check so received from the defendant, and at once to inform the defendant thereof, and that a failure so to inform itself and to notify the defendant would discharge him. There were further requests, to the effect that the plaintiff's action in asking for and taking from Fowle the check given by him to the plaintiff on February 28, 1896, after the plaintiff knew

that Fowle had deposited to his own credit checks payable to the plaintiff, was a ratification by it of Fowle's appropriation to his own use of the checks, and that the plaintiff's action in requesting the Old Colony Trust Company to pay checks of Fowle's after the plaintiff had such knowledge was such a ratification.

One question for decision is whether the plaintiff can recover if, by its own negligence in the conduct of its business, Fowle was in its employ, and intrusted with the possession of the checks, when ordinary care would have shown the plaintiff that Fowle was dishonest, and had already stolen from it, and collected, by forging the plaintiff's indorsement, many checks previously sent to it by its customers. The finding of fact that Fowle was not permitted by the negligence of the plaintiff to obtain payment of either check does not render this question immaterial, because, if the plaintiff's negligence in this regard was a material consideration, much evidence relevant to it was stricken out or excluded, and the finding made without considering that evidence has no weight. It is apparent that the judge below considered such negligence on the part of the plaintiff wholly immaterial. If it was so, the exclusion of evidence tending to establish it did the defendant no harm; but the finding of fact must be laid one side, and, notwithstanding that finding, we must inquire whether the plaintiff's negligence, if it could be found from the evidence offered, was a defense.

The doctrine of contributory negligence as a defense to actions of tort is now of most frequent application; but we have been referred to no instance in which it has been held applicable to actions upon commercial paper, or even when the holder of such paper sues in tort for its conversion one who has innocently taken it upon a forged indorsement. Nothing could more completely unsettle commercial dealings than to extend that doctrine to suits brought by holders of negotiable paper against other parties thereto. If any change is to be made in the law, looking to the discouragement of negligence on the part of holders of such paper, and to the protection of parties who may be defrauded by the forgery of indorsements, it should be made by the legislature, as in the case of the English statutes as to indorsements of checks and bills upon bankers. See Stat. 16 & 17 Vict. chap. 59, § 19; 45 & 46 Vict. chap. 61, § 60. We are of opinion that the holder of an unindorsed check, payable to his own order, is under no legal obligation to the drawer to exercise care as to how the check shall be kept, or to whom he shall commit its custody, or to see to it that the check shall not be put in circulation by the forgery of his indorsement, so long as he acts honestly, without collusion. Such a holder is not deprived of his remedy against the drawer by merely negligently intrusting such a check to a clerk who, due care would have told him, was dishonest, and thus giving the clerk an opportunity to commit crime. He has the right to assume that his clerk will not commit a crime, and to rest upon the presumption that he has not stolen or forged, and will not do so; and he is under no legal obligation either to the drawer of the check or to the public to see

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to it that the check is not put in circulation with a forged indorsement. *Combs v. Scott*, 12 Allen, 493, 497; *Belknap v. National Bank*, 100 Mass. 376, 97 Am. Dec. 105; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Mackintosh v. Elliot Nat. Bank*, 123 Mass. 393, 395; *Mount Morris Bank v. Gorham*, 169 Mass. 519, 521; *Patent Safety Gun Cotton Co. v. Wilson*, 49 L. J. N. S. 713; *Société Générale v. Metropolitan Bank*, 27 L. T. N. S. 849, 858; *Scholfield v. Lonsborough* [1896] A. C. 514; *Bank of Ireland v. Evans's Charities*, 5 H. L. Cas. 339; *Ogden v. Benas*, L. R. 9 C. P. 513; *Fine Art Society v. Union Bank*, L. R. 17 Q. B. Div. 705; *Swan v. North British Australasian Co.* 2 Hurlst. & C. 175, 189; *Arnold v. Cheque Bank*, L. R. 1 C. P. Div. 578, 586, 588.

Such a holder of a negotiable check is under no other legal obligations with reference to it than those which rest upon any holder of commercial paper completed and put in circulation by the maker. If the check is stolen from him, and put in circulation, by means of the forgery of his indorsement, he is not answerable, as is one who intrusts to another his signature or indorsement in blank, with authority to use it in making or giving currency to negotiable paper. The doctrine of *Putnam v. Sullivan*, 4 Mass. 45, 8 Am. Dec. 206; and of *Young v. Grote*, 4 Bing. 253, does not apply, and it cannot properly be extended to the case of a completed check already in circulation, and intrusted by the holder to a clerk for purposes which neither give nor imply any authority to pass it on to another holder, nor give the clerk any power to do so without the commission of a crime.

It is not necessary now to determine whether the debts for which the checks were given were extinguished. If the checks were taken by the plaintiff in absolute extinguishment of the debts that circumstance could not relieve the drawer from his legal obligations as drawer. While the drawer has done his duty, and it is through no fault of his that the payee does not get his money if the check is stolen from him and collected upon a forged indorsement, that does not furnish a sufficient reason why the loss should remain upon the payee, rather than the drawer. The check was received in payment, and the debt extinguished only in consideration of the drawer's obligation as drawer, and of the payee's rights as holder, which included the right of recourse to the drawer if, upon proper indorsement and due demand, the check should not be paid by the drawee. Although there are intimations in support of the theory that cases like the present are instances in which, as to two innocent parties, losses are to be left where they fall, we think the rights of the present parties must be worked out by considering the usual rights of the drawer and drawee of a check given in a commercial transaction. See *Thomson v. Bank of British N. A.* 82 N. Y. 8; *Morse, Banks & Banking*, § 395.

The fact that the defendant had been in the habit of buying goods of the plaintiff for ten years, and of making payment by checks, imposed no liability upon the plaintiff as to the methods in which its own business should be conducted, or as to what clerks it should em-

ploy. So far as these checks are concerned, its obligations to the defendant were merely those defined by the law of negotiable paper, and did not include the duty of taking care that the checks should not be stolen or its indorsement forged.

Nor do we think that the plaintiff is to be charged with the knowledge that the checks had been stolen or embezzled and collected upon its forged indorsements, either because Fowle, its clerk, had that knowledge, or because the means of knowledge existed in the plaintiff's books of account, so that the plaintiff would have made the discovery if its monthly trial balances had been made by an honest clerk. The loss of the checks to the plaintiff was not in fact known to it until Fowle's arrest, on January 29, 1896, and, as to all other parties to the checks, they were never lost checks. One was paid in four days, and the other in nine days, after its date; and they were thenceforth in the custody of the drawee or drawer. Assuming that the owner of a check which he knows to be lost is under a duty to give to the public and to the parties to the check immediate notice of the loss, we see no reason for holding that one who has become the holder of a check is under a duty to give notice to the drawer and the drawee or to the public as of a lost check if the check is in fact stolen and collected upon a forged indorsement, and he remains honestly ignorant of those facts, and incorrectly, but honestly, assumes that it has been collected in the regular course of his business. Unless the plaintiff was under a duty to give notice as of a lost check, there was no duty to anyone connected with the checks which required the plaintiff to examine its books of account, or to make trial balances, or to discover by any means what had become of the checks. Assuming that, if such a duty towards other parties had rested upon the plaintiff, it would be chargeable with the knowledge which Fowle had, or which would have been acquired by the making of the trial balances by an honest clerk, or by an examination of the plaintiff's books by its officers, as the depositor was chargeable with the knowledge of his dishonest clerk to whom he intrusted the examination of returned checks in *Dana v. National Bank of the Republic*, 132 Mass. 156, since no such duty to others rested upon the plaintiff, it is not to be charged with knowledge which it did not in fact have. Fowle was himself defrauding the plaintiff in forging the plaintiff's indorsement and collecting the checks for his own use, and therefore his own knowledge of the fraud acquired in its perpetration is not to be imputed to the plaintiff. *Indian Head Nat. Bank v. Clark*, 166 Mass. 27, and cases cited. Nor is this contended. And, as the examinations of the books in making the trial balances were not made in the performance of a duty owed by the plaintiff to any other party, the knowledge of the agent who made those examinations is not to be imputed to the plaintiff, nor is it to be charged with the information which its means of knowledge disclosed, it not being wilfully ignorant, nor having purposely neglected to use the means of knowledge within its power. *Combs v. Scott*, 12 Allen, 493, 497.

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As the plaintiff cannot properly be charged with imputed knowledge that Fowle was indorsing with its name these checks or any of the other checks which he stole or embezzled and collected by forging its indorsement, we find nothing in what occurred until the plaintiff obtained actual knowledge of the frauds to work an actual or implied adoption or ratification of Fowle's acts in indorsing the checks with the plaintiff's name, or in collecting them. The want of actual knowledge is fatal. *Combs v. Scott*, 12 Allen, 493; *Murray v. C. N. Nelson Lumber Co.* 148 Mass. 250; *Dole Bros. Co. v. Cosmopolitan Preserving Co.* 167 Mass. 481. The receipting of subsequent bills by the plaintiff without informing the defendant that the debts for which these checks were given had not been extinguished was not an act intended or designed to convey to the defendant any representation as to what had become of the checks in suit, and could not justify the defendant in his inference that the checks had been collected by the plaintiff, so as to estop the plaintiff from showing the truth. The receipting of subsequent bills without mention of the previous checks was not done with the intent to mislead the defendant, nor with any expectation or reason to believe that the defendant would, in consequence of it, do or omit to do anything with reference to the checks now in suit. *Stiff v. Ashton*, 155 Mass. 180; *Lincoln v. Gay*, 164 Mass. 537; *Traders' Nat. Bank v. Rogers*, 167 Mass. 315, 321, 86 L. R. A. 539.

The remaining question is whether what occurred after the actual discovery of the frauds requires us to sustain the defendant's exceptions. It is not necessary for us to consider whether the payee of a check which has been stolen from him, put in circulation by forgery, and paid by the drawee, upon ascertaining those facts should give notice to the maker, and to those who have taken the check as rightfully in circulation, of such facts within the payee's knowledge as are material to the rights and obligations of such persons growing out of their transactions with the check. A majority of the court is of the opinion that a payee who, under such circumstances, misleads the drawer to his prejudice, and thereby places him in a worse position than he would otherwise be in with reference to the assertion or protection of his rights resulting from what has been done with the check, is thereby estopped from maintaining an action against the drawer upon the check, and that for this reason the exceptions should be sustained and the finding for the plaintiff be set aside. It is true that it was found specially that the defendant's position had not been changed to his prejudice; but this finding must be disregarded, because evidence relevant and material to the question was offered by the defendant, and wrongfully excluded, even if the finding was correct upon the evidence admitted, which we do not decide. The evidence offered and excluded to show upon what footing and by what representations and assurances the plaintiff, through Gray, got the checks from the defendant, was material upon the questions whether the plaintiff was estopped, by its own acts done after its discovery of the forgeries, from collecting the checks of the defendant, and whether the

plaintiff had adopted as to him the forged indorsements. So, also, the evidence of the plaintiff's acts between its discovery of Fowle's frauds and its demand of the checks from the drawee on February 14, was material in determining whether the defendant had been prejudiced in his rights to recover against the drawee. To say nothing of the plaintiff's omission to notify the defendant of its own purpose to treat the checks as unpaid checks, and to collect them of the defendant, the plaintiff's act in getting the checks from the defendant on January 29 as paid checks was intended by the plaintiff to change the defendant's position, and did change it, by depriving him of the possession of the checks. They had come to the defendant's hands honestly, and as vouchers for charges made against him by the drawee. Even if they had been demanded of him by the plaintiff as its property, the defendant could honestly refuse to give them up, and could honestly at once return them to the drawee, with notice of the facts, and thus save himself from loss by perfecting his right to recover from the drawee the amount of the unauthorized payments which the drawee had charged against him in account. See *Northampton Nat. Bank v. Smith*, 160 Mass. 281. The enforcement of the defendant's rights against the drawee was not so plain and easy for him without as with the possession of the checks, and the loss of possession itself might have been found a change

in his position to his prejudice. Besides this, the plaintiff's act in getting the checks from the defendant as paid checks, without notifying him that the plaintiff claimed them as its own property, and intended to collect them, while at the same time giving the defendant information that the plaintiff's indorsements were forged, would naturally induce the defendant to omit to give information of the forgery to the drawee; and it does not appear that any information was given to the drawee until the checks were demanded again of it, on February 14. The fact that the drawee has always been solvent, and remains solvent, is not the only factor in determining whether the defendant has lost his right against the drawee. See *Dana v. National Bank of the Republic*, 132 Mass. 156; *Leather Mfrs. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811; *Leather Mfrs. Bank v. Merchants' Bank*, 128 U. S. 26, 32 L. ed. 842. Without discussing that question, we think the evidence as to what was done by the plaintiff after it knew of the forgeries should have been admitted, and that if it appeared that the plaintiff got the checks from the defendant as paid checks, to be returned to him, and did not properly notify the defendant that the plaintiff claimed the checks as unpaid and as its own property, and that it intended to assert that ownership and collect the checks, a finding for the defendant would be warranted.

Exceptions sustained.

NEBRASKA SUPREME COURT.

STATE of Nebraska, *ex rel.* Constantine J. SMYTH, Attorney General,

vs.
Frank E. MOORES *et al.*

(.....Neb.....)

*1. To justify the courts in declaring a statute invalid, it is not essential that it should contravene some express provision of the Constitution. If the act is inhibited by the general scope and purpose of the fundamental law, it is invalid, as though forbidden by the letter of that instrument.

2. The bill of rights of our Constitution is not an enumeration of all the powers reserved to the people of this state. A statute is unconstitutional and void which is repugnant to the rights, expressed or implied, retained by the people.

3. The right of local self-government in cities and towns (i. e. the power of the citizens thereof to govern themselves, as to matters purely local in their nature, through officers of their own selection) existed in this state at the time the present Constitution was framed, and was not surrendered upon the adoption of that instrument, but is vested in the people of the respective municipalities, and the legislature is powerless to take it away.

*Headnotes by NORVAL, J., and RAGAN, C.

NOTE.—In respect to the constitutional right of local self-government, the above case goes as far as any that has yet been decided. On this question, 41 L. R. A.

4. The right to maintain a fire department in a city or town is one of the rights vested in the people of municipalities, and is to be exercised by them without legislative interference, except to the extent the lawmaking body may prescribe rules to aid the people of the municipalities in the exercise of such right.

5. The act of the legislature of 1897 (Laws 1897, chap. 10, Comp. Stat. chap. 12a), in so far as it assumes to confer authority upon the governor to appoint fire and police commissioners in cities of the metropolitan class, is void, as being an unlawful attempt to deprive the people of such cities of the right of local self-government.

6. *State, Simeral, v. Seavey*, 23 Neb. 455, overruled.

(*Sullivan, J., and Ryan and Irvine, CC., dissent.*)

(June 23, 1898.)

A APPLICATION for a writ of quo warranto to test the validity of the appointment of defendants by the governor as fire and police commissioners of the city of Omaha in which the mayor of the city and his appointees intervened, claiming that the right to make the appointment was vested in the local authorities and not in the state authorities. On demurrer to the application, and to the answer and cross

see also *Bathbone v. Wirth* (N. Y.) 34 L. R. A. 408, and other cases cited in footnote thereto.

petition of interveners and to the answer of the governor's appointees. *Demurrer to application and answer and cross-petition of interveners overruled. Demurrer to answer of governor's appointees sustained.*

The facts sufficiently appear in the opinions.

Messrs. McCoy & Olmsted, for interveners:

The people of Omaha have the right by election by themselves, or by appointments by their own locally elected agents, to choose their fire and police commissioners.

Police protection was part of the municipal schemes of the free cities of Europe of about the twelfth century.

Guizot, *History of Civilization*, Henry's ed. 1877, 153, 167-169.

The whole civil policy is based upon two grand ideas as its foundations and supports; the idea of local self government, and the idea of centralization. The first was borrowed from the tribal customs of the Saxons and other Germanic tribes who invaded western Europe; the second is a heritage from Rome. The one is the safeguard of liberty; the other the source of power—liberty and power, two elements which should enter into every political society.

Pomeroy, *Const. Law*, Bennett's ed. § 155, p. 100.

Judge Dillon (*Mun. Corp.* vol. 1. 3d ed. pp. 1-72) gives a very learned account of the origin and history of municipal governments.

He says (pp. 26, 27): The power of local government is the distinctive purpose and the distinguishing feature of a municipal corporation proper. A municipal corporation is an investing the people of a place with the local government thereof.

See also *Cuddon v. Eastwick*, 1 Salk. 192; *People v. Morris*, 13 Wend. 325; 2 Kent. Com. p. 275; *People, LeRoy, v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103.

The legislature has the right to delegate legislative powers to municipalities, because that is the common law.

Cooley, *Const. Lim.* p. 118.

Magna Charta provided: "The city of London shall have all the old liberties and customs, which it hath been used to have. Moreover we will and grant, that all other cities, boroughs, towns, and the barons of the five ports, and all other ports, shall have all their liberties and free customs."

By act of 25 Edw. I. Magna Charta became a part of the common law of England.

1 Bl. Com. p. 128.

The elective franchise or right of liberty or self-government was called by Blackstone, not a part of the natural "right of personal liberty," but a right auxiliary and subordinate to it, although by the English law they were absolutely entitled to it.

1 Bl. Com. pp. 158, 159.

Our natural rights under the Declaration of Independence are life, liberty, and property; of which liberty, the right of the people, the electors, to choose their own agents in all national, state, or municipal or local, governments, whether legislative, executive, or judicial, is a part, and of which liberty the people cannot be deprived without due process of law.

41 L. R. A.

Liberty is broad enough in its meaning to include all our political rights.

As respect population and property conditions, there is little difference between each of the colonies at the time of the Declaration of Independence and Omaha of to-day. So that, if self-government was necessary to our fathers of the colonies, it is likewise essential to our happiness.

1 Foster, U. S. Const. 1895, p. 100, says: "The very first thing the settlers did anywhere was to betake themselves to the task of governing themselves. The colonists were of a people whose whole career has been characterized by an insatiable craving after local self-government."

If it be conceded that the legislature has the power to create and the power to abolish local offices (Von Holst, *Const. Law of U. S.* 823), yet the fixed principle remains that, to whatever degree and in whatever way the legislature does extend or modify a local government, in the creation, abolishing, or changing of its offices and the functions thereof, such extension or modification of its offices and of the functions thereof must be made in a constitutional way, *i. e.*, subject to the political rights of the people of the locality, or, in other words, in a way so that all offices or agencies that are created in a local government shall be filled by the consent, choice, or election of the people residing within the jurisdictional limits of the local government, and so that the functions of those offices shall be performed by the agents of the people, so selected from their own number.

Hoke v. Henderson, 15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 677.

If the word "liberty" is broad enough to secure to a person the right to appoint an agent in all private concerns (*Alleyer v. Louisiana*, 165 U. S. 578, 589, 41 L. ed. 832, 835; *Ritchie v. People*, 155 Ill. 93, 29 L. R. A. 79; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340; *Fraser v. People*, 141 Ill. 171, 16 L. R. A. 492; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 228, 259, 41 L. ed. 979, 982, 992), it surely is broad enough to secure to an elector the right to choose his own local officer.

The admission by Congress of the people of any territory or foreign state as a state into the Union was and is a direct and positive declaration by Congress that the government created by the new state's Constitution was republican in form, and that its Constitution was not inconsistent with the Constitution of the United States, and such decision of Congress is binding on all the national and state courts.

Penn v. Tollison, 26 Ark. 545; *Calhoun v. Calhoun*, 2 S. C. N. S. 283; *Luther v. Borden*, 7 How. 1, 42, 12 L. ed. 581, 599; *Texas v. White*, 7 Wall. 700, 780, 19 L. ed. 227, 239; *White v. Hart*, 13 Wall. 649, 20 L. ed. 686; *Blair v. Ridgely*, 41 Mo. 64, 97 Am. Dec. 248; *Brittle v. People*, 2 Neb. 198.

Written rights cannot be construed to deny or impair others.

U. S. Const. Amend. 9, 10; Neb. Const. 1875, art. 1, § 26; art. 2, § 1; Von Holst, *Const. Law of U. S.* Mason's ed. p. 267.

Local self-government is a right we have, inalienable, whether wholly written, partly written, partly reserved or wholly reserved.

Von Holst, Const. Law of U. S. p. 331; 1 Barbour, Rights of Persons & Property, p. 99; 2 Kent, Com. p. 1.

The only limitation to the powers of the legislative department that can exist, must be found either in the Constitution of the United States or of this state or in the natural and inherent rights of the citizens, which they cannot part with or be deprived of by the society to which they belong.

People v. Morris, 18 Wend. 328.

In *Rathbone v. Wirth*, 6 App. Div. 277, on June 2, 1896, Judge Herrick says (p. 284): "It [the legislature] has the power, subject to the qualified negative of the governor, to pass any law which it may deem necessary for the public good, not inconsistent with the first principles of government, nor contrary to the provisions of the Constitution of this state or the United States." *Burch v. Newbury*, 10 N. Y. 874, 892."

"Local self-government is the school which fits people for self-government. Local self-government is the result, and also the most efficient preserver, of civil liberty. . . . The principle is one that runs through our entire system of government from the road and school district up to the Federal government. The right of cities to govern themselves has been the subject of attack by arbitrary power from a very early period. It appears to have been in one of the abuses complained of by the barons in England prior to the granting of the Great Charter."

Id. pp. 290, 291; *State, Jameson, v. Denny*, 118 Ind. 382, 4 L. R. A. 79; *People, Bolton, v. Albertson*, 55 N. Y. 50; *People, Le Roy, v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103.

The right of local self-government existed prior to the adoption of the Constitution, and was not expressly yielded up (if indeed it could be) or granted to any of the departments of the state government by that Constitution, which, on the contrary, was framed with reference to the then existing local governments, and the right of self government still belongs to the people of the municipalities of the state.

Evansville v. State, Blend, 118 Ind. 427, 4 L. R. A. 93; *State, Jameson, v. Denny*, 118 Ind. 382, 4 L. R. A. 79; *People, Townsend, v. Porter*, 90 N. Y. 68.

Justice Gray said: "I refer to the right of local self-government; a right which inheres in a republican government, and with reference to which our Constitution was framed."

Rathbone v. Wirth, 150 N. Y. 459, 34 L. R. A. 408; *State, Howe, v. Des Moines*, 103 Iowa, 76, 39 L. R. A. 285; *Atty. Gen. v. Detroit*, 58 Mich. 213, 55 Am. Rep. 675; *State, Jameson, v. Denny*, 118 Ind. 382, 4 L. R. A. 79; *Evansville v. State, Blend*, 118 Ind. 426, 4 L. R. A. 93; *State, Holt, v. Denny*, 118 Ind. 449, 4 L. R. A. 65; *People, Wood, v. Draper*, 15 N. Y. 532; *People, Bolton, v. Albertson*, 55 N. Y. 50; *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677; *People, Le Roy, v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *People, Park Comrs., v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202.

Police commissioners are local or civil officers.

41 L. R. A.

The state cannot tax us for local police protection, but the city must tax us therefor, as a corporate purpose of the city.

Bradshaw v. Omaha, 1 Neb. 16; *State, Howe, v. Des Moines*, 103 Iowa, 76, 39 L. R. A. 285; *Pope v. Phifer*, 3 Heisk. 682; *State, Chautau, v. Leffingwell*, 54 Mo. 458; *People v. Hastings*, 29 Cal. 449; *Cornell v. People, Walsh*, 107 Ill. 372; *Lovington v. Wider*, 53 Ill. 302.

Messrs. W. J. Connell and M. B. Reese for the mayor and city council of Omaha.

Messrs. George A. Day, E. R. Duffe, and J. J. Dunn for Bullard *et al.*

Norval, J., and Ragan, C., formulated the opinion of the court:

The legislature of this state at its session held in 1897 passed an act incorporating metropolitan cities, and defining, prescribing, and regulating their duties, powers, and government. Laws 1897, chap. 10, Comp. Stat. chap. 12a. Sections 166, 167, of said act follow:

"Sec. 166. In each city of the metropolitan class, there shall be a board of fire and police commissioners, to consist of the mayor, who shall be *ex officio* chairman of the board, and four electors of the city who shall be appointed by the governor.

"Sec. 167. Immediately on the taking effect of this act, the governor shall appoint for each city governed by this act four commissioners, not more than two of whom shall be of the same political faith or party allegiance, one of whom shall be designated to serve until the first Monday of April, 1898, and one to serve until the first Monday of April, 1899, and one to serve until the first Monday of April, 1900, and one to serve until the first Monday of April, 1901, and on the last Tuesday in March in 1898, and on the same day in each year thereafter, the governor shall appoint one commissioner in each city governed by this act, to take the place of the commissioner whose term of office expires on the first Monday in April following such appointment, and those so appointed to succeed others shall serve for the term of four years following the first Monday in April after their appointment, except where appointments are made to fill vacancies, in which cases those appointed shall serve the remainder of term of the persons whose vacancies they are appointed to fill. Wherever a vacancy shall occur in any board of fire and police commissioners, either by death, resignation, removal from the city, or any other cause, the governor shall appoint a commissioner to fill such vacancy."

Section 168 provides, *inter alia*: "No person shall be appointed a police commissioner who is engaged in the sale of malt, spirituous, or vinous liquors, or who is engaged in the business of dealing in tobacco or articles manufactured therefrom, or who is an agent for any fire insurance company or companies or interested therein, or in the business of soliciting fire insurance, or who shall have been engaged in any of such callings or business within one year previous to the date of appointment." Section 169 confers upon such board "all powers and duties connected with and incident to the appointment, removal, government, and discipline of the officers and members of the fire and police departments of the city." The

board is empowered and required to appoint a chief of the fire department, and such other officers of said department as may be deemed necessary, and to remove such officers, or any of them, whenever the board shall consider and declare such removal necessary for the proper management or discipline, or for the more effective working or service, of said department. The board is given power to employ all necessary firemen and assistants, and it is made its duty to appoint a chief of police, police matron, and such other officers and policemen as may be necessary, to the extent that funds may be provided therefor by the mayor and council. All officers and police of the police department are subject to removal by the board of fire and police commissioners, under such rules and regulations as may be adopted by said board, whenever such removal becomes necessary for the proper management or discipline, or for the more effective working or service, of the police department.

The respondents J. H. Peabody, D. D. Gregory, William C. Bullard, and R. E. L. Herdman were appointed by the governor, under the provisions of said §§ 166 and 167, as members of the board of fire and police commissioners for the city of Omaha; and the respondent Frank E. Moores is the mayor of said city, and by virtue of said act is made a member of said board, and its chairman. The mayor and a majority of the councilmen of the city of Omaha, having assumed to exercise, control, and manage the fire and police departments of said city to the exclusion of any and all acts of the board appointed by the governor, an application by the state, on the relation of the attorney general, was filed in this court for a writ of quo warranto against the respondents named above, and the members of the city council of Omaha, to test the constitutionality of the sections of the said act of 1897 which attempt to confer upon the governor the power to appoint four members of the board of fire and police commissioners for each city of the metropolitan class. To this application the appointees of the executive answered, setting up their respective appointments as members of said board, and their subsequent qualifications; and the mayor and council also filed an answer alleging their right, power, and authority to provide for the appointment of the members of the board of fire and police commissioners of said city of Omaha, to exercise, control, and manage the fire and police departments of said city, and control and direct in all respects said departments, and that Peter W. Birkhouser, Charles J. Kurbach, Mathew H. Collins, and Victor H. Coffman have been, under and in pursuance of an ordinance of the city of Omaha, appointed by the mayor of said city, and confirmed by a majority of the council thereof, as members of said board of fire and police commissioners of said city, and have qualified as such. The said appointees of the mayor and council have intervened, and filed an answer and cross application of information, setting up their respective claims to the office in question, and that the said act of 1897 is unconstitutional and void. The attorney general has filed a general demurrer to the answer of the respondents, as well as to the answer and

cross application of the interveners, and the interveners have demurred to the answer of the governor's appointees. The cause has been submitted for judgment on said demurrers.

The validity of the law is assailed on the ground that it is violative of the inherent right of local self-government, by depriving the people of the cities of the metropolitan class from choosing their own officers. There is no express provision in the Constitution of this state which gives municipal corporations the power to select their officers, or to manage their own affairs; nor is there any clause to be found in that instrument which in express terms inhibits the legislature from conferring upon the governor the power to appoint municipal officers to manage and control purely local affairs. If this act is invalid on the ground that the appointing power was placed in the hands of the governor, it is because the law is repugnant to some rights retained by the people at the time of the adoption of the organic law. It is true, the state Constitution is not a grant of legislative power, and the lawmaking body may legislate upon any subject not inhibited by the fundamental law; and it has been so held in *Magneau v. Fremont*, 80 Neb 848, 9 L. R. A. 786, and numerous other decisions of this court. But it by no means follows from this that the legislature is free to pass laws upon any subject, unless in express terms prohibited by the Constitution. The inhibition on the power of the legislature may be by implication as well as by expression. Laws may be, and have been, declared invalid, although not repugnant to any express restriction contained in fundamental law.

In *Von Holst*, Const. Law of U. S. p. 271, may be found this apposite language: "Congress has only the powers granted it by the Federal Constitution. The legislative power of the state legislatures, on the contrary, is unlimited, as far as no limits are set to it by the Federal or the state Constitution. This does not mean, however, that these restrictions must always be expressed in explicit words. As it is generally admitted that the factors of the Federal government have certain 'implied powers,' so it has never been disputed that the state legislatures are subject to 'implied restrictions', that is, restrictions which must be deduced from certain provisions of the Federal or state Constitution, or that arise from the political nature of the Union, from the genius of American public institutions," etc.

Judge Cooley, in his valuable work on Constitutional Limitations, 5th ed. p. 208, uses this language: "It does not follow, however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the Constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed. Prohibitions are only important where they are in the nature of exceptions to a general grant of power; and if the authority to do an act has not been granted by the sovereign to its representative, it cannot be necessary to prohibit its being done."

In *Mechem*, Pub. Off. § 123, it is said: "Indeed, this right of local self government, as it has been briefly termed, is held to be an established feature and incident of our political sys

tem, and it is not within the power of the legislature of a state to permanently fill by appointment the local offices established by law for purely local purposes."

In *Cincinnati W. & Z. R. Co. v. Clinton County Comrs.* 1 Ohio St. 77, the court says: "But, as the general assembly, like the other departments of government, exercises only delegated authority, it cannot be doubted that any act passed by it, not falling fairly within the scope of legislative power, is clearly void, as though expressly prohibited. And we agree, entirely, with the supreme court of Pennsylvania in *Parker v. Com.* 6 Pa. 511, 47 Am. Dec. 480, that 'it is this species of insidious infraction that is more to be feared and guarded against, than direct attacks upon any particular principle proclaimed as a part of the primordial law; for attempts of the latter description will generally be met by instant reprobation, while the stealthy and frequently seductive character of the former is apt to escape detection until the innovation is made manifest by the infiction of some startling wrong.' It is not my purpose to point out the numerous cases in which a legislative act might be avoided, as transcending the limits of the powers delegated to that body, although not expressly prohibited. The attempted exercise of executive or judicial power, delegated to the other departments, will very readily suggest many instances, while many others may be easily imagined, of encroachments upon reserved rights, not surrendered to any department of the government. From these considerations, it follows that it is always legitimate to insist that any legislative enactment drawn in question is void, either because it does not fall within the general grant of power to that body, or because it is expressly prohibited by some provision of the Constitution."

In *People, Bolton, v. Albertain*, 55 N. Y. 50, it was said: "A written Constitution must be interpreted, and effect given to it as the paramount law of the land, equally obligatory upon the legislature as upon other departments of government and individual citizens, according to its spirit and the intent of its framers, as indicated by its terms. An act violating the true intent and meaning of the instrument, although not within the letter, is as much within the purview and effect, of a prohibition as if within the strict letter; and an act in evasion of the terms of the Constitution, as properly interpreted and understood, and frustrating its general and clearly expressed or necessarily implied purpose, is as clearly void as if in express terms forbidden. A thing within the intent of a Constitution or statutory enactment is, for all purposes, to be regarded as within the words and terms of the law. A written Constitution would be of little avail as a practical and useful restraint upon the different departments of government if a literal reading only was to be given it, to the exclusion of all necessary implication, and the clear intent ignored, and slight evasions or acts, palpably in evasion of its spirit, should be sustained as not repugnant to it."

Justice O'Brien, in *Rathbone v. Wirth*, 150 N. Y. 459, 34 L. R. A. 408, uses this language: "When the validity of such legislation is brought in question, it is not necessary to show

that it falls appropriately within some express written prohibition contained in the Constitution. The implied restraints of the Constitution upon legislative power may be as effectual for its condemnation as the written words, and such restraints may be found either in the language employed, or in the evident purpose which was in view, and the circumstances and historical events which led to the enactment of the particular provision as a part of the organic law."

In *People v. Morris*, 18 Wend. 825, Justice Nelson said: "The only limitation to the powers of the legislative department that can exist, must be found either in the Constitution of the United States or of this state, or in the natural and inherent rights of the citizens, which they cannot part with, or be deprived of, by the society to which they belong. The latter qualification is undefined, and perhaps undefinable, by any general code having a just regard to the security of these rights. Some of the Constitutions of the states contain a declaration of these powers, and some also declare (and all are, no doubt, so to be understood) that the enumeration shall not be construed as denying or impairing others retained by the people. We have no bill of rights, though many of the principles usually found in such an instrument are incorporated in the provisions of the Constitution. The enumeration was designedly omitted, because unnecessary, and tending to weaken, if not endanger, those unnoticed. The limitation or qualification in this respect must depend upon the enlightened wisdom and discretion of the legislature, and the decisions of the judicial department."

In *Rathbone v. Wirth*, 6 App. Div. 277, Judge Herrick, speaking of the legislature, observed: "It has the power, subject to the qualified negative of the governor, to pass any law which it may deem necessary for the public good, not inconsistent with the first principles of government, nor contrary to the provisions of the Constitution of this state or of the United States." *Burch v. Neubury*, 10 N. Y. 874-892. And, in interpreting the power of the legislature under the Constitution, we are not confined to the strict letter of that instrument, or compelled to point out the exact article, section, clause, or phrase therein which grants or denies the power in question. There are some things so contrary to the entire purpose and spirit of the Constitution that they must be said to be in conflict with it although it cannot be contrasted with any specific portion of it. The object of its adoption, and its purpose and intent, taken as a whole, must be considered. . . . What has been called 'the political tendency of the Constitution' may be considered in interpreting it. *People, Townsend, v. Porter*, 90 N. Y. 75. The full measure and intent of the instrument is not always to be found in its mere letter. To again quote Justice Cooley: 'If we may suppose, for an illustration, that the legislature shall provide that in Detroit any single person may be chosen, in whom may be vested the whole legislative authority of the city, and all other authority pertaining to local government, of every description and nature, not expressly by the Constitution confided to officers speci-

ned, it would require unusual boldness in any one who should undertake to defend such a local dictatorship as something within the competency of legislation under a Constitution avowedly framed to guard, protect, and defend the local powers and local liberties.' *People, Dunn, v. Detroit Super. Ct. Judges*, 29 Mich. 228. To put another illustration under the last clause of § 2 of article 10 of the Constitution, all offices not in existence at the adoption of the Constitution, but that shall thereafter be created by the legislature, may be filled by officers elected by the people, or appointed, as the legislature may direct. Suppose the legislature should see fit to create a new county office, and should provide that, at the general election for the election of state officers, the person for whom the next highest number of ballots should be cast for such office should thereafter discharge the duties thereof. A new office is created, which the legislature has a right to create, and also to determine the method of filling it. There is nowhere any express prohibition against legislation of that character in the Constitution, and yet what man will say that an act of that kind would stand for a moment, not because it is in conflict with an express provision of the Constitution, but because it is repugnant to its whole spirit and intent. . . . The supreme power of the people does not arise from the Constitution, or exist by virtue of it. It existed prior to it. It makes and unmakes Constitutions, but is not made by them. Consequently we are not to look into the Constitution for any grant of power to the people, or any definition of their powers. They possess all that they have not surrendered by the Constitution. One of the primary purposes for the adoption of a written Constitution is the protection of minorities and individuals from the exercise of absolute power. . . . For that purpose the people have yielded up some of their powers, but they retain all that they have not restricted themselves from exercising by the express words of the Constitution, or by necessary implication therefrom."

The legislature of Ohio enacted that certain cities of that state should have a board of police commissioners, to be elected by the voters of the municipality, but that no elector should vote at an election for more than two persons for such commissioners, and the four persons receiving the highest number of votes cast should be declared elected. In *State v. Constantine*, 42 Ohio St. 437, 51 Am. Rep. 883, it was held that the provision which denied to an elector the right to vote for all the members of the police board was unconstitutional, although the Constitution merely provided that each elector shall be entitled to vote at all elections. The court says: "This implication fairly arises from the language of the Constitution itself, but is made absolutely certain when viewed in the light of circumstances existing at the time of its adoption. No such thing as 'minority representation' or 'cumulative voting' was known in the policy of this state at the time of the adoption of this Constitution in 1851. The right of each elector to vote for a candidate for each office to be filled at an election has never been doubted. No effort was made by the framers of the Consti-

tution to modify this right, and we think it was intended to continue and guarantee such right by the provision that each elector 'shall be entitled to vote at all elections.' See *Maynard v. First Presby. Dist. of Kent County Canvassers*, 84 Mich. 228, 11 L. R. A. 383. This court, in *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 703, held the act known as the "Eight Hour Law," invalid, on the ground that it denied the right of parties to contract with reference to compensation for services, although no express constitutional provision guaranteed to the individual the right to contract as he pleased. The law was also held bad as class legislation, but the decision was placed as squarely upon the other ground. In *West Point Water Power & Land Improv. Co. v. State, Moodie*, 49 Neb. 218, it was ruled that the reserved powers of the state are inalienable, and cannot be surrendered or taken away by the legislature.

The first article of our state Constitution expressly enumerates certain rights which the people have reserved to themselves, and manifestly any law passed in violation of such reserved rights would be declared by the courts unconstitutional. It cannot be successfully asserted that the only rights reserved to the people are those enumerated in said article of the Constitution, since § 26 thereof declares: "This enumeration of rights shall not be construed to impair or deny others, retained by the people, and all powers not herein delegated, remain with the people." This language removes all doubt that powers other than those specified in the bill of rights were retained by the people, and any statute enacted in violation of such rights is as clearly invalid as though the same had been expressly forbidden by the fundamental law. Suppose a statute should be enacted providing that a candidate who received the smallest number of votes for a public office shall be declared elected thereto; could it be doubted that such a law would be unconstitutional, notwithstanding it is not in conflict with any express provision of the Constitution? We think not. The right of the majority to govern is as much reserved to the people as though such right had been in apt language expressed in the Constitution. The important question, therefore, is whether the right of the people of municipal corporations to choose their own local officers is one of the powers retained by the people, which the legislature cannot take away. An examination of the various provisions of our Constitution fails to show that the right is not conferred upon the legislature, or any other department of state government, in direct, explicit, and plain language, or impliedly, to deprive municipal corporations of the power to govern themselves by officers of their own selection. On the contrary, it is very evident that the Constitution was framed upon the theory of local self government,—the right of the people to determine for themselves who shall be their officers. It has provided that the state and county officers shall be chosen by the people, and the legislation in this state prior to the adoption of the Constitution invariably recognized the principle of local self-government. The several charters of cities and towns existing when the present Constitution was adopted provided for

the selection of municipal officers by the citizens of the municipalities, and it was in 1887 when the legislature of this state first attempted to deprive municipal corporations of the power to choose their local officers. The right of local self-government is not forbidden by the Constitution, while the principle is fully recognized in that instrument, and its framers must have contemplated, that the right, then existing, of municipal corporations to choose their local officers to administer their local affairs, should continue as in the past. This right still exists, and the legislature is powerless to abridge the same or take it away.

In *Rathbone v. Wirth*, 6 App. Div. 277, we find this discussion of the right of local self-government: "Under our form of government that supreme power is vested in and exercised by the majority, and for all practical purposes the majority are the people. The principle that the majority shall govern lies at the very basis of our government. Among the rights of the majority, as a part of its sovereign power, is the right to select officers, either directly, by election, or indirectly, by authorities or officers whom they have chosen by election.

... This power of the majority to govern, the legislature cannot take from them. The legislature exercises the legislative power of the people; it is their agent for that purpose; but it cannot limit or surrender any of the power or authority of its principals. But it may be said the legislature is composed of the representatives of the people, and that, therefore, their acts are presumed to be the acts of a majority of the people, and that, while this act deprives the majority of the people in one locality of their power, still it is in accordance with the will of the majority of the people of the whole state, and that thereby the principle of majority government is recognized. There would be force in that suggestion if it was not for another principle of our government recognized by our Constitution, and if the people had not by the Constitution limited their power to override the will of a majority in any locality. The principle I refer to is the principle of local self-government.

... Local self-government is the school which fits people for self-government. Local self-government is the result, and also the most efficient preserver, of civil liberty.

... The principle is one that runs through our entire system of government, from the road and school district up to the Federal government.

... Without further continuing this branch of the discussion, suffice it to say that in my opinion the purpose of the bill is obnoxious to the Constitution, as an infringement upon the right of the majority to select their own officers either immediately by election or by their accredited agents, and as destructive of the principle of local self-government."

In *Rathbone v. Wirth*, 150 N. Y. 459, 84 L. R. A. 408, Mr. Justice Gray, in delivering the opinion of the court, said: "I refer to the right of local self-government, a right which inheres in a republican government, and with reference to which our Constitution was framed. The habit of local self-government is something which we took over, or, rather, continued, from the English system of government; and, as Judge Cooley has remarked 41 L. R. A.

with reference to the Constitutions of the states, 'if not expressly recognized, it is still to be understood that all of these instruments are framed with its present existence and anticipated continuance in view.' Cooley, Const. Lim. p. 85. The principle is one which takes but little reflection to convince the mind of being fundamental in our governmental system, and as contributing strength to the national life, in its educational and formative effect upon the citizen. It means that in the local, or political, subdivisions of the state, the people of the locality shall administer their own local affairs, to the extent that that right is not restricted by some constitutional provision. I do not think it can be seriously disputed that the conception of the state is free from the element that it belongs to it to control purely local affairs, and that state interference finds justification only when state policy, or local abuses, demand it. I think that no inference is warranted that other powers have been conferred by the people upon their legislative body than those which are mentioned in the Constitution, or which are necessary to carry into effect those which are expressly given.

... The theory of the Constitution is, that the several counties, cities, towns, and villages are, of right, entitled to choose whom they will have to rule over them; and that this right cannot be taken from them, and the electors and inhabitants disfranchised, by any act of the legislature, or of any or all the departments of the state government combined. This right of self-government lies at the foundation of our institutions, and cannot be disturbed or interfered with, even in respect to the smallest of the divisions into which the state is divided for governmental purposes, without weakening the entire foundation; and hence it is a right, not only to be carefully guarded by every department of the government, but every infraction or evasion of it to be promptly met and condemned, especially by the courts, when such acts become the subject of judicial investigation.' This is strong and significant language. Read in its light, the provision of the act under consideration appears as legislation hostile to that freedom of action which the people of Albany have the right to claim, under the Constitution, in the management of their own affairs."

In *People, Le Roy, v. Hurlbut*, 24 Mich. 44, 79, 9 Am. Rep. 108, there was involved the validity of an act of the legislature creating a board of public works in the city of Detroit, and providing for the appointment of the officers or members of the board by the legislature. Section 14, art. 15, of the Constitution of Michigan declares: "Judicial officers of cities and villages shall be elected, and all other officers shall be elected or appointed, at such time and in such manner as the legislature shall direct." The law was held invalid, and that permanent appointments for purposes solely municipal can be made alone by municipal authority. Campbell, Ch. J., in his opinion said: "In the litigation now before us there is no acquiescence by the city in the choice of the board of works, or in any part of the legislative action on the subject. We are therefore compelled to consider the plain question whether the state authorities

have a right to assume unlimited control of all municipal appointments. Judicial offices the Constitution has distinctly provided for as elective, and they are local in their action, rather than in their nature. But as to other offices the power is plenary, or it does not exist at all. It may as well include every office as any less than all. It may put all the power into the hands of one person, as well as divide it among several, and it may continue it for life as well as for a less period. Life tenure is not rare in municipal offices. The aldermen of London, and probably of many other cities, hold for life. It may create incorporated cities and villages in such numbers as to put the great mass of local administration in the hands of state agents. This is not very likely to happen, but it is just as likely as many other things which it has been thought proper to guard against by constitutional enactment. It is, beyond dispute, directly opposed to the principal design of all our Constitutions; and, if it has not been guarded against, there has been a very great oversight, and the present legislation shows that the danger was not imaginary. But the Constitution is not fairly open to such criticism. We must never forget, in studying its terms, that most of them had a settled meaning before its adoption. Instead of being the source of our laws and liberties, it is, in the main, no more than a recognition and re-enactment of an accepted system. The rights preserved are ancient rights, and the municipal bodies recognized in it, and required to be perpetuated, were already existing, with known elements and functions. They were not towns or counties or cities or villages in the abstract,—or municipalities which had lost all their old liberties by central usurpation, but American and Michigan municipalities of common-law origin, and having no less than common-law franchises. . . . Our Constitution cannot be understood or carried out at all, except on the theory of local self-government, and the intention to preserve it is quite apparent. In every case where provision is made by the Constitution itself for local officers, they are selected by local action. . . . It is impossible to read that document without finding the plainest evidence that every part of the state is to be under some system of localized authority, emanating from the people. This is no mere political theory, but appears in the Constitution as the foundation of all our polity. There is no middle ground. A city has no constitutional safeguards for its people, or it has the right to have all its officers appointed at home. Unless this power is exclusive, the state may manage all city affairs by its own functionaries. The only reasonable meaning of the constitutional clause in question is that, when the legislature has designated the time and manner of appointment or election, the local authority shall fill the offices as so ordained."

Cooley, J., delivered a separate concurring opinion in the same case, so full of sound reason and common sense that we have taken copious excerpts therefrom. He said: "We have before us a legislative act creating for the city of Detroit a new board, which is to exercise a considerable share of the authority usually possessed by officers locally chosen; to

have general charge of the city buildings, property, and local conveniences; to make contracts for public works on behalf of the city; and to do many things of a legislative character which generally the common council of cities alone is authorized to do. The legislature has created this board, and it has appointed its members; and both the one and the other have been done under a claim of right which, unless I wholly misunderstand it, would justify that body in taking to itself the entire and exclusive government of the city, and the appointment of all its officers, excepting only the judicial, for which, by the Constitution, other provision is expressly made. And the question, broadly and nakedly stated, can be nothing short of this: Whether local self-government in this state is or is not a mere privilege, conceded by the legislature in its discretion, and which may be withdrawn at any time at pleasure. I state the question thus broadly because, notwithstanding the able arguments made in this case, and after mature deliberation, I can conceive of no argument in support of the legislative authority which will stop short of this plenary and sovereign right. . . . The doctrine that within any general grant of legislative power by the Constitution there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be somewhat startling to our people, and would be likely to lead hereafter to a more careful scrutiny of the charters of governments framed by them, lest sometime, by an inadvertent use of words, they might be found to have conferred upon some agency of their own the legal authority to take away their liberties altogether. If we look into the several state Constitutions to see what verbal restrictions have heretofore been placed upon legislative authority in this regard, we shall find them very few and simple. We have taken great pains to surround the life, liberty, and property of the individual with guaranties, but we have not, as a general thing, guarded local government with similar protections. We must assume either an intention that the legislative control should be constant and absolute, or, on the other hand, that there are certain fundamental principles in our general framework of government, which are within the contemplation of the people when they agree upon the written charter, subject to which the delegations of authority to the several departments of government have been made. That this last is the case appears to me too plain for serious controversy. The implied restrictions upon the power of the legislature, as regards local government, though their limits may not be so plainly defined as express provisions might have made them, are nevertheless equally imperative in character; and, whenever we find ourselves clearly within them, we have no alternative but to bow to their authority. The Constitution has been framed with these restrictions in view, and we should fall into the grossest absurdities if we undertook to construe that instrument on a critical examination of the terms employed, while shutting our eyes to all other considerations. The circumstances from which these implications arise are.

First, that the Constitution has been adopted in view of a system of local government, well understood and tolerably uniform in character, existing from the very earliest settlement of the country, never for a moment suspended or displaced, and the continued existence of which is assumed; and, second, that the liberties of the people have generally been supposed to spring from, and be dependent upon, that system. . . . Our traditions, practice, and expectations have all been in one direction. And when we go beyond the general view, to inquire into the details of authority, we find that it has included the power to choose in some form the persons who are to administer the local regulations. Instances to the contrary, except where the power to be administered was properly a state power, have been purely exceptional. . . . In view of these historical facts, and of these general principles, the question recurs whether our state Constitution can be so construed as to confer upon the legislature the power to appoint for the municipalities the officers who are to manage the property, interests, and rights in which their own people alone are concerned. If it can be, it involves these consequences: As there is no provision requiring the legislative interference to be upon any general system, it can and may be partial and purely arbitrary. As there is nothing requiring the persons appointed to be citizens of the locality, they can and may be sent in from abroad; and it is not a remote possibility that self-government of towns may make way for a government by such influences as can force themselves upon the legislative notice at Lansing. As the municipal corporation will have no control, except such as the state may voluntarily give it, as regards the taxes to be levied, the buildings to be constructed, the pavements to be laid, and the conveniences to be supplied, it is inevitable that parties, from mere personal considerations, shall seek the offices, and endeavor to secure from the appointing body, whose members in general are not to feel the burden, a compensation such as would not be awarded by the people who must bear it, though the chief tie binding them to the interests of the people governed might be the salaries paid on the one side and drawn on the other. As the legislature could not be compelled to regard the local political sentiment in its choice, and would, in fact, be most likely to interfere when that sentiment was adverse to its own, the government of cities might be taken to itself by the party for the time being in power; and municipal governments might easily and naturally become the spoils of party, as state and national offices unfortunately are now. All these things are not only possible, but entirely within the range of probability, if the positions assumed on behalf of the state are tenable. It may be said that these would be mere abuses of power, such as may creep in under any system of constitutional freedom; but what is constitutional freedom? Has the administration of equal laws by magistrates freely chosen no necessary place in it? Constitutional freedom certainly does not consist in exemption from governmental interference in the citizen's private affairs; in his being unmolested in his family, suffered to buy, sell,

and enjoy property, and generally to seek happiness in his own way. All this might be permitted by the most arbitrary ruler, even though he allowed his subjects no degree of political liberty. The government of an oligarchy may be as just, as respectful of private rights, and as little burdensome, as any other; but, if it were sought to establish such a government over our cities by law, it would hardly do to call upon a protesting people to show where in the Constitution the power to establish it was prohibited. It would be necessary, on the other hand, to point out to them where, and by what unguarded words, the power had been conferred. Some things are too plain to be written. If this charter of state government, which we call a 'constitution,' were all there was of constitutional command; if the usages, the customs, the maxims, that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests, the precepts which have come from the revolutions which overturned tyrannies, the sentiments of manly independence and self-control which impelled our ancestors to summon the local communities to redress local evils, instead of relying upon King or legislature at a distance to do so,—if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain; but the living spirit, that which gives it force and attraction, which makes it valuable, and draws to it the affections of the people; that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within the last hundred years, many of which in their expressions, have seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give,—this living and breathing spirit which supplies the interpretation of the words of the written charter, would be utterly lost and gone. . . . The state may mold local institutions according to its views of policy or expediency; but local government is a matter of absolute right, and the state cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the state not only shaped its government, but at discretion sent in its own agents to administer it, or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs, or no control at all. What I say here is with the utmost respect and deference to the legislative department even though the task I am called upon to perform is to give reasons why a blow aimed at the foundation of our structure of liberty should be ward off."

The same doctrine was recognized and applied by the same court in *People, Park Comrs., v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202. In that case there was under consideration a statute relative to a public park for the city of Detroit, which created a board of park commissioners, and designated six citizens of Detroit as the first members of such board. The act was held invalid because the selection of the park commissioners by the legislature was repugnant to the inherent right of local self-

government. The constitutional right of municipal self-government was sustained in *People, Atty. Gen. v. Detroit*, 29 Mich. 108; *People, Park Comrs., v. Detroit*, 29 Mich. 843; *People, Hubbard, v. Springwells Twp. Board*, 25 Mich. 153; *Allor v. Wayne County Auditors*, 48 Mich. 76; *Atty. Gen. v. Detroit*, 58 Mich. 213, 55 Am. Rep. 675. By an act of the legislature of Michigan, the governor was empowered to appoint three commissioners to improve a certain highway, and levy the expense on adjacent lands. The law was declared invalid in *People, Hubbard, v. Springwells Twp. Board*, 25 Mich. 153, as inimical to the fundamental theory of self-government. In Michigan there existed a statute making it the duty of the governor, by appointment, to fill any vacancy in a county office for and during the unexpired portion of the regular term limited to such officer; and in pursuance of said enactment the governor appointed one George C. Lawrence as auditor for the county of Wayne, in the place of William C. Mahoney, deceased. Proceedings in the nature of quo warranto by the attorney general, on the relation of said Lawrence, were instituted in the supreme court to test the right of the latter to said office of county auditor. The validity of the law under which Lawrence was appointed was assailed, and the court said the statute which gave the governor power to fill vacancies in county offices was invalid, since it deprived the electors of the county of the right to choose their own officers. *Atty. Gen., Lawrence, v. Trombly*, 89 Mich. 50. McGrath, J., speaking for the court, said: "No question is raised as to the legality of his appointment, but respondent insists that the act of 1857 is unconstitutional, as abridging the right of local self-government that the governor's authority under the act of 1878 is limited by implication to provisional appointments, and that the electors of Wayne county had the right to fill the vacancy at the next, or at any subsequent, general election after such vacancy occurred. While the Constitution contains no express verbal restrictions upon the power of the legislature to authorize the governor to make permanent appointments to purely local offices, the principle of local self-government is so deeply imbedded in the groundwork of our system of government that no mere general grant of legislative power can be said to include the authority to take from the people the management of their local concerns, and all delegations of authority to the several departments of government must be deemed to have been made subject to this fundamental principle. This is but a restatement of the doctrine laid down by Justice Cooley, after an able and exhaustive discussion of the question, participated in by all the members of the court in *People, Le Roy, v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103." Judge McGrath, after stating that the correctness of the doctrine enunciated in *People, Le Roy, v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, has not been since questioned, but approved in numerous cases, which he cites, said: "The act of 1857 is therefore invalid, as the legislature cannot divest the people of the county of Wayne of the right to select their own officers in the usual manner." The Michigan cases referred to in this opinion are in point here, as they

were decided under a constitution like our own which contains no express provision limiting the power of the legislature to authorize the governor to appoint purely local officers. The supreme court of Michigan steadfastly denied the power of the legislature to deprive municipal corporations of the right of local self-government, although in *People, Drake, v. Mahaney*, 18 Mich. 492, that court, in harmony with the principle announced by many courts, approved a law authorizing the selection by the governor of police commissioners for cities; recognizing a distinction between officers whose duties are purely of a local character, and officers, chosen for a particular city or town, whose duties are of a public or general nature, and which concern the state or general public. The former class the legislature may not empower the governor to appoint, while such authority may be conferred upon the executive as to the officers belonging to the latter class.

The legislature of the state of Indiana passed a law (Acts 1889, p. 247) purporting to give control of the streets, alleys, sewers, lights, water supply, etc., in cities containing more than 50,000 inhabitants, to boards of public works appointed by the legislature for residents of the cities affected. This act was under consideration in *State, Jameson, v. Denny*, 118 Ind. 883, 4 L. R. A. 79, and held to be void, as denying the right of local self-government, although the law contravened no express provision of the Constitution of that state. That decision is planted squarely upon the proposition that the right of the people to govern themselves, as to matters purely local in their nature, through the medium of local municipal officers of their own choosing, was not curtailed by the adoption of the Constitution, but is still vested in them, and the legislature is powerless to take such right away. Coffey, J., in delivering the opinion of the court, observed: "It is perhaps true that the general assembly may at will pass laws regulating the government of towns and cities, taking from them powers which had previously been granted, or adding to those which had previously been given; but we do not think that it can take away from the people of a town or city rights which they possessed, as citizens of the state, before their incorporation. The object of, granting to the people of a city municipal powers is to give them additional rights and powers to better enable them to govern themselves, and not to take away any rights they possessed before such grant was made. It may be true that as to such matters as the state has a peculiar interest in, different from that relating to other communities, it may, by proper legislative action, take control of such interests; but as to such matters as are purely local, and concern only the people of that community, they have the right to control them, subject only to the general laws of the state, which affect all the people of the state alike. The construction of sewers in a city, the supply of gas, water, fire protection, and many other matters that might be mentioned, are matters in which the local community alone is concerned, and in which the state has no special interest, more than it has in the health and prosperity of the people generally;

and they are matters over which the people affected thereby have the exclusive control, and it cannot, in our opinion, be taken away from them by the legislature." In the same opinion after speaking of the duties and powers conferred upon the three members of the board provided for by the act, this language is employed: "If the legislature may put these matters in the hands of three men, why not in the hands of one man? And if they may transfer these matters, why may they not transfer others? In other words, the effort is by this act to take from the city all control over the improvements of the city, without the consent of her people, and place it in the hands of the agents of the state chosen by the legislature, and charge the people of the city with the whole expense. We do not think that the people have conferred upon the legislature any such power. It is subversive of all local self-government,—a right that the people did not surrender when they adopted the Constitution. They still retained, after the adoption of that instrument, the right to select their own local officers, and every effort to deprive them of such right must be held to be beyond the power of the legislature. In our opinion the entire act attempting to create a board of public works and affairs for cities having a population of 50,000 or more is in conflict with the Constitution, and is void." Elliott, Ch. J., in a separate concurring opinion in the same case, said: "The right to choose officers is primarily and inherently in the people. Primarily it is neither an executive nor a legislative function. Except as expressly or impliedly delegated to the executive or the legislative department, it resides entirely in the electors of the state. Silence on the subject takes no part of the power from the people, and vests none in their representatives. *State, Fowler, v. Johns*, 3 Or. 588; *People, Whitney, v. Bull*, 46 N. Y. 57, 7 Am. Rep. 303; *Speed v. Crawford*, 3 Met. (Ky.) 207. . . . I do not deny that the legislature has the power to change the form and mode in which municipal corporations shall be governed. On the contrary, I affirm that without the consent of the inhabitants the form of the corporate government may at any time be altered, but I do deny that the legislature has the power to deprive the electors of a municipal corporation of the right to choose their own immediate local officers. . . . By immediate local officers I mean such as are charged with the control of purely local concerns, as the streets, the fire apparatus, and the like matters. In the class of local officers I do not include the peace-keeping officers, or the constabulary, for such officers are in reality officers of the state, as it is the duty of the state to provide for the personal safety of its citizens on the thronged streets of a great city as well as on the secluded rural highways. What I affirm, in short, is this: That because an elector lives in a city he cannot have the right to vote upon purely local affairs taken from him by any statute. The decisions which declare that the state may appoint peace officers in cities can be sustained only upon the ground that such officers are state officers and not local officers. The principle is one not to be extended, but to be limited."

The precise question now before us has been
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determined by the supreme court of Indiana, in an able and exhaustive opinion, in *Evansville v. State, Blend*, 118 Ind. 426, 4 L. R. A. 93, and *State, Holt, v. Denny*, 118 Ind. 449, 4 L. R. A. 65. In both of those cases there was under consideration an act creating a metropolitan police and fire board in cities having a certain population, providing for the appointment of the commissioners or members of said board by the legislature, and giving them full control and power over the police and fire departments of such cities, and property and records belonging to said departments. The act was assailed as being unconstitutional on various grounds,—among others, that it deprived the people of the cities coming within the provisions of the law of the right of local self-government. The invalidity of the law was declared on that ground. *Berkshire, J.*, in delivering the opinion of the court in the first case, uses this language: "The commissioners who compose the board are not the officers or representatives of the city, for it has no part in their selection, and no control over their actions. They are appointed by the legislature, and derive all authority from that high power. They are therefore the officers and representatives of the state, and not of the city. But under the law all expenses, of whatever kind, relating to these departments, the city has to pay. . . . If the act related alone to the management of the police department, and the state was proposing to take upon itself the burden of maintaining the department, as well as its management, or if it were made to appear that the city had failed to furnish a police force, or one that was sufficient for the protection of persons and property, then a very different question would be presented for our consideration. Except so far as an efficient police department goes, which is for the protection of the public at large, the people of the state are not interested in any of the matters to which the said act of the legislature relates, but the citizens of Evansville and Indianapolis, the two cities to which the act applies, are alone interested. It therefore becomes a question whether or not the legislature may take from the people of these two cities the right of local self-government,—the right to manage and control their own purely local affairs in their own way,—and place the management of all such local affairs under state control. We do not believe that the legislature has any such power. Before written Constitutions, the people possessed the power of local self-government. It is conceded that the people of Indiana originally possessed all governmental power, and it will not be questioned but that they still possess such of that power as has not been delegated. All the power which the people have delegated is what has passed from them by the Constitution. *Pom. Const. Law*, 9th ed. title *Centralization and Local Self-Government*, §§ 151 et seq.; 1 *Dill. Mun. Corp.* 8d ed. § 9; *Cooley, Const. Lim.* 5th ed. p. 225; *People, Le Roy, v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *People, Park Comrs., v. Detroit*, 28 Mich. 238, 15 Am. Rep. 202; *People, McCagg, v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677; *People, Bolton, v. Albertson*, 55 N. Y. 50; *People, Townsend v. Porter*, 90 N. Y. 68.

... No provision is found anywhere in the Constitution, which takes from the people the right of local self government."

The third division of the syllabus in *State, Holt, v. Denny*, 118 Ind. 449, 4 L. R. A. 65, reads thus: "The right of local self government in towns and cities was not surrendered upon the adoption of the Constitution, but is still vested in the people of the respective municipalities; and the legislature cannot appoint officers to administer municipal affairs, its powers ending with the enactment of laws prescribing the manner of selection and duties of the officers." Olds, J., delivered the opinion of the court in that case, and in discussing the question under consideration said: "It is contended by counsel for appellants that, by the Constitution of the state, all power is vested in the legislative department of the government, except such as is expressly granted to the executive and the judiciary, or retained by the people in the Constitution itself. We are not in harmony with counsel's theory of our state government, but we state it this way: At the adoption of the state Constitution, all power was vested in the people of the state. The people still retain all power, except such as they expressly delegated to the several departments of the state government by the adoption of the Constitution. The legislative, executive, and judicial departments of the state have only such powers as are granted to them by the Constitution. In the 1st section and 1st article of the Constitution it is declared 'that all power is inherent in the people.' It is contended by counsel that, as certain rights were granted and certain other rights reserved by the people, therefore all rights were granted, except such as were expressly reserved. The peculiarity of the theory is, that while the people, by the Constitution, made grants of power to three different departments of government, it is contended that all power that was at that time in the grantor, the people, passed to one branch of the government, *vis.* the political or legislative branch, and that it took all power not mentioned in the instrument, and the executive and judicial took only such as was expressly granted to them, and the people retained such only as was specifically named and reserved. It is certainly a novel method of construction, and contrary to all rules for construing contracts, deeds, wills, and other written instruments; and it seems to us that the proposition need but to be stated, to prove its fallacy. In construing and giving an interpretation to the Constitution, we must take into consideration the situation as it existed at the time of its adoption, the fact expressed in the instrument that all power is inherent in the people, the rights and powers vested in, and then exercised by, the people; the existence of cities and towns, and the right of local self-government exercised by them; and the laws in force, and form of government existing at the time of its adoption. One of the fundamental principles of municipal corporations is the right of local self-government, including the right to choose local officers to administer the affairs of the municipality." Again, in the same opinion, after quoting from various authorities to establish that the inherent right of local self-govern-

ment lies at the foundations of our institutions, it is stated that "we might quote from numerous other authorities to the same effect as the above, but we have quoted sufficient to show that the right of local self-government, including the right of the people of a municipality to select their own officers, was a sacred, fundamental principle and idea of municipal corporations, well founded, sacredly guarded, and long enjoyed by the people of the state at the time of the adoption of the Constitution. As we interpret the theory of our state government, this right of local self-government, vested in, exercised, and enjoyed by, the people of the municipalities of the state at the time of the adoption of the Constitution, yet remains in them, unless expressly yielded up and granted to one of the branches of the state government by the Constitution. And in the decision of the question presented in this case, it is only necessary to determine whether or not that power is granted to the legislative branch of the government, as it is only it which has attempted to deprive the people of cities of the right to choose their own officers, and administer their local affairs." After reviewing the various provisions of the Constitution of Indiana relating to the legislative department of the state, the opinion continues: "The conclusion we unhesitatingly reach is, that the right of local self-government in towns and cities of this state is vested in the people of the respective municipalities, and that the general assembly has no right to appoint the officers to manage and administer municipal affairs; that the right of the general assembly ends with the enactment of laws prescribing the manner of selection and the duties of the officers. There is a class of officers whose duties are general, but who act for the state in localities, which the general assemblies of some states have exercised the right to appoint, and courts have upheld the right to make such appointments; but this class of officers are constabulary or peace officers, those whose duties are to preserve the peace. In this case we do not deem it necessary to consider that portion of the law relating to peace officers, or to determine the right of the general assembly to appoint officers of that character under our Constitution. The right of the state, however, to exercise such power must rest on the theory that the state owes protection to its citizens wherever they may be, within the borders of the state, alike upon highways in a sparsely-populated territory as upon the streets of a densely populated city, and to discharge such obligation has the right to exercise control over the peace officers of the state; but the law in question provides for taking exclusive control of the fire department within certain cities, appointing the officers and controlling the department, and compelling the cities to pay all of the expenses. . . . It is fair to presume that the people of this state, in the adoption of the Constitution, did not intend to surrender the right of self-government in so far as to allow the legislature to even take charge of the fire department of every town and city of the state, and to appoint officers to take charge of and manage the affairs of such department, and limit the legislative body to sixty-one days in every two years.

We do not believe that such was the intention of the people at that time nor do we believe that such is their understanding of the power of the legislature at the present time; nor is there any word or sentence in the Constitution granting such power. . . . We hold that the right to provide and maintain a fire department in a town or city is one of the rights which are vested in the people of municipalities, is to be exercised by them, and is not subject to legislative interference, except in so far as that body may prescribe rules to aid the people of the municipality in the exercise of such right; that such right is an element of local self-government which was vested in the people of the municipalities at the time of the adoption of the Constitution, and was not parted with by them; that so much of the statute under consideration as relates to the management and control of the fire departments of cities is unconstitutional and void." Further along in the opinion it was decided that the provisions of the statute relating to the fire and police departments were so interwoven, connected with, and dependent upon each other as to invalidate the entire law. It is true that the statute was held unconstitutional, also, on other grounds; one of them being that it attempted to confer on the legislature executive functions,—the power to appoint the members of the board. But the right of local self government was not incidentally discussed in the opinion, as has been suggested, but was a prominent feature of the decision; and the law was expressly declared invalid, as infringing the inherent right of the municipalities embraced within the purview of the law to choose their own local officers.

No case has come under the observation of the writer, except *State, Sinerai, v. Seurey*, 22 Neb. 454, which sustains a law authorizing the appointment, either by the legislature or the executive, of a board of fire and police commissioners for a municipal corporation. The decisions relied upon and cited by Commissioner Ryan, excepting the case above indicated, do not so hold, as a cursory examination discloses. In *Daley v. St. Paul*, 7 Minn. 890 (Gil. 311), it was ruled that the legislature possessed the power to appoint commissioners to lay out and establish a public street within the corporate limits of the city of St. Paul, and to assess the damages and benefits flowing from the taking of property for that purpose. It is to be observed that only seventeen lines of the official report of the opinion of the court are devoted to a consideration of the question; and the conclusion there reached is predicated entirely upon *People, Wood, v. Draper*, 15 N. Y. 538, in which last mentioned case the power of the legislature to appoint municipal officers was not involved or decided. In *People, Wood, v. Draper*, the validity of the act of the state of New York was sustained which established a metropolitan police district, comprising the counties of New York, Kings, Richmond, and Westchester, and provided for the appointment of five commissioners by the governor, with the advice and consent of the senate, who with the mayors of New York and Brooklyn, constituted a board of police for said district. The law under consideration in that case was assailed as being in conflict with § 2, art. 10, of 41 L. R. A.

the Constitution of 1846 of the state of New York, which provided that "all county officers whose election or appointment is not provided for by this Constitution shall be elected by the electors of the respective counties, or appointed by the boards of supervisors or other county authorities, as the legislature shall direct. All city, town, and village officers, whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such cities, towns, and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose. All other officers whose election or appointment is not provided for by this Constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people, or appointed as the legislature may direct." The court held, and properly so, that the commissioners provided for by the act there under consideration were not county, city, town or village officers, but mere officers created after the adoption of the Constitution, and therefore the section of the Constitution quoted expressly committed to the legislature the power to provide for election or appointment of such commissioners in any manner it deemed suitable. We have no similar constitutional provision in Nebraska. In *Police Comrs. v. Louisville*, 3 Bush, 597, there was under consideration an act of the legislature providing for the organization of a police force for the city of Louisville and county of Jefferson. That decision is not in point here, for the very obvious reason the statute there involved provided for the election of the commissioners by the qualified voters of the city and county. Moreover, said commissioners were not municipal officers, nor was the question of the inherent right of the people to local self government involved. By article 133 of the Constitution of the state of Louisiana of 1864, it was provided that the citizens of the city of New Orleans should have the right of appointing the several public officers necessary for the administration of the police of said city, and the said article gave the mayor the power to select the members of the police force of said city. The Constitution of that state of 1868 omitted article 133 of that of 1864 and under the subsequent Constitution the legislature created a board of police commissioners for the city of New Orleans, to be appointed by the governor, which board was given full power to appoint and remove and control the officers and men of the police force of said city. This act was under consideration in *Diamond v. Cain*, 21 La. Ann. 309, where it was held that the omission in the Constitution of 1868 of article 133 of the Constitution of 1864 left the entire matter of the police regulations of New Orleans under the power and discretion of the legislature, and that the act there under review vested the mayor of the authority to appoint public officers. The right of local self-government was not discussed or adjudicated in that case. In *Com. v. Plaisted*, 148 Mass. 375, 2 L. R. A. 142, a law was sustained which created a board of police for the city of Boston, to be appointed by the governor and council. The court in the opinion concede the invalidity of the law on the ground that it deprived the

city of the power of self government in matters of internal police; but this was little relied on in the argument, and the question was disposed of by the court without much consideration, and without the citation of a single authority in support of the conclusion reached. Moreover, that cases distinguishable from the one at bar, in that the officers provided for by that act had nothing to do with the control or management of the fire department of the city, while the statute before this court commits the whole subject of the appointment of firemen and the selection of the chief and other officers of the fire departments of metropolitan cities, and the removal of such officers and men, to the board of fire and police commissioners created by said law. The authorities quite uniformly agree that the preservation of the public peace is essentially a matter of public concern; that the instrumentalities by which the same is effected, whether appointed by the governor, or elected by a vote of the people, are agencies of the state, and not of the municipalities; and that there exists a well defined distinction between matters which concern the municipality and those which pertain to the state at large. Conceding that the legislature, unless inhibited by the Constitution, may provide the mode of selecting police officers, yet it has no power or authority to deprive the municipalities of the right to select officers whose duties are solely of a local nature, such as officers connected with the fire department. While the police control of cities in some of the states has been confided to boards of police commissioners appointed by some executive state officer or officers, yet the validity of such laws has been sustained solely on the ground that such officers are agencies of the state, and not of the municipalities for which they were appointed. *State, Atwood, v. Hunter*, 38 Kan. 578, and *State, Atty. Gen., v. Covington*, 29 Ohio St. 102, are distinguishable on the ground above stated, since the act under consideration in each case provided for the appointment of a board of police commissioners to be appointed by state authority, and no power was given such board concerning the management and control of the fire department. *Gillespie v. Lincoln*, 35 Neb. 84, 16 L. R. A. 849, is not an authority in favor of the proposition that the state has the power to choose the officers or members of the fire department of a city. It was decided in that case that a municipal corporation was not liable for the negligent act of members of its fire department.

State, Simeral, v. Seavey, 22 Neb. 454, sustained a section of "An Act Incorporating Metropolitan Cities, and Defining, Regulating, and Prescribing Their Duties, Powers, and Government," approved March 30, 1887, which provided for a board of fire and police commissioners for cities governed by that act, and for their appointment by the governor. It was held that the mode designated for the selection of the members of the board did not contravene the Constitution. That decision is diametrically opposed to the conclusion reached by the writer, and is the only one of its kind. It has been asserted, and probably not without foundation, that the section of the law there under consideration was adopted to give the party then in power in the state a supposed partisan

advantage in the government of the affairs of the city of Omaha; and it may be that the same motive influenced the adoption of the provision of the law of 1887 under review. However that may be, it affords no ground for declaring a law unconstitutional. The sole question that concerns the court is whether the law is repugnant to any express or implied limitations upon the power of the legislature. The act before us, as well as the one construed in *State, Simeral, v. Seavey*, 22 Neb. 454, denied to the people of Omaha the power to choose a portion of their own local officers, and, in so far as it did so, is unconstitutional; for the right to provide and maintain a fire department in a city is one of the powers vested in the inhabitants of such municipality, as an element of local self government, and is to be exercised by them without legislative interference, except to the extent that the lawmaking body may create rules to assist in the exercise of such right. It is to be deplored that a different conclusion was reached in the case just mentioned, as it is always embarrassing to a court to overrule one of its own decisions. No member of the court has been more persistent than the writer in following our own adjudications, and he would do so now were he not convinced that the rule announced in *State, Simeral, v. Seavey*, 22 Neb. 454, is not only wrong, but is far reaching in its consequences. The legislation which that opinion sustains tended to take from the people one of their reserved powers, — the right of local self-government, — one of the principles upon which our state fabric rests. If the legislature may authorize the governor to appoint a fire and police commission for cities of the metropolitan class, then there is nothing to prevent lawmakers from taking from every city and town in the state the power to choose all of the local officers thereof, except police judges which position is made elective by the Constitution, and empower the governor to appoint all municipal officers except the ones just named. The mind revolts when the doctrine of the *Seavey Case* is carried to its legitimate extent. The denial to the people of the right to govern themselves is undemocratic, and if such doctrine is enforced we could no longer boast of "a government of the people, for the people, and by the people."

The demurrer to the application, as well as the demurrer to the answer and cross petition of the interveners, should be overruled. The demurrer to the answer of the respondents the governor's appointees should be sustained, and a judgment of ouster entered against them. It will be observed that § 168, chap. 12a, Comp. Stat., attempts to make persons engaged in any one of certain enumerated vocations ineligible to the office of police commissioner. The omission to discuss that provision must not be construed as impliedly sustaining its constitutionality. We merely refrain from now expressing an opinion on the subject. Judgment accordingly.

Harrison, Ch. J., concurring.

Ryan, C., dissenting:

We cannot concur in the views of a majority of the court. This action of quo warranto was instituted in this court, upon the relation of the

attorney general, to test the rights of J. H. Peabody, D. D. Gregory, William C. Bullard, and R. E. L. Herdman to serve as fire and police commissioners of the city of Omaha, under and by virtue of appointments of the governor of this state. Certain other parties were made defendants, or became such by intervention; but neither their claims nor status need be described, for the sole question presented by the demurrer to the answer asserting the validity of the said appointments is whether the statute under which the above-indicated appointments were made is valid. This statute is embodied in the Compiled Statutes as chapter 12a, of which the sections to be discussed are 166 and 169. By these it is provided that in cities of the class of Omaha there shall be a board of fire and police commissioners, to consist of the mayor and four electors of the city, who shall be appointed by the governor. All powers and duties connected with and incident to the appointment, removal, government, and discipline of the officers and members of the fire and police departments of the city, under such rules and regulations as may be adopted by the board of fire and police commissioners, are vested in that board, to which are delegated certain defined powers, proper to enable it to perform its functions. It is argued against the validity of the above-noted statutory provisions that by them the people of Omaha are deprived of the right of local self-government. It is not claimed that these sections contravene any express provision of the Constitution prescribing how municipal officers must be appointed, but that they deny the right of local self-government, which exists, independently of our Constitution, upon principles which are recognized in the Declaration of Independence and the Federal Constitution, and are illustrated in the evolution of our forms of government, state and national. It is conceded that the case of *State, Simeral, v. Seavey*, 22 Neb. 454, must be overruled if this contention is sustained; and accordingly we shall consider whether or not there have been advanced arguments of sufficient weight and cogency to justify the course indicated.

It seems to be assumed that, if *State, Simeral, v. Seavey* is overruled, there will result no confusion or conflict by reason of other decisions of this court. In this assumption we think counsel for plaintiff are mistaken. In *Magneau v. Fremont*, 30 Neb. 843, 9 L. R. A. 786, it was said: "It has been the uniform holding of this court that the Constitution is not a grant, but a restriction, of legislative power, and that the legislature may legislate upon any subject not inhibited by the Constitution. *State, Atchinson & N. R. Co. v. Lancaster County Comrs.* 4 Neb. 537; *State, Abbott, v. Dodge County Comrs.* 8 Neb. 124, 30 Am. Rep. 819; *Hanscom v. Omaha*, 11 Neb. 37; *State, Hamilton County Comrs. v. Ream*, 16 Neb. 685; *Shaw v. State*, 17 Neb. 334. In *State, Sayre, v. Moore*, 40 Neb. 854, 25 L. R. A. 774, there was under consideration the validity of a specific appropriation made by the legislature for the relief of Scott's Bluff county, and it was said: "The next reason assigned by the auditor for not drawing the warrant to pay the appropriation is 'that the act making the appropriation is contrary to the letter and

spirit of the Constitution of the state of Nebraska.' We quote Cooley, Const. Lim. 4th ed. p. 210, as follows: 'When a law of Congress is assailed as void, we look into the national Constitution to see if the grant of specified powers is broad enough to embrace it; but, when a state law is attacked on the same ground, it is presumably valid in any case, and this presumption is a conclusive one, unless in the Constitution of the United States or of the state, we are able to discover that it is prohibited. We look in the Constitution of the United States for grants of legislative powers, but in the Constitution of the state to ascertain if any limitations have been imposed upon the complete powers with which the legislative department of the state is vested in its creation. Congress can pass no laws but such as the Constitution authorizes, either expressly or by clear implication, while the state legislature has jurisdiction of all subjects on which its legislation is not prohibited. The lawmaking power of the state recognizes no restraints, and is bound by none, except such as are imposed by the Constitution. That instrument has been aptly termed a legislative act by the people themselves in their sovereign capacity, and is, therefore, the paramount law. Its object is not to grant legislative power, but to confine and restrain it. Without the constitutional limitations, the power to make laws would be absolute.' Tested by the rule quoted from this eminent jurist, there is nothing in the Constitution of Nebraska that prohibits the legislature of the state, representing, as it does, the sovereignty of the people, from appropriating money to reimburse a county for expenses incurred by it in the prosecution of criminals." To sustain the contention against the right of the four commissioners appointed by the governor, we must therefore not only directly overrule *State, Simeral, v. Seavey*, 22 Neb. 454, but we must go a step further, and discard the principle just quoted from *Magneau v. Fremont*, 30 Neb. 843, 9 L. R. A. 786. In the first paragraph of the syllabus of *Boyes v. Summers*, 46 Neb. 308, it was said that "when this court is asked to declare a statute unconstitutional, the particular section of the Constitution which it is claimed the law infringes should be pointed out in the brief filed;" and by analogy we are led to believe that there should be a like certainty that a statute is void by reason of considerations other than a conflict with a constitutional provision.

In entering upon the discussion of the identical question with which we are now concerned, it was said by Judge Dillon, with a conservatism not always the characteristic of text writers, that "the adjudged cases exhibit some contrariety of opinion respecting the scope of legislative authority over municipal corporations, or rather respecting the question how far such corporations, viewed as legal personalities, and as such representing special rights of the community that is incorporated, are within the operation or protection of the usual constitutional restraints upon legislative power. The present chapter will be devoted to a consideration of this subject. In dealing with questions of this delicate and complex nature we must beware of broad propositions, and avoid general speculations. The

only wise and safe course is to keep near the shore, and within the light of actual adjudications, accompanying these with such observations as seem to be required." 1 Dill. Mun. Corp. § 57. With this cautionary language in mind, the case of *State, Holt, v. Denny*, 118 Ind. 449, 4 L. R. A. 65, very confidently relied upon by counsel for the relator, may be profitably considered. A statute of the state of Indiana provided that in all cities of the state, of 29,000 or more inhabitants, there should be established within and for such cities a board of metropolitan police and fire department, to consist of three commissioners. The members of the first board or boards were to be elected by the general assembly upon the taking effect of the act, and said board was empowered to select a superintendent of police, captains, sergeants, detectives, and such other officers and patrolmen as the said board might deem advisable. This board was also clothed with power to remove or suspend any member of the police force, and provide rules of discipline, and to make and promulgate general and special orders, through the superintendent, who was constituted the executive head of the force. In the discussion of the provisions of the above act there were used certain expressions with reference to local self-government, and these expressions have been seized upon as material with which to fortify the position of the relator. It may be that the court was influenced in its conclusion adverse to the validity of the act by the fact that the right of local self-government was denied to people resident within cities of the class indicated; but, even if this is true, a careful consideration of the line of argument of the court will disclose that this was not the paramount consideration, but that this action of the legislature in reserving to itself the power of appointment of the three commissioners, provided by the act was a very prominent, if not the controlling, factor. After a statement of the facts, and a discussion of the authentication of the act in question, there is found in the opinion this language: "We next consider whether or not the act and its provisions are within the scope of legislative authority, under the Constitution of the state. It is contended by counsel for appellants that, by the Constitution of the state, all power is vested in the legislative department of the government, except such as is expressly granted to the executive and the judiciary, or retained by the people, in the Constitution itself. We are not in harmony with counsel's theory of our state government, but we state it this way: At the adoption of the state Constitution all power was vested in the people of the state. The people still retain all power, except such as they expressly delegated to the several departments of the state government by the adoption of the Constitution. The legislative, executive, and judicial departments of the state have only such powers as are granted to them by the Constitution. In the 1st section and 1st article of the Constitution it is declared 'that all power is inherent in the people.' It is contended by counsel that as certain rights were granted, and certain other rights reserved by the people, therefore all rights were granted, except such as were expressly reserved. . . . As we interpret the theory of our state government, this

right of local self-government vested in, exercised and enjoyed by, the people of the municipalities of the state at the time of the adoption of the Constitution, yet remains in them, unless expressly yielded up and granted to one of the branches of the state government by the Constitution. And in the decision of the question presented in this case, it is only necessary to determine whether or not that power is granted to the legislative branch of the government, as it is only it which has attempted to deprive the people of cities of the right to choose their own officers and administer their local affairs." Following the above quoted language, there was a discussion of the powers of the legislative branch of the state government as defined by the Constitution of the state of Indiana. It would be unprofitable to closely follow this discussion, but from it we shall quote the following language: "Under our system of government, divided into three separate, distinct, co-ordinate branches, the legislative and judicial departments may exercise appointing power to offices peculiarly related to and connected with the exercise of their constitutional functions, and to maintain their independent existence,—that is to say, the general assembly may elect or appoint the officers of their respective branches, and relating to their department of the government; courts may appoint administrators, guardians, master commissioners, and such officers as are necessary to the free and independent exercise of power conferred by the Constitution; but the appointment of officers generally is naturally and properly an executive function. *Taylor v. Com.* 3 J. J. Marsh. 401; letter of Thomas Jefferson to S. Kerchival, dated July 12, 1816; *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60; *Wood v. United States*, 15 Ct. Cl. 151; *Perkins v. United States*, 20 Ct. Cl. 486; *United States v. Perkins*, 116 U. S. 488, 29 L. ed. 700; *State, Atty. Gen., v. Covington*, 29 Ohio St. 102; *Achley's Case*, 4 Abb. Pr. 35; *State, Atty. Gen., v. Kennon*, 7 Ohio St. 546; *People, Nichols, v. McKee*, 68 N. C. 429; *State, Howerton, v. Tate*, 68 N. C. 546; Pom. Const. Law, § 643; *Federalist*, Letters 47, 48. The only remaining provision which we think it can possibly be claimed granted any power to the general assembly to fill offices, is § 1, art. 15, which provides: 'All officers whose appointments are not otherwise provided for in this Constitution shall be chosen in such manner as now is, or hereafter may be, prescribed by law.' . . . As applied to town officers, the language used certainly cannot be construed as an intention on the part of the people to surrender their right of local self-government, and as granting the power to the general assembly to elect or appoint local officers in the various towns of the state. . . . Section 3, art. 6, provides that 'such other county and township officers, as may be necessary, shall be elected or appointed in such manner as may be prescribed by law.' We have not placed any new or forced construction on the Constitution, nor have we advanced any new or strange theory of our state government, but are adhering to the well recognized theory of our government, and walking in the same beaten path that all have walked since the adoption of the Constitution. Since its adoption, and before, the

people of the counties, townships, cities, and towns have exercised the exclusive right of selecting and choosing their local officers; the legislature has recognized their right to do so, and prescribed the manner of election, and now, for the first time, the general assembly has claimed to itself the power of selecting such officers for two cities of the state. We have quoted and considered all the provisions of the Constitution granting power to the legislative department of the state government, and are clearly of the opinion that the legislature is granted no such power as is exercised in the passage of this act, in providing for the election of and in electing the officers contemplated by the act; but, indeed, it is not earnestly contended by counsel that any such power is by express terms granted, but it is contended, as stated in the outset, that, by the creation of the departments of government by the Constitution, all power vested in the legislature that was not, by express terms, reserved to the people or granted to the executive or judicial departments, and that the burden rests on him who asserts that a law is unconstitutional, to point out the provisions of the Constitution that forbid its passage." After briefly arguing that a statute might be declared unconstitutional, even though it might be impossible to indicate any express provision of the Constitution as being one with which such statute might conflict, the opinion continues as follows: "The conclusion we unhesitatingly reach is, that the right of local self government in towns and cities of this state is vested in the people of the respective municipalities, and that the general assembly has no right to appoint the officers to manage and administer municipal affairs; that the right of the general assembly ends with the enactment of laws prescribing the manner of selection and the duties of the officers. There is a class of officers whose duties are general, but who act for the state in localities, which the general assemblies of some states have exercised the right to appoint, and courts have upheld the right to make such appointments; but this class of officers are constabulary or peace officers,—those whose duties are to preserve the peace. In this case we do not deem it necessary to consider that portion of the law relating to peace officers, or to determine the right of the general assembly to appoint officers of that character under our Constitution. The right of the state, however, to exercise such power, must rest on the theory that the state owes protection to its citizens, wherever they may be within the borders of the state, alike upon highways in a sparsely-populated territory as upon the streets of a densely-populated city, and, to discharge such obligation, has the right to exercise control over the peace officers of the state; but the law in question provides for taking exclusive control of the fire department within certain cities, appointing the officers and controlling the department, and compelling the cities to pay all of the expenses. Although some authority may be found to support such right on the part of the legislature, we think it is in conflict with our system of state government, and derogatory to the rights of the people."

A very full consideration has been given
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State, Holt, v. Denny, 118 Ind. 449, 4 L. R. A. 65, because it was, in argument, relied on as distinctly sustaining the contention of relator's counsel that the law which we now have under review must be declared unconstitutional because it deprives the citizens of Omaha of the right of local self-government. It is quite clear that the fact that the legislature had arrogated to itself the right to name the three commissioners by whom the city officers were to be appointed, and might be removed, had great weight with the court; for by that tribunal this was described as an executive, and not a legislative, function. Moreover, even under these circumstances the court very strongly intimated that the appointment by commissioners of the police officers of the city, as part of the constabulary force of the state, might be upheld,—a proposition afterwards sanctioned in *State, Terre Haute, v. Kolsen*, 130 Ind. 434, 14 L. R. A. 566. It was doubted in *State, Holt, v. Denny*, 118 Ind. 449, 4 L. R. A. 65, whether the consideration with respect to police officers tended to countenance the control of the fire department by state commissioners, but in this state the relation of the fire departments of cities to the state has been held to be the same as the relation of police forces of cities. *Gillespie v. Lincoln*, 35 Neb. 34, 16 L. R. A. 849. As we understand the opinion in *State, Holt, v. Denny*, 118 Ind. 449, 4 L. R. A. 65, the right of local self-government was discussed somewhat incidentally, and alone might not have been sufficient to have brought the court to the conclusion which was reached; and even if we are wrong in this conception of the gist of the argument, the intimation of that court was, very strongly, that appointments of police officers by state authorities could be justified on a ground which in this state would justify like appointments in the fire departments. As these two classes embrace the subject matter herein in controversy, the case of *State, Holt, v. Denny* 118 Ind. 449, 4 L. R. A. 65, cannot be considered as very satisfactorily supporting the contention of counsel for the relator with respect to the city's right of local self-government.

It was urged that the supreme court of Michigan had repeatedly upheld the right of local self government, in a manner and to an extent which should be followed in the case at bar. The opinion in one of the cases cited (*People, Park Comrs., v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202) was written by Judge Cooley; and, as he has referred therein to the other cases in that state, we shall accept his description of their scope. In *People, Park Comrs., v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202, there was under consideration a statute whereby the legislature of Michigan had created a board of park commissioners for the city of Detroit. This board had power and authority to adopt plans for a public park or boulevard, or both, with the necessary avenues or approaches thereto, for the city of Detroit, and for these purposes the board might select the needful lands, either wholly or in part within the city or any of the adjacent townships, and might acquire and purchase lands at a cost of not to exceed \$300,000. When the site of a park or boulevard should be selected, the board might lay before the city council estimates of the ex-

penses necessary to carry out its plans, and the said council was thereupon required to provide the money for such expenses by the issue and sale of city bonds. The action was for a mandamus to compel the issue and sale of bonds; the preliminaries thereto having, as alleged, been complied with. On this subject there was in the opinion this language: "The proposition that there rests in this or any other country the authority to compel a municipal body to contract debts for local purposes against its will is one so momentous in its importance, and so pregnant with possible consequences, that we could not fail to be solicitous, when it was presented, that its foundations should be thoroughly canvassed and presented, and that we might have before us, in passing upon it, all the considerations that could be urged it its support. . . . In *People, Le Roy, v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 108, we considered at some length the proposition which asserts the amplitude of legislative control over municipal corporations; and we there conceded that when confined, as it should be, to such corporations as agencies of the state in its government, the proposition is entirely sound. In all matters of general concern there is no local right to act independently of the state; and the local authorities cannot be permitted to determine for themselves whether they will contribute, through taxation, to the support of the state government, or assist, when called upon, to suppress insurrections, or aid in the enforcement of the police laws. Upon all such subjects the state may exercise compulsory authority, and may enforce the performance of local duties, either by employing local officers for the purpose, or through agents or officers of its own appointment. The same doctrine was declared in *People, Drake, v. Mahaney*, 18 Mich. 481, and in *People, Bay City, v. State Treasurer*, 28 Mich. 503. . . . Whoever insists upon the right of the state to interfere and control by compulsory legislation the action of the local constituency in matters exclusively of local concern should be prepared to defend a like interference in the action of private corporations and of natural persons. It is as easy to justify on principle a law which permits the rest of the community to dictate to an individual what he shall eat, and what he shall drink, and what he shall wear, as to show any constitutional basis for one under which the people of other parts of the state, through their representatives, dictate to the city of Detroit what fountains shall be erected at its expense for the use of its citizens, or at what cost it shall purchase, and how it shall improve and embellish, a park or boulevard for the recreation and enjoyment of its citizens. The one law would rest upon the same fallacy as the other, and the reasons for opposing and contesting it would be the same in each case." There has been sufficient quoted from *People, Park Comrs., v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202, to disclose how slightly it tends to countenance the principle herein contended for; and the principle on which this case was decided was determinative of the controversy in *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677. Section 2, art. 10, of the Constitution of the state of New York, in force at the time the cited cases from the courts of that state

were decided, was in the following language: "All county officers whose election or appointment is not provided for by this Constitution, shall be elected by the electors of the respective counties, or appointed by the boards of supervisors or other county authorities, as the legislature shall direct. All city, town, and village officers, whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such cities, towns, and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this Constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people, or appointed as the legislature may direct." It is very clear that the above provisions as to the election or appointment of city, town, and village officers, render inapplicable the cases cited to sustain the proposition that there exists a right of local self-government independently of constitutional authority. Indeed, an inference might very plausibly be drawn that the legislature could have provided for the government of cities, towns, and villages in the absence of the constitutional restriction noted, and that the existence of such a constitutional restriction raises a presumption of its necessity. It is probable we may have omitted mention of some cases relied upon in the voluminous briefs of counsel for the relator, but we believe we have noted those most confidently relied upon, and shall now address ourselves to a review of the cases cited by the opposing counsel.

In *Com. v. Plaisted*, 148 Mass. 875, 2 L. R. A. 142, there was under consideration a statute whereby the governor of the state of Massachusetts, with the advice and consent of the council, was required to appoint from the two principal political parties three citizens of Boston, who should constitute a board of police of said city. The police of the city was to be appointed, and was subject to removal, by this board. Referring to this act of the legislature, the court said: "It is also suggested, though not much insisted on, that the Statute of 1885, chap. 323, is unconstitutional, because it takes from the city the power of self-government in matters of internal police. We find no provision of the Constitution with which it conflicts, and we cannot declare an act of the legislature invalid because it abridges the exercise of the privilege of local self-government in a particular in regard to which such privilege is not guaranteed by any provision of the Constitution. While the Constitution recognizes our system of town-governments as an inherent part of our general system of government, so that the legislature could not abolish the town system without coming in contact with some part of its provisions, yet in most respects it leaves the power and duty of providing laws for the government of the towns and cities in the discretion of the legislature. . . . The several towns and cities are agencies of government largely under the control of the legislature. The powers and duties of all the towns and cities, except so far as they are specifically provided for in the Constitution, are created

and defined by the legislature, and we have no doubt that it has the right, in its discretion, to change the powers and duties created by itself, and to vest such powers and duties in officers appointed by the governor, if, in its judgment, the public good requires this, instead of leaving such officers to be elected by the people or appointed by the municipal authorities."

In the year 1860 the legislature of Maryland by statute, provided for a new police system, and to carry it into effect, named certain commissioners, upon whom were conferred the powers necessary for that purpose. Contrary to the views expressed in *State, Holt, v. Denny*, 118 Ind. 449, 4 L. R. A. 65, the court of appeals of Maryland sustained the exercise of this appointing power by the legislature. *Baltimore v. State, Board of Police*, 15 Md. 376, 74 Am. Dec. 572. In the opinion there was the following language: "It is conceded that the legislature was not under any obligation to confer the power of appointment on the executive; by this clause of the Constitution the power was placed there, in the event of a different mode not being prescribed in the law. But, it is said, it ought to have been delegated to the people or local authorities of the city of Baltimore. In the absence of any such requirement of the legislature, we do not perceive that they were under a duty to make such delegation of the appointing power. The Constitution surely designed to repose some discretion in the legislature, both over the mode of appointment, and the propriety and necessity of passing any law on the subject to which the exercise of the power might relate. It seems difficult to suppose that the people, through the Constitution, would intrust to that branch of the government nearest to the source of power the right to create an office, and to indicate others to appoint the officers, and be unwilling to place the appointment with the legislature itself. The Constitution must receive an interpretation according to the sense in which the people are supposed to have understood its language; but it ought also to be construed with reference to the previous legislation of the state. *State v. Wayman*, 2 Gill & J. 285. And when such power has been exercised by the legislature from the earliest period of the government, is it unreasonable to suppose that the people were aware that the same might occur again unless prohibited by the Constitution? If there is no prohibition, express or implied, it would result from this view that the people intended the legislature should continue to exercise the power."

By an act of the legislature of Kentucky there was established a board of police for the city of Louisville and county of Jefferson. This board was elected by the voters and the city, as provided in the aforesaid act, and its right to select police officers pursuant to the provisions of the act in question was denied by the mayor of said city. The question thereby raised was not identical with that presented to us, but in the consideration of the question which was presented there was employed this language: "It is now a well settled and universally recognized American doctrine that the state legislature represents sovereignty

of the people of the state in all things not delegated to the Federal government, nor prohibited by the United States Constitution to the states, nor prohibited by the state Constitution." *Police Comrs. v. Louisville*, 3 Bush, 597.

In *Diamond v. Cain*, 21 La. Ann. 809, there was under consideration an act of the legislature whereby was created a board of commissioners of the city of New Orleans, empowered to remove and appoint the police force of said city. The mayor, to whom had been intrusted the powers which were superseded by the provisions of said act, insisted that it was unconstitutional, and on that theory appointed a chief of police. The contest was by quo warranto proceedings instituted by the claimant of this office by virtue of the mayor's appointment against the claimant appointed by the aforesaid board of commissioners, and, without the statement of any particular principle applicable to the fact of the case at bar, it was held by the supreme court that the appointee of the board was entitled to hold the office in dispute.

In *State, Atwood, v. Hunter*, 88 Kan. 578, there was questioned by quo warranto proceedings the validity of an act of the legislature of Kansas by virtue of which the executive council of that state was authorized to appoint a board of police commissioners, by which board there were required to be appointed a police judge, a marshal, a chief of police, and other police officers. The right of the defendant depended upon the validity of his appointment by said board to fill the office of police judge of the city of Leavenworth. In the opinion there was this language: "The point has been made, though not much contended for, that police government by commission is illegal. In effect, it is said to be opposed to the fundamental theory of self government, and denies to the people of the district the right to select their own officers from their own number. Whatever may be said regarding the policy of placing the police administration of cities in a board of police commissioners who are chosen by state officers rather than through the electors of the cities, there can be no doubt that the legislature has the power to do so. The Constitution imposes no limitations upon the legislature in respect to the agencies through which the police power of the state shall be exercised. It may be conferred upon the officers of local municipalities chosen by the people resident therein, or, if deemed expedient, it may be vested in officers or persons otherwise selected. Cities are but agencies of the state, created to aid in the conduct of public affairs. The functions of cities and their officers are prescribed by the legislature, and it rests in the sovereign discretion of that body to say how much of the police power shall be exerted by the municipality."

Daley v. St. Paul, 7 Minn. 390 (Gil. 311), was an action for the recovery of damages for the establishment of a public street or road by commissioners appointed by the legislature of the state; and it was held that in the appointment of such commissioners the legislature had not acted outside the scope of its powers, and accordingly the city was liable for the damages awarded.

In *State, Atty. Gen., v. Covington*, 29 Ohio St. 102, the rights of the defendants, as members of the board of police commissioners and of the board of health for the city of Cincinnati, were challenged by quo warranto proceedings; and a demurrer to an answer justifying the title of defendants under the provisions of said act was overruled. The review of the authorities would not be complete if there was omitted a quotation from the case last cited of language applicable to certain provisions of our Constitution. Section 26 (the closing section of our bill of rights) is as follows: "This enumeration of rights shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people." In *State, Atty. Gen., v. Covington*, 29 Ohio St. 102, McIlvaine, J., said: "The principal objections urged by counsel for relator against the validity of this statute are based on the first clause of § 2, art. 1, of the Constitution, which declares, 'All political power is inherent in the people,' and the 20th section of the article, which is as follows: 'This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people.' The first of these declarations enunciates the foundation principle of our government, to wit, that the people is the source of all political power, but it was not intended as a denial of the power or right of delegation and representation. If this were not otherwise palpable, it would be made so by the second declaration above named, to wit, 'and all powers not herein delegated remain with the people.' This last clause means exactly what its words import, but even from them a plain implication arises that all the powers in and by the Constitution delegated do not remain with the people, but are vested in the agents and officers of the government, to be exercised by them alone. Among the powers delegated by the Constitution is the following (art. 2, § 1): 'The legislative power of the state shall be vested in the general assembly.' Now, whatever limitations upon the power thus delegated to the general assembly may be found in other provisions of the Constitution, it is quite clear that § 20 of the 1st article does not impose any limitation upon it whatever. That section only declares that powers not delegated remain with the people. It does not purport to limit or modify delegated powers. It cannot be doubted that the terms of the Constitution, whereby the legislative power of the state is vested in the general assembly, are comprehensive enough to authorize the enactment in question. Rules and regulations for local municipal government of cities and villages are subjects of, and are as clearly within the scope of, legislation as are those which concern the state at large. Cities and villages are agencies of the state government. Their organization and government are under the control of the state, and every law which affects them must emanate from the general assembly, where the legislative power of the state is vested. Now, it is true that the terms in which this grant of power is made to the

general assembly are restrained and limited by many inhibitory provisions contained in the instrument, but we find no express inhibition against such legislation as is contained in this statute. The question therefore is, Is there an implied inhibition against it? It is claimed by counsel for the relator, as we understand their arguments, that such inhibition is implied from the provisions quoted above from the bill of rights, especially when they are considered in connection with the history and practice of the state, at and previous to the adoption of the Constitution. The circumstances referred to by counsel, it is claimed, would show that previous to the adoption of the present Constitution in 1851, the police of the several cities and villages within the state had been elected by the electors resident therein, or appointed by boards or officers elected by the electors. And, therefore, it is to be inferred from the above declaration in the bill of rights, to wit, 'and all powers not herein delegated remain with the people,' that the power to change the mode of election or appointment of the police force of cities and villages was intended to be withheld from the general assembly. To this argument . . . [we] desire to express our unqualified dissent. By such interpretation of the Constitution, the body of laws in force at the time of its adoption would have become as permanent and unchangeable as the Constitution itself, for such argument would apply with equal force to every subject of legislation concerning which no special direction is contained in the Constitution. Indeed, the true rule for ascertaining the powers of the legislature is to assume its power under the general grant ample for any enactment within the scope of legislation, unless restrained by the terms or the reason of some express inhibition."

The persistency with which we have been urged to recede from the views expressed in *State, Simeral, v. Seavey*, 22 Neb. 454, has induced us to re-examine the grounds upon which that case was decided. The importance of the question involved should be accepted as our sufficient apology for the extended discussion into which we have necessarily been led in the accomplishment of this purpose. We are now more than ever satisfied of the correctness of the proposition laid down in *State, Simeral, v. Seavey*, 22 Neb. 454, that "the state is the unit of political power, and is responsible, through its legislature and executive, for the preservation of the peace, morals, education, and general welfare of the people, and in the discharge of the duties necessary for these purposes, they are limited only by the supreme Constitution of the government, the laws passed pursuant thereto, and our own Constitution and laws."

For the reason given in *State, Atty. Gen., v. Covington*, 29 Ohio St. 102, the legislature in the exercise of its powers in the respect challenged in this case, did not violate any provision of our bill of rights.

Sullivan, J., and Irvine, C., concurring.

Rehearing denied September 23, 1896.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *Resp't.*,
v.

Frank N. SHELTON, *App't.*

(156 N. Y. 268.)

1. It is error to suggest to a jury, as a reason for agreeing, that failure to agree is "almost to confess incompetency," as personal considerations should never be permitted to influence their conclusions.
2. An obvious effort of the court to drive the members of the jury into an agreement requires a new trial, if they agree.
3. The old rule permitting coercion of a jury in order to secure a verdict has been swept away, and under our present method the independence of a jury is respected:
4. A jury must be deemed coerced, so that a judgment of conviction based on their verdict will be reversed, when they agreed after they had been out for eighty-four hours without beds or coats, during forty of which they had been confined in a small room, and from the remarks of the court and the treatment they had received they had every reason to believe that a still longer confinement on chairs and hard benches was in store for them, while the judge had also told them, after the foreman had reported that their agreement was impossible, that a failure to agree was "almost to confess incompetency."

(June 7, 1896.)

APPEAL by defendant from a judgment of a Trial Term of the Supreme Court for Cayuga County convicting him of murder. *Reversed.*

Statement by Parker, Ch. J.:

The defendant, Frank N. Sheldon, was, on the 9th day of October, 1896, indicted by the grand jury of Cayuga county for the crime of murder in the first degree, charged with the killing of his wife, Eva M. Sheldon. On the 12th day of October, 1896, he was arraigned on said indictment, and pleaded not guilty. On the 25th day of January, 1897, at a trial term of the supreme court held in and for the said county, the indictment was moved for trial. The trial lasted for seven weeks, ending on the 15th day of March.

A great number of witnesses (one hundred and nineteen in all) were examined. The evidence against the accused was largely circumstantial. The defense insisted that the deceased came to her death by suicide, and considerable evidence pointing in that direction was given during the progress of the trial. It was generally supposed at first that the deceased had taken her own life, as, when the body was discovered in a closet of the house occupied by her and the prisoner, a pistol was lying beside it, and not for some time after the burial was the defendant accused of the crime of which he was subsequently convicted. In fact there were two disinterments of the body,

NORM.—As to the coercion of a jury to secure an agreement, see also note to *Darling v. New York, P. & B. R. Co.* (R. I.) 16 L. R. A. 643.

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considerable time elapsing between them, before the idea of murder became prevalent and the prisoner charged with the crime.

On March 11 the case was finally submitted to the jury, who immediately retired to deliberate upon their verdict. Three times, at their request, the jury were brought into court for instructions. After being out all of one night and the greater part of one day, they announced that they had not agreed upon a verdict. The judge ordered the jury to be sent out again for further deliberation. They returned into court the second time, after having been out two nights, all of one day, and part of the second day, and reported, in a writing signed by the foreman, that they were unable to agree upon a verdict, and that it was impossible for them to do so. The jury were again sent back to the jury room by the court, after receiving certain instructions, and remained there until 8:20 o'clock of that day (it being Saturday), when they were sent for by the court, who, after giving them further instructions and directing certain provision to be made for their convenience and comfort, ordered them to be taken back for further deliberation. They remained out, from that time, two nights and one day, until Monday morning, when they returned into court, and announced a verdict of guilty as charged in the indictment. The jury were out altogether four nights and about four days. During all this time they had been provided with no sleeping accommodations whatever, confined for two nights and almost two days in the narrow quarters of a jury room, and the rest of the time in the courtroom, which had been set aside for that purpose. What followed each time, as the jury returned into court, will fully appear by the following synopsis taken from the record:

"Jury went out Thursday, March 11, 1897, at 8:30 P. M. 11:30 A. M., Friday, jury came into court, and asked two questions as to the evidence, which were answered by the court from the minutes of stenographer (folios 11-202 to 11,240) without objection. 3:25 P. M. jury again came into court and announced they had not agreed upon a verdict. By the Court: 'Well, gentlemen, you must make an effort to agree. This case has involved immense labor. A great deal of time, as you know, has been given to it, and, from all the evidence that has been produced, it would seem that the case is susceptible of a conclusion. The only way of reaching a conclusion is through the verdict of the jury. There is no reason why these twelve men are not as capable of understanding this case and coming to a conclusion as any other twelve that could be gotten together. It is a case of too much importance, that has entailed too much labor, to permit a jury to separate without the utmost effort to agree. Differences that exist amongst you as to the evidence must be further investigated. Any questions of law the court will be glad to explain to you. It is for the interest of all concerned and public justice that there should be a decision of this case so that the questions in it shall be put at rest. I cannot hear of a

disagreement of this jury. You must retire, gentlemen.' The jury again retired at 8:30 P. M., and at 5:30 P. M. sent a communication to the court asking for further information. Instructions were given, and questions of jury answered by reading from stenographer's minutes (folios 11,245 to 11,281), without objection. Jury then retired. Saturday morning, March 13, 1897, the jury came into court by the order of Justice Dunwell, at 12:45 P. M., and presented a written communication to the court. Mr. Drummond having previously waived his presence in court, which read as follows: 'Judge Dunwell—Dear Sir: The probability, or even possibility, of this jury ever agreeing is impossible in my opinion. George J. Holden, Foreman.' By the Court: 'The order will be that you be conducted to your hotel, and that you be brought back for further deliberation. The counsel for the defendant is not here, and later I will have something further to say to you with reference to your present communication. I have made my own arrangements so as to be back at your call both for to-day and for some time in the future; so that this case may be fully disposed of if there is a possibility of it, and I will have something further to say on this subject later in the day, when the defendant's counsel can be present.' At 8:20 P. M. the jury again returned to the court, and were addressed by the court as follows: 'Gentlemen, I have been giving consideration to the note that you addressed to the court this morning, in which you stated your doubts as to your ability to agree upon a verdict in this case. I very much regret this supposition of yours, but I by no means despair. This case has involved immense labor, enormous expense has been entailed, evidence has been gathered and brought before you from every direction, evidence bearing directly upon the issues in this case, and some of it remotely upon the issues. All, everything that could be suggested, that might throw light upon the question submitted to you, has been brought before you and is in your possession. Now, the truth of this case lies within the compass of that evidence. Mrs. Sheldon died by violence. How that came about and whether the defendant is guilty or innocent is something that must be told by the evidence that has been presented to you. I don't know that you fully appreciate the gravity and importance to this community and to the state that a decision shall be reached in this matter, and that this important question shall be settled as to whether the defendant is guilty or innocent. This case has occupied nearly seven weeks, and to say now, at the end of all that time, at the end of all this labor and expense, that the question is no better off than it was when started, is almost to confess incompetency in this matter. Of course, I have no means of knowing, and I don't desire to know, unless it is something that you desire to bring before the court, the reasons why this state of affairs exists in your body. I hope it is nothing like pride of opinion. I hope it is nothing like, having once taken a position in this case, that, therefore, you must say it is unalterable; that it is not susceptible of change by argument, and by a review of the evidence in the case,—because such considerations as those

would be most unworthy to divide a jury upon so important a question. Engaged as I am in the administration of, or attempt to administer, public justice in this district, I have laid aside my other engagements so that this case can be attended to, because I appreciate the importance of it, and I would like to enforce upon you an appreciation of the importance of settling this question. It has got to be settled. When an affair of this kind has occurred it has got to be tried, it has got to be investigated, and the interests of public justice will not stop short of going to the very bottom of it, and discovering what the truth is, regardless of time and expense. I do not say these things, gentlemen, in a fault-finding way. I desire to say them to you with the idea of urging upon you and of bringing to your minds an appreciation of the great importance of this matter, and of settling it and deciding it. I appreciate somewhat your position. I don't say this with any unkindness. I know that your labors in this matter have been tedious, and that they are wearisome, and I appreciate the length of time that you have been out, and you must not think that I am forgetful of these things; but there must be a supreme effort made on your part to harmonize differences, and, therefore, I am going to insist that you begin at the very outset of the case, from the very beginning, and go over it again, looking at it from every possible point of view, so that there shall not be a failure of justice in this case. I know that your jury room is a narrow place, and that you are a good deal confined there, and for that reason I have arranged with the sheriff that you shall occupy this room from now on to the completion of your labors. Of course, I don't know how long it will take, and, therefore, I have arranged with the sheriff that you shall have more comfortable quarters, so that this room will be cleared shortly after you have retired, and the officers will remain downstairs in the sheriff's office, and you will be given this room, giving you a better opportunity to circulate about; and making your position as comfortable as possible under the circumstances.' At 7:55 P. M. the court ordered that the jury be taken to supper and returned to their room for further deliberation. . . . The court also entered an order that the jury should be conducted to their meals at the usual hours, tomorrow, Sunday, and including Monday morning. Defendant's counsel objected and accepted to the remarks and instructions given to the jury, at 8:20 P. M., on March 13, 1897, and to each and every part thereof. Defendant particularly and specifically objects and excepts to folios 11,805 to and including folio 11,817, and also asks that the written communication of the jury to the court be made a part of the record. Monday morning, March 15, 1897, at 7:30, the jury sent word to Justice Dunwell that they were ready to report, and they were accordingly brought into court at 8:30 A. M., the roll called by the clerk, and the question put: 'Gentlemen of the jury, have you agreed upon a verdict?' By Foreman Holden: 'We have. We find the prisoner guilty as charged in the indictment.' By the Court: 'You say you find the prisoner guilty, as charged in the indictment, of murder in the

first degree?' By Foreman Holden: 'We do.' The jury were thereupon polled and each answered, 'Guilty.' Defendant's counsel moved arrest of judgment under § 467 of the Code of Criminal Procedure, and also on each and every ground, as provided by the Code of Criminal Procedure in reference to an arrest of judgment. Defendant's counsel also moved for a new trial in the case, under § 465 of the Code of Criminal Procedure, and upon each and every ground stated in § 465, and especially subdivisions 4, 5, and 6 of that section. Both motions were denied, and exceptions taken by defendant."

Mr. Robert L. Drummond, for appellant:

It is one of the rights of a jury to disagree, and it is one of the duties of a trial court to hear their report of a disagreement.

Code Crim. Proc. § 428, subsec. 2.

The only right that the trial court had in the premises is given by § 428. He went outside of and beyond the provisions of this section.

Slater v. Mead, 58 How. Pr. 57.

It was error to instruct the jury—"Of course, I have no means of knowing . . . why this state of affairs exists in your body." It was another reminder to them that they were going to stay until they had agreed on a verdict. This was coercion, and this alone is ground for reversal.

Green v. Telfair, 11 How. Pr. 260; *Slater v. Mead*, 58 How. Pr. 57; *Oranston v. New York, O. & H. R. R. Co.* 108 N. Y. 614.

Mr. George W. Nellis, for respondent:

A trial court has a wide discretion as to the trial, and questions involving that discretion can be legally raised only by motion to set aside the verdict, and cannot be raised on appeal.

There are many questions of that character, among which is the length of time a jury shall be kept out.

Caldwell v. New Jersey S. B. Co. 47 N. Y. 282; *Daly v. Byrne*, 77 N. Y. 182.

The time of how long a jury shall be kept out is wholly within the discretion of the judge presiding at the trial, and the question of whether that discretion has been properly exercised can be raised only on motion to set aside the verdict.

It was proper for a judge presiding at the trial to set before the jury all proper motives to induce them to agree upon a common result, and those motives might properly be repeated and earnestly urged upon them by the trial judge.

Green v. Telfair, 11 How. Pr. 260; *Erwin v. Hamilton*, 50 How. Pr. 32.

Parker, Ch. J., delivered the opinion of the court:

The question before this court is not how long may a court keep a jury together, for that is a matter resting in the sound discretion of the trial court. Nor is the question whether a jury should be compelled to stay together more than one night without a bed, or at least a cot, to lie on, for that, too, is a matter resting in discretion. It seems a wiser exercise of that discretion, however, to provide sleeping accom-

modations for the jury after the first night, at least. This can be readily done in most hotels, without interference with the requirement to keep the jury together. But, while these questions are not before the court, the facts which suggest them are, and, together with other facts, they command an answer to the query, May there be coercion of a jury in a capital case? If this question be answered in the negative, there follows the further inquiry, Was there coercion in this case?

By the ancient common law, jurors were kept together as prisoners of the court, until they had agreed upon their verdict. *Thomp. & M. Juries*, § 810. It was regarded, not only proper, but requisite, that they should be coerced to an agreement upon a verdict. *Proffatt, Jury Trial*, § 475. "A jury, sworn and charged in case of life or member, cannot be discharged by the court or any other, but they ought to give a verdict." *Co. Litt.* 327b. *Bl. Com.* p. 875, says: "The jury, after the proofs are summed up, unless the case be very clear, withdraw from the bar to consider their verdict; and, in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed."

And it has been held that, if the jurors do not agree in their verdict before the judges are about to leave the town, . . . the judges are not bound to wait for them, but may carry them to town . . . in a cart." In the *Doctor and Student* (1518) at page 271, it is said: "I take not the law of the realm to be that the jury, after they be sworn, may not eat nor drink till they be agreed of the verdict; but truth it is there is a maxim and an old custom in the law that they shall not eat nor drink after they be sworn, till they have given their verdict, without the assent and license of the justices. . . . And, if they will in no wise agree, I think that the justices may set such order in the matter as shall seem to them by their discretion to stand with reason and conscience, by awarding a new inquest, and by setting fine upon them that they shall find in default, or otherwise as they shall think best in their discretion; like as they may do if one of the jury die before verdict, or if any other like casualties fall in that behalf." *Mr. Emlyn*, in his preface to the second edition of the *State Trials*, printed in 1780, says: "The law requires that the twelve men, of which the jury consists, shall all agree before they give in a verdict; if they don't, they must undergo a greater punishment than the criminal himself; they are to be confined in one room without meat," etc., till they are starv'd. It would be pretty hard to assign any tolerable reason for this usage; if it has seldom or never happen'd I'm afraid it has sometimes been prevented only by the unjust compliance of some of the jurors against their own consciences. . . .

To what end, therefore, are they to be restrained in this manner? It may, indeed, force them to an outward seeming agreement against the dictates of their own consciences, but can never be a means of informing their judgment or convincing their understanding. . . . Why must the jurors be compelled to an agreement one way or the other? After all, a forced agreement is no better

than none. If the consent of him who stands out against the rest be of any regard, it ought to be free; if of none, then why can't a verdict be given without it?"

The inconsistency of insisting that every one of twelve men must agree before a verdict can be rendered, and at the same time justifying a court in coercing one or more jurors into an agreement with their fellows, received early attention by the courts of this state.

In *People v. Olcott*, 2 Johns. Cas. 301, 1 Am. Dec. 168, the defendant was tried under an indictment for conspiracy to defraud, and the jury being unable to agree, the court, against the consent of the defendant, ordered a juror withdrawn and the jury discharged. Mr. Justice Kent, in an opinion reviewing prior cases at length, paid his respects (at page 309) to the rule formerly existing of compelling an agreement of the jury. He said: "The doctrine of compelling a jury to unanimity by the pains of hunger and fatigue, so that the verdict in fact be founded, not on temperate discussion and clear conviction, but on strength of body, is a monstrous doctrine, that does not . . . stand with conscience, but is altogether repugnant to a sense of humanity and justice. A verdict of acquittal or conviction, obtained under such circumstances, can never receive the sanction of public opinion. And the practice of former times, of sending the jury in carts from one assize to another, is properly controlled by the improved manners and sentiments of the present day."

In *People v. Goodwin*, 18 Johns. 187, 9 Am. Dec. 208, the defendant was indicted for manslaughter. The jury being unable to agree before the last moment the court would sit, they were discharged. The question arose whether defendant could be again put upon his trial on the indictment. In writing the opinion of the court, Spencer, Ch. J., said: "In the case of *People v. Olcott* . . . all the authorities then extant upon the power of the court to discharge a jury in criminal cases, and the consequences of such discharge, were very ably and elaborately examined by Mr. Justice Kent, and it would be an unpardonable waste of time to enter upon a re-examination of them." The chief judge quotes largely from Justice Kent's opinion, and says: "The learned judge inveighs with force and eloquence, against the monstrous doctrine of compelling a jury to unanimity by the pains of hunger and fatigue, so that the verdict is not founded on temperate discussion, but on strength of body. Although the case of the *People v. Olcott* was a case of misdemeanor, the reasoning is, in my judgment, entirely applicable to cases of felony; and, although the opinion was confined to the case under consideration, a perusal of it will show that it embraces every possible case of a trial for crimes."

Other comparatively early criminal cases in which the same question was presented and passed on were *People v. Ward*, 1 Wheel. Crim. Cas. 469; *Grant v. People*, 4 Park. Crim. Rep. 527; *People v. Green*, 13 Wend. 55; *United States v. Perez*, 9 Wheat. 579, 6 L. ed. 165.

In *Green v. Telfair*, 11 How. Pr. 260, a motion was made to set aside a verdict on affidavits. The judge said to the jury, in substance: 41 L. R. A.

This case has excited considerable feeling; the nature of jury trials implies concessions and compromise; no juror should control result, or otherwise the verdict would be that of one man, not that of twelve; that for five years he had discharged but one jury that had failed to agree, and he should send them out again, and hoped they would agree. One of the jurors said he supposed (it being Saturday afternoon) their duties would be at an end and they would be discharged at twelve o'clock, to which the judge replied that this was not so; that he was authorized to receive the verdict on Sunday, a.d. besides, it was his intention to go to Albany by the next train, and, if they did not agree before he left, he would return on Monday and receive their verdict. Jury retired, remained absent about half an hour, returned into court, and rendered a verdict for plaintiff. Mr. Justice Harris, before whom the motion was made to set aside the verdict on the ground of coercion, said in the course of his opinion: "An attempt to influence the jury, by referring to the time they are to be kept together, or the inconvenience to which they are to be subjected, in case they are so pertinacious as to adhere to their individual opinions, and thus continue to disagree, cannot be justified. A judge has no right to threaten or intimidate a jury in order to affect their deliberations. I think he has no right to even allude to his own purposes as to the length of time they are to be kept together. There should be nothing in his intercourse with the jury having the least appearance of duress or coercion. . . . That, should they continue to disagree, they are not to be exposed to unreasonable inconvenience, nor to receive the animadversion of the court."

In *Slater v. Mead*, 53 How. Pr. 58, the judge said to the jury: "You must agree upon a verdict. I cannot discharge you until you agree upon a verdict." The jury retired and soon returned and rendered their verdict of no cause of action. Verdict was set aside on motion at special term, the opinion citing with approval the remarks of Mr. Justice Harris in *Green v. Telfair*, 11 How. Pr. 260.

In *Ingersoll v. Lansing*, 51 Hun, 108, the court made no provision for discharging the jury in the absence of the presiding justice from the county, unless they agreed, which compelled them to bring in a verdict or remain in confinement for four days without aid, protection, or even the presence of the court. On appeal, this was held to constitute coercion, and therefore that the trial court erred in refusing to set aside the verdict. In the course of the opinion, which was written by Mr. Justice Follett, the opinion in *Green v. Telfair* is cited with approval, and also *Pierre v. Pierce*, 38 Mich. 412. In the latter case the jury retired on Tuesday p. m. Wednesday p. m. officer informed the judge that they could not agree. Thereupon the judge directed the officer to inform them: "The judge does not believe it yet; and you might say to them that it is essential they agree to-night, as I am going away, and won't be back until day after tomorrow, and they might not get discharged until I come back, as Judge Coolidge is going to be here." The verdict was returned within an hour. It was held that the verdict should be regarded as coerced, the

court saying. "Every attempt to drive men into an agreement which they would not have reached freely is a perversion of justice." "The one may be right as well as the eleven, and if right may be able to persuade them. . . . And it is very possible, at least, . . . that a message of the kind here given would be regarded by the outstanding juror as a somewhat strong intimation of the judge's opinion concerning the plainness of the case, and the impropriety of holding out."

In *Physioc v. Shea*, 75 Ga. 466, a new trial was granted, where a verdict was rendered shortly after the judge told the jury (which had been out all night) that they could have breakfast at their own expense, they having had no supper.

In *Chesapeake & O. S. R. Co. v. Barlow*, 86 Tenn. 537, the jury reported inability to agree. The trial judge said: "This is too common, and you ought to agree;" that he would not discharge them, but should keep them together for the remaining three weeks of the term unless they agreed. They agreed next day. The verdict was set aside.

In *State v. Bybee*, 17 Kan. 462, the court said to the jury that they ought, by compromise and surrender of individual opinion, to agree, and that failure to do so would be an imputation on court and jury. In an opinion written by Judge Brewer the court presented its reasons for reversing the judgment, in part, that while the court might call the attention of the jury to many matters that rendered an agreement desirable, such as time already taken, improbability of securing additional testimony, the general public benefit in a speedy close of a litigation, the question of expense to parties and the public, yet no juror should be influenced to a verdict by fear that failure to do so would be regarded by the public as reflecting upon either his intelligence or his integrity. "Personal consideration should never be permitted to influence his conclusions; and the thought of them should never be presented to him as a motive for action." That was a criminal case, and it may be said, in passing, that the language used by the trial judge to the jury is very much like that used on one occasion by the judge in the case at bar. The intelligence of the jury was not more sharply reflected upon in that case than in this, for the trial justice said: "This case has occupied nearly seven weeks, and to say now, at the end of all that time,—at the end of all this labor and expense,—that the question is no better off than it was when started, is almost to confess incompetency in this matter."

In *Hancock v. Elam*, 8 Baxt. 33, the judge ordered the jury locked up until they should agree, not allowing them to have dinner. Held error.

Spearman v. Wilson, 44 Ga. 478, held: "The court erred in overruling the motion for a new trial, upon the ground that, after the jury were brought in and answered they had not and were not likely to agree, he stated to them if they did not bring in a verdict very soon he would make arrangements to carry them to Greensboro. This question has been decided in *Gholston v. Gholston*, 31 Ga. 625."

In 16 Am. & Eng. Enc. Law, p. 522, the rule 41 L. R. A.

is said to be that "language on the part of the court, the obvious tendency of which is to coerce an agreement on the part of the jury, affords ground for a new trial. To insist too strenuously upon the necessity of an agreement may have such effect."

Terre Haute & I. R. Co. v. Jackson, 81 Ind. 19, 24, was an appeal from a decision overruling a motion for a new trial. Judgment was reversed, and a new trial granted, upon the ground of coercion. After the jury had retired and been out nine hours, the trial court, without consent of the appellant, "caused the jury to be informed through the bailiff having them in charge that, if they did not agree upon a verdict, the court would keep them until Saturday night, a period of four days, to which action of the court the defendant at the proper time, as soon as her attorneys learned of such action, objected and excepted." "This action of the court cannot be justified. It constituted,—as it must have been intended it should,—a kind of coercion upon the jury, which was inconsistent with their proper independence."

A plain error was committed. Its plain tendency was to influence the jury."

Berry v. People, 1 N. Y. Crim. Rep. 43, 47, reported in memorandum (77 N. Y. 588), is not at all in conflict with the trend of all recent authority upon this question. In that case the jury, after being charged, retired for deliberation, and upon returning to the court asked for further instructions, and then announced their inability to agree upon a verdict. The recorder, addressing the jury, said: "I would discharge you, but under my sense of duty I cannot. . . . After a few days it, [the case] has been presented to you, and thoroughly argued and tried, witnesses were examined and cross-examined. I do not care what you find; guilty or not guilty; it is perfectly immaterial to me. But I say it is my duty if you cannot agree, that I shall lock you up for the night; that is a most ungrateful thing for me to do to any jury. As I told you on Friday night, I do not want you detained from your families, and I do not now. If you cannot agree, I shall order an officer to take you in charge. I will give you fifteen minutes, and see if you can arrive at a conclusion." But for the expression of the trial judge, "I shall lock you up for the night," his remarks would have presented no ground for criticism. This court was of the opinion that the trial judge did not intend to coerce the jury; that he sought merely to convey the idea that they would have to remain over night at the court. This court said in its *per curiam* opinion: "The alleged threat to lock up jurors if they failed to agree was, we think, only intended as a statement that the jury would have to remain over night, as the court would adjourn. Nothing like a threat of imprisonment or punishment could have been intended." The decision of the court, therefore, was that there had been no attempt at coercion, the language complained of not being susceptible of a construction that would give it that effect with the jury, and not that a judgment would be allowed to stand either where the trial court had attempted to coerce the jury, or the language used by him was of such a character

that it probably had that effect. *Phanix Ins Co. v. Moog*, 81 Ala. 885, and *Taylor v. Jones*, 2 Head, 565, are in line with cases cited.

Reference has now been made to nearly all the cases which I have been able to find, of comparatively recent date, and they establish that the old rule permitting coercion of a jury in order to secure a verdict has been swept away; that, under our present method, the independence of a juror is respected. An attempt to drive the members of a jury into an agreement is beyond the power of the court, and an obvious effort to effect such a result demands a new trial.

In this case we can well understand the anxiety of the learned judge who presided at the trial, to have it ended by a verdict of a jury. The trial had lasted nearly seven weeks; it had been a severe strain upon the jury to be kept together all that time; the expense had been exceedingly great for so small a county; and to have all this inconvenience, labor, and expense borne for nothing seemed a most unfortunate result and one to be avoided if possible. But in the attempt to avoid it the learned judge, as we think, after a very careful consideration of the subject, fell into error, and as a result, very likely coerced some members of the jury into an agreement with their fellow members against their own personal convictions.

Some of the grounds upon which this conclusion rests will now be given.

At 8:30 P. M. of the 11th day of March, 1897, the jury retired to consider a case, the trial of which had consumed nearly seven weeks, during all of which time they had been kept together. All of that night and until 11:30 A. M. of the next day the jury were presumably engaged in discussing the evidence, but at the hour last named they came into court and asked two questions about evidence. The information asked for was furnished by reading a portion of the stenographer's minutes. At 8:25 P. M. of the same day the jury came into court and announced that they had not agreed upon a verdict. The court then addressed the jury upon the importance of a decision of the question submitted to them, concluding as follows: "It is for the interests of all concerned and public justice that there should be a decision of this case, so that the question shall be put at rest. I cannot hear of a disagreement of this jury. You must retire, gentlemen." The jury at once retired, and two hours later asked for further instructions, which were furnished by reading from the stenographer's minutes. The next day, at 12:45 P. M., the jury presented to the court a written communication, which read as follows:

"The probability, or even possibility, of this jury ever agreeing is impossible, in my opinion. [Signed] Geo. J. Holden, Foreman."

For forty hours covering two entire nights, this jury had been engaged in the consideration of the testimony in a small room, and now for the first time reported their deliberate judgment to be that an agreement was impossible. The court responded to this communication as follows: "The order will be that you be conducted to your hotel, and that you be brought back for further deliberation. . . . I have made my own arrangements so as to

be back at your call, both for to-day and for some time in the future, so that this case may be fully disposed of, if there is a possibility for it. . . ." Language more apt to convey to a jury that the hardships of the past forty hours were to be continued for a considerable time in the future cannot easily be imagined. On their return the court addressed them at length, saying, among other things: "I don't know that you fully appreciate the gravity and importance to this community and to the state that a decision should be reached in this matter, and that this important question shall be settled whether the defendant is guilty or innocent. This case has occupied nearly seven weeks, and to say, now at the end of all that time, —at the end of all this labor and expense,—that the question is no better off than it was when it started, is almost to confess incompetency in this matter. . . ."

We suspend quoting from the remarks of the court long enough to again call attention to *State v. Bybee*, 17 Kan. 462, in which the court reversed a judgment of conviction because the trial court, in urging the jury to agree, said "that failure to do so would be an imputation on court and jury." In the opinion of the court, written by Judge (now Mr. Justice) Brewer, it was said: "No juror should be induced to agree to a verdict by a fear that a failure to so agree would be regarded by the public as reflecting upon either his intelligence or his integrity. Personal consideration should never be permitted to influence his conclusions; and the thought of them should never be presented to him as a motive for action." The position taken by that court meets with our approval, and it is alike applicable to the comment of the trial court in this case that a failure to agree "is almost to confess incompetency in this matter."

Taking up again the address of the court to the jury, who had solemnly announced that an agreement was impossible, we quote: "I have laid aside my other engagements so that this case can be attended to, because I appreciate the importance of it, and I would like to enforce upon you an appreciation of the importance of settling this question. It has got to be settled." Later on, but in this same address, the court said: "I know that your room is a narrow place, and that you are a good deal confined there, and for that reason I have arranged with the sheriff that you shall occupy this room from now on until the completion of your labors. Of course, I don't know how long it will take. . . ." The address was followed by an order, entered on the minutes of the court, "that the jury should be conducted to their meals at the usual hours to-morrow, Sunday, and including Monday morning." Monday morning came, and the jury sent word to the court that they had agreed. They had been out for about eighty-four hours without beds or cots; forty of those hours they had been confined in a small room. From the remarks of the court, and the treatment they had received, they had every reason to believe that a still longer confinement on chairs and hard benches was in store for them,—a physical strain such as only strong men could stand. If one or more members of the jury surrendered their convictions

to put an end to the punishment they were undergoing, and with an indefinite continuance of which they were all threatened, it is not to be wondered at. Only very strong characters could have longer resisted the importunities of associates and the appeal of their own exhausted bodies for relief from the strain to which they had been so long subjected. Enough has been said to call attention to some of the rea-

sons which have led us to the conclusion that the agreement of this jury should be regarded as coerced. A verdict thus obtained ought not to be allowed to stand in any case, and, least of all, in one involving a human life.

The judgment should be reversed, and a new trial granted.

All concur.

ALABAMA SUPREME COURT.

R. J. WILLIAMS, *Appt.*,

I. HENDRICKS.

(115 Ala. 277.)

A partner is not liable for the penalty imposed by Code, § 3296, for "wilfully and knowingly" cutting trees of another person when this was done without his consent or knowledge, by his copartner.

(April 27, 1897.)

APPEAL by defendant from a judgment of the Circuit Court for Pike County in favor of plaintiff in an action brought to recover the

NOTE.—Criminal and penal liability for act of copartner, servant, or agent.

- I. General rules.
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I. General rules.

As a general rule a partner is not criminally liable for the acts of his associates done without his knowledge or consent. *Whitton v. State*, 37 Miss. 379.

There can be no partnership in crime. *State v. Gay*, 10 Mo. 441.

So, it has been said in a prosecution against

statutory penalty for cutting timber on another's land. *Reversed.*

The facts are stated in the opinion.

Mr. R. L. Harmon for appellant.

Messrs. Hubbard & Hubbard for appellee.

Coleman, J., delivered the opinion of the court:

Section 3296 of the Code of 1886 provides that "any person who cuts down any oak . . . on land not his own, wilfully and knowingly, without the consent of the owner of the land, must pay to the owner \$10 for every such tree," etc. The plaintiff, the appellee, sued to recover the statutory penalty for cutting down thirty-four oak trees. The

an agent, that there can be no agency in the commission of misdemeanors, and that the agent, and not the principal, is the guilty party. *State v. Ohio & M. R. Co.* 23 Ind. 363.

And in *Spring Valley v. Henning*, 42 Ill. App. 159, which was a suit for a penalty imposed by a city for selling liquors within its limits without first having obtained a license therefor, it was said that what one does by his agents he does by himself. There is no such thing as an agency in crime. The employer is as guilty as the agent, and is an accomplice before the fact, and under the law a principal, and it matters little what the instructions were.

So, in *State v. Great Works Mill & Mfg. Co.* 20 Me. 41, 37 Am. Dec. 38, it was said that where a crime or misdemeanor is committed under corporate authority, the individual concerned, and not the corporation, should be indicted.

But a corporation may be held liable to a penalty for acts of its agents or servants done in the course and within the scope of their employment. *Satterfield v. Western U. Teleg. Co.* 23 Ill. App. 446.

So, where the servant acts in obedience to an express order given by the master, the master is liable for all the consequences of the servant's acts, either civilly or criminally. *Sagers v. Nuckolls*, 3 Colo. App. 85.

Where a person with criminal intent designs the commission of a criminal act, and employs another to carry out his purpose, the act of the person employed in carrying it out becomes the act of the principal, and he, as well as the agent, is criminally responsible therefor. *United States v. Nunnemacher*, 7 Biss. 111.

And where a man does an act which amounts to a felony, through the instrumentality of an innocent agent, the employer, and not the agent, is accountable for the act. *Reg. v. Bleasdale*, 2 Car. & K. 765.

The general rule is a person may be held

evidence shows that the defendant and one Hinton were partners in getting staves, and according to their agreement the defendant furnished the money for the partnership, and Hinton attended to the business of getting out the staves. He furnished to defendant at regular stated periods the amounts due parties from whom trees were purchased, and also what was due for labor, and the defendant settled the claims as thus reported. There was evidence tending to show that Hinton had no authority from defendant to cut trees on any land except by agreement and purchase from the owner, and that the trees in controversy were cut by Hinton for staves without the knowledge and consent of the defendant. One of the questions involved in the case was whether the fact that defendant and Hinton were partners in the stove business subjected the defendant to the statutory penalty. In Story, Partn. § 168, the following language is used: "From what has been already suggested, it is obvious that a tort committed by one partner, or by any other agent of the partnership, will not bind the partnership, unless it be either authorized or adopted by the firm, or be within the proper scope and business of the partnership." The general rule is that those partners only are liable in respect of a tort who are privy to the tort, but this rule is subject to the exception that partners are responsible for the tortious acts of a partner in the prosecution

of the copartnership business. Collyer, Partn. § 457; 8 Kent, Com. p. 47, note. The rule is well settled, at least in this state, that the master is liable for the wilful tortious acts of his servants done within the scope and range of his employment, although the particular act was not authorized by the master. The rule as here declared was at first limited to actions against railroads. *Gilliam v. South & North Ala. R. Co.* 70 Ala. 268. But, if sound as to railroads, there seems to be no good reason why it should not apply, under like circumstances, in all cases of *respondet superior*, or to a partner acting for and within the scope of the business. *Lisley v. Fletcher*, 81 Ala. 284; *Alabama G. S. R. Co. v. Frazier*, 93 Ala. 45; *Kansas City, M. & B. R. Co. v. Higdon*, 94 Ala. 286, 14 L. R. A. 515. In all these cases where the principle was applied the action sought to hold the principal or superior responsible for a common-law liability. The actions were to recover damages sustained as the consequential and natural result of the tort of the agent or servant. If, in the case at bar, the plaintiff had sued to recover the consequential damages sustained by the tortious cutting of the trees by Hinton, the partner, we would without hesitation, under the well-settled principles declared in the foregoing cases, hold that defendant was responsible for such damages resulting naturally and proximately from the tortious acts of his partner done in the

criminally liable for the acts of his agent where he participated in them. *Com. v. Gillespie*, 7 Serg. & R. 469, 10 Am. Dec. 475.

And participation in the acts of an agent which will hold the principal criminally liable therefor may be adduced from circumstantial evidence. *Com. v. Gillespie*, 2 Serg. & R. 469, 10 Am. Dec. 475.

So, the rule that the master is responsible for the acts of his servant in the course of the master's business is applicable in a civil action based upon a penal statute. *Fruchey v. Eagleston*, 15 Ind. App. 88.

And the general principle which governs the responsibility of the master for the acts of his servant applies to an action brought under a statute making that a tort which was not so before, and providing for the recovery of damages against the tortfeasor. *George v. Gobey*, 128 Mass. 289, 35 Am. Rep. 376.

Where an agent who commits a crime in the prosecution of his duties as such is himself guilty, he is the principal, and the employer is an accessory before the fact; but if it be a misdemeanor, both are principal offenders. *People v. Adams*, 8 Denio, 190, 45 Am. Dec. 408.

And one who procures, counsels, commands, or incites his clerk or agent to commit a crime in his absence is an accessory before the fact, and cannot be convicted upon an indictment which charges him with having jointly with his clerk committed the offense as principal. *Hately v. State*, 15 Ga. 347.

And the meaning of the word "command," as applied to the case of a principal and accessory, is, where a person having control over another, as a master over his servant, orders a thing to be done. *State v. Mann*, 3 N. C. (1 Hayw.) 4.

In criminal cases, however, it is the participation of the principal or partner in a wrongful act, either directly or by concurring therein, or by assenting thereto, that renders him liable therefor. If the principal or partner com-

mands, procures, or expresses assent that the wrong shall be done before or at the time of its commission, criminal responsibility may be fixed upon him. *Barnett v. State*, 54 Ala. 570.

But, as a general rule, a master is not criminally liable for a criminal act upon the part of his servant, unless he in some way participates in, countenances, or approves the act. *Com. v. Stevens*, 153 Mass. 421, 11 L. R. A. 357; *Com. v. Nichols*, 10 Met. 259, 43 Am. Dec. 432; *Nail v. State*, 34 Ala. 262; *Hipp v. State*, 5 Blackf. 149, 33 Am. Dec. 463; *Mitchell v. Mims*, 8 Tex. 6; *Rex v. Higgins*, 2 Ld. Raym. 1574.

To render him liable there must be such a direct participation in the act, or such assent and concurrence therein, as would involve him morally in the guilt. *Com. v. Nichols*, 10 Met. 259, 43 Am. Dec. 432.

And where it is sought to hold the master liable for a penalty for the act of his servant, it must appear from the evidence that the servant committed the act under the express direction of the master, or at least that from the nature of his employment authority to do the act was necessarily implied. *Satterfield v. Western U. Teleg. Co.* 23 Ill. App. 446.

Where one person employs another to do an act which may be done in a lawful manner, and the latter in doing it unnecessarily commits a public nuisance whereby injury results to a third person, the employer is not responsible. *Peachey v. Rowland*, 13 C. B. 182, 20 L. T. 208, 22 L. J. C. P. N. 8, 17 Jur. 764.

And a man cannot be convicted of a crime perpetrated by his agent in doing an illegal act which he had been specifically ordered by his principal not to do. *Com. v. Johnston*, 2 Pa. Super. Ct. 317.

And declarations of the agent in the performance of such illegal acts are not generally competent against the principal when sought to be charged in a criminal proceeding. *Nail v. State*, 34 Ala. 262.

In *Com. v. Stevens*, 153 Mass. 421, 11 L. R. A.

statute, the object of which is to punish the wrongdoer as well as to recompense the injured individual. To subject anyone, therefore, to the penalty of the act it must be shown to have been wilfully violated, by proof that the party charged committed the forbidden act himself, or caused another to do it by his command or authority. The statute gives the penalty against the actual trespasser only; it would be a violation of legal principles, therefore, to extend it so as to embrace another by implication. The liability arising from the relation of master and servant is founded in policy, but the implication of authority in the servant, that would render the master liable in many cases in a civil suit, would not be sufficient to convict him in a criminal or penal prosecution. The maxim, *qui facit per alium*,

facit per se, would be strictly applicable in an action of trespass against Cushing, but in this prosecution he is liable only for his personal acts, or such acts of his workmen or servants as are proved to have been done by his express, or at least necessarily implied, authority. There is no proof of such acts, or such authority having been given by Cushing to those who committed the trespass; he cannot, therefore, be considered liable under the statute. Although Dill cannot recover in this action, he is not without a remedy for the injury sustained. That given by the statute is in addition to the remedy at common law, and an action under it would not be a bar to a suit at common law in any result." In the case of *Satterfield v. Western U. Teleg. Co.* 23 Ill. App. 446, the action was brought against the tele-

the press were present, and hoped they would take notice of it, which was indorsed by the others, whereupon condensed, but substantially correct, accounts of what had been said were inserted in the newspapers, which constituted the libels complained of, is sufficient evidence on a prosecution against such member and chairman of the board for libel to go to the jury. *Parkes v. Prescott*, 38 L. J. Exch. N. S. 105, L. R. 4 Exch. 169, 20 L. T. N. S. 537, 17 Week. Rep. 773.

In the above case it was said by Byles, J., dissenting, that there is a distinction between the authority which may make a man liable criminally for a libel published by another, and that which will make him liable civilly for the acts of another.

d. Violation of revenue laws.

Any violation of the internal revenue laws incurring a penalty committed by a partner in the course of partnership business is in legal contemplation the act of all the partners, and each of them is liable to pay the penalty, and the fact that the partner knew nothing of the violation, and never consented to it, is no defense. *United States v. Thomasson*, 4 Biss. 90.

So, an action against partners, brought to recover double the value of certain importations alleged to have been illegally made and received and concealed and purchased by the defendant, under the act of Congress of March 3, 1823 (3 Stat. at L. 781), is not a penal action intended solely for the punishment of crimes against the revenue laws, but is a remedial action providing indemnity for loss in which knowledge of the agent is in law attributed to his principal, as well as that of the partner to all the members of the firm. *Com. v. Sloan*, 4 Cush. 52.

And the partners should be held liable for double the value of importations thus made, received, and concealed, the tortious act of the agent being the act of the principal when done in the course of his agency, though not directly authorized. *Com. v. Sloan*, 4 Cush. 52.

And where partners engage in the manufacture and sale of tobacco, which by the revenue law must be inspected and marked by a United States Inspector, everyone of them must, at his peril, take care that the revenue is not defrauded by any forged inspection marks on the back of packages of tobacco manufactured and sold by the firm. *United States v. Thomasson*, 4 Biss. 90.

So, two persons composing a partnership, who make and sign in their partnership name a false return to the assessor of internal revenue, may be jointly indicted therefor. *United States v. McGinniss*, 1 Abb. (U. S.) 120. 41 L. R. A.

And the members of a firm may be jointly indicted for making a fraudulent monthly return of tobacco manufactured, though only sworn to by one of them. *United States v. Montjoy*, 3 Int. Rev. Rec. 83.

And a principal employing two agents in a very extensive business, who make out false bills of lading while engaged in the regular course of their business, and present them to the collector, and obtain the clearance of a vessel thereon, is liable for treble the tolls usually charged on such property, under 1 N. Y. Stat. at L. 241, § 124, such act being a fraud upon the revenue laws of the state. *Davis v. Bemis*, 40 N. Y. 453, note.

But the responsibility of a merchant for a violation of the revenue laws by his clerk is limited to acts properly within the scope of his employment. *United States v. Halberstadt*, Gilp. 262.

And the purchase of an empty cask which had contained foreign distilled spirits, by the clerk of a commission merchant, and the removal to his store before the marks set thereon under the provisions of the act of Congress of March 2, 1799, had been defaced, does not render the merchant liable to the penalties of the act if he had no knowledge of or agency in the purchase and removal, or any acquiescence in such illegal proceedings. *United States v. Halberstadt*, Gilp. 262.

Where one of several partners enters a wine so that by a mistake of a clerk in the custom office the Crown is defrauded of its duties, however, all the partners who were such at the time of the importation are liable for the whole sum to the Crown. *Atty. Gen. v. Stranyforth*, Bunb. 97.

And a firm, one member of which consigns goods in a foreign country in such way that by mistake the Crown is deprived of a part of the revenue tax thereon, is liable to treble the amount though the act was done by his co-partner without his knowledge. *Graham v. Pocock*, L. R. 3 P. C. 345, 30 J. P. C. N. S. 38, 23 L. T. N. S. 537, 19 Week. Rep. 31.

And where imported goods come to hand, in which several persons are concerned either in partnership or otherwise, it being known that they had not paid the duties, the Crown may come against any one of them for the whole penalty of treble the value prescribed by law, the claim being in the nature of a tort, and not a contract. *Atty. Gen. v. Burges*, Bunb. 223; *Atty. Gen. v. Carbold*, Bunb. 223, note; *Atty. Gen. v. Weeks*, Bunb. 224.

So, the question on an information against a paper maker for sending out paper not tied up and labeled or wrapped with a departure stamp thereon, as required by 1 Geo. IV., chap. 58, § 2

graph company to recover the statutory penalty for trees conceded by the court to have been cut under the directions of the superintendent of the wires of the defendant. There was no evidence to show that the trees were cut under any authority or directions of the defendant, or had been ratified by it. The court conceded the liability of the principal or master for the torts of the agent done within the scope of his authority, but held that the principle did not apply when the action was brought to recover the statutory penalty. A statute of Massachusetts requires "that whenever . . . persons traveling with . . . [any kind of vehicles shall meet each other upon a road or bridge] each . . . [of them] shall seasonably drive his . . . vehicle to the right of the middle," etc. Rev. Stat. chap. 51, § 2.

6, 7, as to whether the wife of the paper maker who pledged paper not wrapped, labeled, and stamped had authority from her husband, is one of fact for the jury. *Atty. Gen. v. Riddle*, 2 *Crompt. & J.* 493, 2 *Tyrw.* 523.

And where a person is concerned as partner or otherwise in goods which have not paid the duties, to render him liable, proof need only be made that the goods came to his power or into his agent's custody. *Atty. Gen. v. Burges*, *Bunb.* 223.

So, all persons present and jointly interested or aiding in the smuggling of goods are principals, and equally liable to the penalty imposed therefor. *King v. Manning*, 2 *Comyns*, Rep. 616.

And where a trader harbors or conceals smuggled goods he is liable for the penalties for the illegal act of a servant done in the conduct of the business with a view to protect the smuggled goods, though he was absent at the time, and the act was done by the servant upon the exigency of the occasion when the goods were discovered. *Atty. Gen. v. Siddon*, 1 *Crompt. & J.* 220, 1 *Tyrw.* 41.

And each of several persons obstructing a custom-house officer contrary to 8 Geo. I. chap. 18, § 25, is separately liable to the penalty imposed by such act. *Rex v. Clark*, 2 *Cowp.* 610.

So, where two partners are separately convicted under 3 & 4 Wm. IV. chap. 53, § 44, providing that every person who shall be concerned in the shipping of goods the duties for which have not been paid shall forfeit treble value thereof or be liable to a penalty of £100 each is liable to the penalties imposed by the act. *Reg. v. Dean*, 12 *Mees. & W.* 39, 13 *L. J. Exch.* N. S. 33.

And a customer who certifies falsely into the exchequer through the concealment of his deputy is liable therefor to the penalties prescribed by 3 Hen. VI. chap. 3, though such customer is required by law to appoint a deputy. *Anonymous*, 2 *Dyer*, 238, b.

And a person may be charged with being concerned in the unshipping of goods, the duties on which had not been paid, and with knowingly harboring goods imported, and illegally unshipped without payment of duties, etc., under 3 & 4 Wm. IV. chap. 53, § 44, where it appears that a practice had prevailed at the custom house of allowing the owners of imported goods to take them away without payment of duty at the time, an entry of them having been previously made in a book kept by the officers for that purpose, and that his clerk had removed some of the leaves from the custom-house book and substituted others containing false entries of the quantity of goods imported, though there was no direct proof that this fact was known
41 *L. R. A.*

"Every person offending against the provisions . . . [of the act] shall for each offense forfeit a sum not exceeding \$20 . . . and he shall further be liable to any party for all damages sustained by reason of such offense." *Id.* § 8. In the case of *Goodhue v. Dix*, 2 *Gray*, 181, the plaintiff sought to hold the principal or master liable upon the ground that the servant omitted seasonably to drive to the right as provided in the statute. The court held that the employer or owner of the vehicle was not liable under the statute "if he be in no way implicated in the conduct of the servant," and that the liability was limited to the particular individual who was guilty of its violation. The case recognized the common-law liability of the principal or employer for the acts of the agent or servant, but held the rule did not apply

to him, he having derived the benefit from the fraudulent transaction. *Reg. v. Dean*, 12 *Mees. & W.* 39, 13 *L. J. Exch.* N. S. 33.

e. Maintenance of nuisances.

One who maintains a nuisance by himself or his servants is liable for a penalty imposed therefor, but the nuisance must have been caused by his own act or the acts of others through his procurement. *Sloan v. State*, 8 *Ind.* 312.

Thus, the owner of works carried on for his profit by his agents is liable to indictment for a public nuisance caused by such agents in carrying on the works, though done by them without his knowledge and contrary to his general orders. *Queen v. Stephens*, *L. R.* 1 *Q. B.* 702, 12 *Jur. N. S.* 961, 14 *L. T. N. S.* 593, 35 *L. J. Q. B. N. S.* 251, 14 *Week. Rep.* 593, 7 *Best & S.* 710.

And the directors of a gas company are answerable for a nuisance caused by the conveying of refuse of gas into a public river, whereby the fish are destroyed and the water rendered unfit to drink, though done by order of the superintendent and engineer under the general authority to manage the works, and though personally ignorant of the particular plan adopted, and though such plan was a departure from the original and understood method, which they had no reason to suppose was discontinued. *Rex v. Medley*, 6 *Car. & P.* 292.

So, evidence that a minor had been forbidden by the keeper to enter a billiard room, and was afterwards admitted by his agents or servants having charge thereof in his absence, is not admissible to establish a defense in a prosecution against such keeper for admitting a minor without written consent of his parents or guardian. *Com. v. Emmons*, 98 *Mass.* 6.

And the fact that a house in which lottery tickets were sold belonged to a person accused of their illegal sale, and that a boy conducted the business therein as a lottery broker under his sign, selling the ticket in question as his agent and in his name, may be submitted to a jury, and they may infer therefrom his participation in the sale of such ticket, particularly if the boy had been employed as his agent to sell tickets authorized by the laws of the state. *Com. v. Gillespie*, 7 *Serg. & R.* 469, 10 *Am. Dec.* 475.

But an indictment cannot be sustained against a railroad company for a nuisance in the obstruction of a highway by the stoppage thereon of trains upon its road by the persons in charge thereof while it is under the sole management of a receiver appointed by the court of chancery over whose acts the company has

WISCONSIN SUPREME COURT.

Isaac T. BRYAN, *Appt.*,
v.
Henry A. ADLER *et al.*, *Respts.*

(97 Wis. 124.)

The refusal of a waiter in an eating house to wait upon a colored patron because of his color renders the eating-house keeper liable, although he did not aid or abet the waiter in such action, to at least the minimum penalty provided by a law entitling all persons to the equal enjoyment of the privileges of eating houses under a penalty of not less than \$5 and costs.

(September 28, 1897.)

A PPEAL by plaintiff from a judgment of the Superior Court for Milwaukee County

evidence whatever tending to show such agency. Postal Teleg. Cable Co. v. Brantley, 107 Ala. 683; Postal Teleg. Cable Co. v. Lenoir, 107 Ala. 640.

b. Sabbath breaking.

The jury in a prosecution against a railroad company for Sabbath breaking may find the defendant guilty if, by proof of the habitual running of freight trains about the time of the offense, or from other satisfactory evidence, it is satisfied that the running of such trains was with the assent of the company, though it appears that by a general order it had directed its agents and employees not to ship anything except live stock and perishable freight on the Sabbath day. *State v. Baltimore & O. R. Co.* 15 W. Va. 362, 36 Am. Rep. 803.

And evidence that a place of business was kept open on Sunday, and that an employee was selling cigars therein, and that the proprietor was present a part of the day, justifies the conclusion that the business was carried on with his knowledge and by his authority, rendering him, as well as the clerk, liable for a penalty imposed upon any person carrying on any worldly employment or business whatever on the Lord's day. *Seaman v. Com.* 11 W. N. C. 14.

But mere proof that a part of a load of coal was transported over a railroad on the Sabbath day is not sufficient to sustain an indictment against the railroad company for Sabbath breaking. The assent of the company must be shown by proving that such Sabbath breaking was habitual, or by other satisfactory evidence, and such assent cannot be inferred from a single breach of the Sabbath by the authorized agents of the company while acting within the scope of their employment. *State v. Baltimore & O. R. Co.* 15 W. Va. 362, 36 Am. Rep. 803.

See also *infra*, III. f.

1. Dealing with slaves.

A partner who was not present, and against whom there was no proof that he knew of, or in any wise assented to, the trading of his copartner with a slave, cannot be held criminally liable for a sale to such slave of a pint of rum by his copartner, under a statute prohibiting selling to slaves. *State v. Coleman*, Dud. L. 32.

And a principal or employer cannot be held criminally liable under the statute prohibiting trading with slaves where the illicit trading was done by his clerk without his knowledge

in favor of defendants in an action brought to recover damages for defendants' refusal to furnish food to plaintiff at their public eating house. *Reversed.*

The facts are stated in the opinion.

Mr. G. W. Hazelton, for appellant:

All persons carrying on any branch of business mentioned in this law must comply with its terms, and the act of the servant within the scope of his employment is the act of the principal.

Craker v. Chicago & N. W. R. Co. 36 Wis. 689, 17 Am. Rep. 504; *Milwaukee & M. R. Co. v. Finney*, 10 Wis. 389; *Bass v. Chicago & N. W. R. Co.* 36 Wis. 468, 17 Am. Rep. 495, 49 Wis. 654, 24 Am. Rep. 437; *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 342, 41 Am. Rep. 41; *Schaefer v. Osterbrink*, 67 Wis. 499, 58 Am. Rep. 875; *Weed v. Panama R. Co.*

or consent. *State v. Matthew*, May, 1835, cited in Dud. L. 34.

And the fact that a negro dealt with the clerk of a shopkeeper without the written consent of his master or owner is not sufficient to charge the shopkeeper, under the South Carolina statute prohibiting dealing, trading, or trafficking with any slave not having a permit from his master, and prescribing a forfeiture of a designated sum, unless knowledge of the fact was brought home to him or some general order proved for that purpose. *State v. Dawson*, 2 Bay, 360.

So, the evidence of the agent of a person indicted for trading with a slave, that he had general instructions from his principal not to traffic with slaves without a written permit, throws the onus upon the state to produce further proof of his guilt. But it is not error to leave the inquiry to the judge whether these instructions have been abrogated, and whether the defendant has specially approved of the act. *State v. Privett*, 49 N. C. (4 Jones, L.) 100.

And where a person is indicted for selling spirituous liquor to a slave, and it is proved that the liquor was sold in his absence by his clerk, an instruction that if the defendant had previously sanctioned the acts of his clerk in selling liquor to slaves under similar orders, and if the jury believe that the accused, if he had been present, would have done as his clerk did, then they are authorized to find him guilty, is erroneous. *Patterson v. State*, 21 Ala. 571.

But while the mutual agency of partners in an unlawful transaction cannot be implied, yet, if their stock in trade, and the furniture and fixtures of their shop, and the run of custom, indicate an unlawful trade, and this is confirmed by proof of a sale of spirits to a slave by one of the partners, the jury in a prosecution for such sale may find the assent and guilty participation of the other. *State v. Biermau*, 1 Strohh. L. 258.

And the owners of a steamboat cannot escape the penalty imposed by Md. act 1838, chap. 375, for transportation on any railroad or steamboat of any slave without permit in writing from the owner thereof, by showing that neither they nor their agents had any knowledge that the slave was on board, and had no intention to violate the law, and that they had used reasonable diligence to prevent such persons from coming on board. *State v. Baltimore & S. S. Co.* 13 Md. 181.

So, in *State v. Robles, Rice*, L. 145, a new

17 N. Y. 363, 72 Am. Dec. 474; *Fishkill Sav. Inst. v. National Bank*, 80 N. Y. 162, 86 Am. Rep. 595; *Duinelle v. New York C. & H. R. R. Co.* 120 N. Y. 122, 8 L. R. A. 224; *Moir v. Hopkins*, 16 Ill. 318, 63 Am. Dec. 312; *Brum v. Brister*, 85 Miss. 391; *Caswell v. Cross*, 120 Mass. 545; *Stickney v. Munros*, 44 Me. 304; 1 Bl. Com. pp. 480-482; 2 Thomp. Neg. p. 861; *Story, Agency*, § 452; *Bishop, Contr.* § 1111; *Phelon v. Stiles*, 48 Conn. 426; *Cooley, Torts*, p. 539, and cases cited in note 1.

There is no exception to the rule except in the case of public officers who are not responsible for the acts of servants they are obliged to employ; the reason here being that the maxim of *respondet superior* has no application, there being no freedom of choice as to the selection and control of agents.

1 Dill. Mun. Corp. § 238, and cases cited.

Messrs. Austin & Fehr, for respondents:

Statutes which create liabilities, where at common law none existed, or which increase

common-law liabilities, are, as a rule, strictly construed. In such cases the newly created liability will not be extended beyond the express provisions of the statute.

28 Am. & Eng. Enc. Law, p. 400, and cases cited in note 1.

Statutes imposing costs are classed among those creating a liability, and must be construed strictly.

28 Am. & Eng. Enc. Law, p. 401, and cases cited in note.

If a statute defining an offense designates one class of persons as subject to its penalties, all others are to be deemed as exonerated. *Maxim Expressio unius est exclusio alterius*.

Howell v. Stewart, 54 Mo. 400; *State v. Jaeger*, 63 Mo. 403; 28 Am. & Eng. Enc. Law, p. 447.

The court will not extend the penalties provided for in an act to a class of persons or things not embraced within the penal clause, even when there is a manifest omission or oversight on the part of the legislature.

trial was granted upon a conviction for selling liquor to a slave, where it appeared that the liquor was sold by a clerk in the absence of the accused, his employer, and without his authority, and that the clerk had been already punished for the same act.

j. Gaming on licensed premises.

A licensed person may be convicted for suffering gaming to be carried on on the licensed premises within the meaning of § 17 of the licensing act of 1872, where the gaming had taken place thereon to the knowledge of a servant of the licensed person who was in charge of the premises, though without any knowledge or connivance on the part of the licensed person. *Bond v. Evans*, L. R. 21 Q. B. Div. 249, 57 L. J. M. C. N. S. 105, 59 L. T. N. S. 411, 36 Week. Rep. 767, 52 J. P. 612.

In the above case *Somerset v. Hart*, L. R. 12 Q. B. Div. 360, 53 L. J. M. C. N. S. 77, 48 J. P. 327, *infra*, was distinguished upon the ground that in that case there was no evidence to show any connivance or wilful blindness on the part of the landlord, and it did not appear that the servant was in charge of the premises, while in the present case it is distinctly shown as a fact that the servant was in charge of the skittle alley where the game took place.

And *Newman v. Jones*, L. R. 17 Q. B. Div. 132, 55 L. J. M. C. N. S. 113, 55 L. T. N. S. 327, 50 J. P. 373, *infra*, III. b, 2, was distinguished upon the ground that it was a decision on other statutes, and that it appears from the judgment that the court quashed the conviction, which had proceeded upon the ground that the committee were the legal owners of the property of the club, the only question submitted being whether the appellants, as trustees of the club, were liable.

So, evidence that three persons stopping at an inn retired to bed shortly before 11 o'clock, and that between 1:30 and 2:15 o'clock the following morning they were discovered in the sitting room playing cards for money, the noise having been heard outside the premises, and that during all this time the hired porter, whose duty it was to sit up and attend to customers, was in a room at an extreme end of the house where he could not hear what was going on, is sufficient to convict the proprietor of suffering gaming on her premises, though it is not established that she had actual knowledge of what was going on. *Redgate v. Haynes*, 45 L. J. M. C. N. S. 68, L. R. 1 Q. B. Div. 89, 33 L. T. N. S. 779, 41 L. R. A.

To warrant a conviction of an innkeeper for permitting gaming on his licensed premises, however, it is not sufficient to show merely that such gaming took place, but while actual knowledge is not necessary, something amounting to constructive knowledge must be shown. *Bosley v. Davis*, 45 L. J. M. C. N. S. 27, L. R. 1 Q. B. Div. 84, 33 L. T. N. S. 528, 24 Week. Rep. 140.

And a licensed person is not criminally responsible for suffering gaming on the licensed premises under the licensing act of 1872, § 17, where it took place to the knowledge of his servant employed thereon, who was not in charge of the premises, and there was no evidence to show any connivance or wilful blindness on the part of the licensed person. *Somerset v. Hart*, L. R. 12 Q. B. Div. 360, 53 L. J. M. C. N. S. 77, 48 J. P. 327.

And knowledge of a potman in an inn that gaming was carried on therein is not such constructive knowledge of the innkeeper as would subject him to conviction for suffering gaming to be carried on on his premises under 35 & 36 Vict. chap. 94, § 17. *Somerset v. Hart*, 53 L. J. M. C. N. S. 77, L. R. 12 Q. B. Div. 360, 48 J. P. 327.

In the above case *Mullins v. Collins*, L. R. 9 Q. B. 292, 43 L. J. M. C. N. S. 67, 29 L. T. N. S. 838, 22 Week. Rep. 297, *infra*, III. g, was distinguished upon the ground that in that case the plaintiff called no witnesses, but relied entirely upon certain points of law, thus opening the door to the inference that he had no affirmative case, and that the liquor was served by a woman, as to whom it would appear that there was some doubt whether she was not the appellant's wife and intrusted by him with the management of the house, the court saying that it seemed to it that this consideration really diminished very much its weight as authority on the point in question.

So, evidence that a police constable who was passing along the street by an inn, discovered that gaming was going on inside, and that one of the gentlemen playing said that he never saw a waiter come in during the playing, though he could not swear that a waiter did not come, and the depositions of the manageress that she did not supply the cards and knew nothing of the game, do not warrant a conviction of the manageress for suffering gaming on her licensed premises. *Bosley v. Davies*, 45 L. J. M. C. N. S. 27, L. R. 1 Q. B. Div. 84, 33 L. T. N. S. 523, 24 Week. Rep. 140.

Brooks v. State, 88 Ala. 122; *United States v. Ten Cases of Shawles*, 2 Paine, 163; 23 Am. & Eng. Enc. Law, p. 882; *Tewksbury v. Schulenberg*, 41 Wis. 596.

Cassoday, Ch. J., delivered the opinion of the court:

The complaint alleges, in effect, that on and prior to October 30, 1895, the defendants were conducting a public eating house and saloon

in Milwaukee; that on that day the plaintiff and another entered said eating house for the purpose of being served, and seated themselves at one of the tables provided for patrons, and waited some forty minutes for someone to take their order; that, on inquiry, they were informed by the defendants that their order was not taken because the plaintiff was a colored man, whereupon they left, and went elsewhere for supper; that, by such failure and refusal

k. Miscellaneous offenses.

That the acts complained of were done by a servant of a railroad company without its knowledge or consent and against its express orders is no defense in an action for violation of an ordinance restricting the rate of speed of trains crossing city streets. *Buffalo v. New York, L. E. & W. R. Co.* 64 N. Y. S. R. 150.

And the proprietor of a hotel is liable to a penalty provided by Ind. Rev. Stat. 1894, § 3291, 3293, for the denial of the full and equal accommodations of an inn on account of race or color, by the clerk of his hotel. *Fruchey v. Eagleson*, 15 Ind. App. 88.

See also principal case, *BRYAN v. ADLER*.

And the act of the president of a bank, of permitting a firm of which he was a member to overdraw its account at the bank with intent to defraud the bank of the money, is a misapplication of the moneys of the bank within the meaning of U. S. Rev. Stat. § 5209, for which he is criminally responsible. *United States v. Fish*, 24 Fed. Rep. 685.

So, where change bills are issued by a clerk of a partnership in a store, and they are afterwards received and paid out by the clerk in the firm's business with the knowledge and assent of its members, such subsequent use and emission are an offense within the meaning of Ala. Rev. Code, § 8643, by all who concurred or participated in it, though the partners may not have known or assented to the original act, and the several partners are jointly and severally guilty though they did not jointly assent to it. *Barnett v. State*, 54 Ala. 579.

And one who gives old county bank notes, which are valueless, to a man to pass, telling him to say, if asked about them, that he took them from a man he did not know, who passes them, is guilty of obtaining money under false pretenses. *Reg. v. Dowe*, 11 Cox, C. C. 115, 87 L. J. M. C. N. S. 52, 17 L. T. N. S. 481, 16 Week. Rep. 344.

So, a guardian of the poor for a township, who carries on business as a cabinet maker and upholsterer in partnership with his son, is liable to the penalty imposed by 4 & 5 Wm. IV., chap. 76, § 77, for furnishing or supplying for his own profit, or on his own account, any goods materials, or provisions ordered to be given in parochial relief to any person in such parish or union, where the relief officer purchased at his shop from his son and partner an iron bedstead which was by the direction of the relief officer delivered at the house of an outdoor pauper in the union, though the accused was not present when it was ordered, paid for, or delivered, and the price was paid to his son, and the bedstead was only loaned to the pauper and remained the property of the guardians. *Davies v. Harvey*, 43 L. J. M. C. N. S. 121, L. R. 9 Q. B. 433, 30 L. T. N. S. 629, 22 Week. Rep. 733.

And where a banksman, who was the servant of a charter master of a mine, who by a special rule made pursuant to 23 & 24 Vict. chap. 151, for regulating such mine, was to be

the responsible manager of the pit, and the banksman was to take care that not more than eight men should descend into the pit at the same time, violated such rule by lowering more than eight persons, and there was evidence that the charter master was close by and cognizant of his act, he may be convicted of aiding and abetting the banksman in the violation of such rule. *Howells v. Wynne*, 32 L. J. M. C. N. S. 241, 15 C. B. N. S. 3, 9 Jur. N. S. 1041, 11 Week. Rep. 807.

So, the Missouri statute awarding a penalty whenever any person shall die from an injury occasioned by the negligence of any officer, agent, servant, or employee while running or managing any locomotive, car, or train of cars, includes the negligence of any or all servants, and is not limited to that of a superior in command. *Rine v. Chicago & A. R. Co.* 100 Mo. 228.

But a complaint in an action for the penalty imposed by N. J. act March 11, 1890, § 13, for the prevention of cruelty to animals, upon any persons who, by their agents, servants, employees, or otherwise shall be guilty of such cruelty, must allege that the defendant did the act of cruelty complained of, or that he caused or procured it to be done. It is not sufficient to allege that he did it by his servant or agent; his direct agency must be shown by his presence, order, or direction. *State, Roerber, v. Society for Prevention of Cruelty to Animals*, 47 N. J. L. 237.

So, a die-sinker who is employed, for a pretended innocent purpose, to make a dye calculated to make shillings, who, suspecting the purpose, informs the commissioners of the mint, and makes the die under their directions for the purpose of detection, is an innocent agent, and his employer may be properly convicted therefor. *Reg. v. Bannen*, 1 Car. & K. 295, 2 Moody, C. C. 300.

And the members of a partnership who are mortgagees are liable for the statutory penalty for failure to enter satisfaction of a mortgage upon notice or request addressed to one, such notice being notice to all. *Renfro v. Adams*, 62 Ala. 302.

But a publisher is not liable to the statutory penalty for the keeping, publishing, and selling of a photograph previously copyrighted by another, imposed by U. S. Rev. Stat. § 4965, where the act was done by its agent or agents in pursuance of their employment, without his knowledge or consent. *Schreiber v. Sharpless*, 4 Fed. Rep. 175.

And a telegraph company is not liable for the penalty prescribed by Iowa Rev. Stat. 1894, § 5511, 5512, for failure to transmit a telegram, where the agent accepted the same in good faith, believing that the company had an office in the town to which it was directed, and transmitted it in the regular course of business, and it was not delivered for the reason that there was no office at that place. *Peterson v. Western U. Teleg. Co.* 10 Ind. App. 227.

Nor is the master, captain, manager, or owner of a steamboat responsible, under the act

to take the plaintiff's order, the defendants wrongfully and unjustly denied to the plaintiff the equal enjoyment and privilege of their said eating house, without valid reason or excuse, and by an unjust and illegal discrimination, based wholly on color, to his damage in the sum of \$500. The answer in effect admits that the defendants conducted such saloon and restaurant at the time mentioned; that they had many hundreds of patrons and many em-

ployees, and could not give personal attention to all their guests; that the plaintiff, a colored man, and his friend, a white man, were served with breakfast at their restaurant on the morning of that day; that about supper time they returned, and after remaining in the restaurant a short time, the plaintiff complained to the defendants that he had not been served; that the defendants thereupon requested one of their waiters to serve the plaintiff, but that he re-

of Congress of 1845, § 13, and the postoffice act of 1825, for the penalty imposed for failing to deliver letters, where the failure was due to the conduct of a clerk in their employ, and they were ignorant of the existence of the letter, and could not, by the use of reasonable diligence, have obtained knowledge of it. *United States v. Beaty, Hempst. 487.*

So, the penalty prescribed by Tenn. Code, § 4038, imposed upon an attorney failing to pay over money collected for a client upon return of execution *nulla bona*, and that he shall be stricken from the roll of attorneys, is not applicable to the case of a partner in a firm of attorneys who did not participate in the receipt or wrongful appropriation of the money. It is only applicable to the party derelict in duty and personally guilty of the wrong. *Porter v. Vance, 14 Lea, 629.*

And a railroad company is not liable for a penalty imposed by statute for failure on the part of its employees to feed animals shipped over its road, where the failure occurred while the road was in the hands of a receiver. *Texas & P. R. Co. v. Barnhart, 5 Tex. Civ. App. 601.*

Nor is a railroad company liable for the penalty imposed on railroads for detention of freight after tender of the freight charges due, by their officers, agents, and employees, by 2 Sayles, Tex. Civ. Stat. art. 258a, § 3, where it occurred while the road was in the hands of a receiver. *Missouri, K. & T. R. Co. v. Stoner, 5 Tex. Civ. App. 50.*

And see principal case, *HALL v. NORFOLK & W. R. Co.*, on the question of a penalty for over charge of freight or passenger rates.

So, to enable a party to recover double damages for injuries to stock, under Clay's Ala. Dig. 241, § 3, which is highly penal, it must be shown that the fence of the defendant was insufficient, and that the injury to the stock of the plaintiff arose out of some act of the defendant done, or commanded or directed to be done, by him. The mere negligence of a servant acting in the ordinary business of the master, although the damage to the stock of the plaintiff actually results from it, will not authorize a recovery, though an action on the case at common law would lie therefor. *Smith v. Causey, 22 Ala. 568.*

III. Violation of liquor laws.

a. Conflict of authority.

There is a decided conflict in the cases with reference to the criminal and penal liability of a partner, principal, or master for violation of the liquor laws by a partner, agent, or servant, which is even more marked than that with relation to other violations of law in general. It would seem, however, that perhaps by a majority of the cases the rule is adopted that the partner, principal, or master is not liable, unless the act was done with his authority or assent. But under statutes prohibiting the act in question absolutely and expressly, either by one's own hand or that of another, the partner, principal, or master is held liable. And there is a large number of cases holding him liable

if the act was one within the apparent scope of authority, though expressly forbidden, and there are still others holding the prohibition to be absolute, requiring the partner, principal, or master, at his peril, to see that it is not violated, without reference to the question of his knowledge, authority, or assent.

b. Unlawful sale generally.

1. By partner.

One partner is criminally liable for the unlawful sale of spirituous liquor by the other, where the sale was made in pursuance of an understanding between them, and for their joint benefit and account. *State v. Neal, 27 N. H. 131.*

And that one was often in a store conducted in the name of another, and that he bought, sold, and bartered goods there, inspected the books and made charges, and went to a neighboring city and bought goods for the store, and that he had formerly been a partner and the old sign of the firm still remained upon the building, are evidence to prove that he was a partner for the purpose of a prosecution for the illegal sale of intoxicating liquor therein. *State v. Wiggin, 20 N. H. 449.*

So, one who by the use of his capital or credit aids in procuring or furnishing whisky to another for the purpose of being unlawfully sold by the latter, which is so sold and he receives a given per cent on the cost of all the whisky so furnished and sold, is guilty, with the seller, of selling liquor unlawfully, whether under the terms of the agreement between them a technical partnership existed or not. *Phillips v. State, 95 Ga. 478.*

And a partner in a grocery store, who is interested as such in the liquor charged to have been illegally sold, is criminally responsible for the act of his copartner done in the course of the partnership business, in selling it, under Miss. Rev. Code, art. 9, § 199, subjecting to indictment anyone selling intoxicating liquors without a license, and anyone interested in the liquors so sold. *Whitton v. State, 87 Miss. 879.*

But the law does not imply from the fact that persons were mercantile partners, an agreement by them as part of their partnership undertaking to violate the penal laws by a sale of whisky in contravention of the statute; and therefore the guilt of either of them depends, either upon a sale by him, or the assent of his mind in some form to a sale by the other. *Acree v. Com. 18 Bush, 353.*

So, where two persons are jointly indicted as common sellers of intoxicating liquor, and single sales are relied on for their conviction, either may be convicted under the same indictment for any sale made by him, without reference to any joint participation or privity between them. *Com. v. Cook, 12 Allen, 542.*

And where two persons are charged in the same indictment with retailing intoxicating liquors contrary to law, and it appears that the liquors were sold by one of them alone, he may be convicted, and the other acquitted. *State v. Simmons, 66 N. C. 622.*

fused to do so, although demanded of him by the defendants; that thereupon the plaintiff left the restaurant; that, as soon as they could secure other help, they discharged said waiter; that the defendants had not been prosecuted for a misdemeanor, under chapter 228, Laws 1896; that they denied that they aided, incited, or countenanced said waiter in such refusal, or that they or either of them refused the plaintiff service in their restaurant. At the close of

the trial, the jury returned a verdict in favor of the defendants, and, from the judgment entered thereon, the plaintiff brings this appeal.

It is undisputed that the saloon and restaurant mentioned was a public eating house; that the waiters of the defendants therein were all white; that the plaintiff was black colored; and that the refusal to wait upon him was solely by reason of his color. The statute of this state provides, in effect: "That all per-

An information charging two persons with unlawfully selling intoxicating liquors is equivalent to a charge that each is guilty of so selling, and where one is tried separately he may be convicted, though the testimony fails to show that the other had any connection with it. *State v. Sterna*, 28 Kan. 154.

And a sale of intoxicating liquor made by one person alone is admissible in evidence under a complaint against him and two others for illegally selling intoxicating liquors, where he is tried alone. *State v. Wadsworth*, 30 Conn. 55.

But two persons indicted for jointly selling without a license cannot be both convicted upon proof that each one committed an act similar to the one charged. *Stephens v. State*, 14 Ohio, 386.

In *Tracy v. Perry*, 5 N. H. 504, however, it was held that two persons who join in the illegal sale of a glass of wine without being duly licensed incur the penalty jointly, and are not severally liable to several penalties.

B. By agent or servant.

The case of a sale of liquors prohibited by law at the shop or establishment of a principal, by an agent or servant usually employed in conducting his business, is one of that class in which the master may properly be charged criminally for the acts of his servants. *Com. v. Nichols*, 10 Met. 259, 43 Am. Dec. 432; *Hanson v. State*, 43 Ind. 330.

A liquor dealer is liable for sales made by an agent in his presence and with his knowledge and consent, the same as if he made the sales himself. *Hofner v. State*, 94 Ind. 84.

Where a person procures spirituous liquors for the purpose of retailing them, and hires another to attend to the bar as his servant, and he does the retailing, the employer is guilty the same as the employee. *State v. Caswell*, 2 Humph. 390.

And where a particular sale of liquor is made by a clerk or servant with the assent of the master, express or implied, he is criminally responsible therefor, and it would be wholly immaterial what general instructions he might have previously given. *State v. Mueller*, 35 Minn. 497.

And a general authority by an employer to his clerk to sell liquor unlawfully renders the employer criminally liable for any single sale made by the clerk in pursuance of such authority. *Kinnebrew v. State*, 80 Ga. 232.

So, where a servant sells spirits belonging to his employers contrary to law with their assent, both they and the servant may be held criminally liable therefor. *State v. Wiggin*, 20 N. H. 449.

And a master who knowingly permits his slave, while under his control, to retail liquor in a house belonging to the master, is himself guilty of the offense of keeping a tippling-house, and liable to the penalty imposed therefor. *Com. v. Major*, 6 Dana, 243.

A man may keep a tippling-house by his agent, and one who does so, whether by a hired

person or his wife or servant, incurs the penalty. *Com. v. Major*, 6 Dana, 243.

And a person may be convicted on an indictment for the unlawful sale of spirituous liquors made by a servant or agent employed in his business. *Com. v. Park*, 1 Gray, 553.

In civil actions, and in prosecutions for misdemeanors, a declaration or indictment alleging that the accused did an act, as selling intoxicating liquor, is sustained by proof that he caused it to be done by another. *Com. v. Park*, 1 Gray, 553.

And a count in an information charging a person with selling intoxicating liquors to be drunk at the place where sold, in violation of the liquor law, is sustained by proof that the liquor was sold by another as his agent, and it need not be averred in the information that it was sold by an agent; though greater particularity might have been required in case of an indictment. *Parker v. State*, 4 Ohio St. 563.

So, where a customer comes into a place kept for the sale of liquor, and helps himself to a drink, and places the price within reach of a clerk or agent of the employer, who receives it and puts it with the money of the proprietor, there is a sale by the owners if they assent, for which they are criminally responsible. *State v. Wiggin*, 20 N. H. 449.

And where two bartenders in the employ of the proprietor or owner of a business containing a cigar store in front and a "joint" in the back part, made sales of intoxicating liquors in violation of law, and the evidence establishes that they were made with the knowledge or assent of the owner or proprietor, or by his direction and authority, such owner or proprietor is liable on account thereof, the same as if made by him in person. *State v. Falk*, 51 Kan. 269.

Nor is the proprietor of a drug store, who is not himself a druggist, relieved from liability for the sale of intoxicating liquor by persons in his employ running his drug store, by the fact that he was by law compelled to employ legal pharmacists who were accredited and accepted by the commonwealth. *Com. v. Johnston*, 5 Pa. Super. Ct. 585.

And an instruction in a prosecution for the illegal sale of intoxicating liquors, that if the agent of the accused, in his presence and with his knowledge and consent, sold intoxicating liquor, the accused would be liable the same as if he made the sale himself, is not erroneous, though the evidence tends strongly to prove that the purchase was made of him, where there was some evidence tending to show that it was made of a bar tender in his presence. *Hofner v. State*, 94 Ind. 84.

So, the managing agent of a nonresident proprietor of a store, who has general direction and supervision of the clerks therein the same as his employer would have if present, is liable to the penalty imposed by law for the sale of intoxicating liquors, though such sale was in fact made by the clerks. *State v. Dow*, 21 Vt. 484.

sons within this state shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, restaurants, saloons, . . . eating houses, . . . and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons of every race and color." Laws 1895, chap. 223, § 1. "That any person who shall violate the fore-

going section or any part thereof, by denying to any person, except for reasons by law applicable alike to all persons, the full enjoyment of any of the accommodations, advantages, facilities, or privileges enumerated in said section, or by aiding or inciting such denial, . . . shall for every such offense be liable to the person aggrieved thereby in a sum not less than \$5 as damages, with costs to be recovered in any court of competent jurisdiction

Under what appears to be the prevailing rule, however, an employer is not criminally liable for a sale of liquor in violation of the laws against tipping, made by his employee without his knowledge of the fact. *Neidelsner v. State*, 6 Baxt. 499.

A party can only be held liable criminally for a sale of liquor by his servant, when made with his authority or with his knowledge or assent. If made without his knowledge, and really in opposition to his will, and in no way participated in, approved, or countenanced by him, he is not liable. *State v. Mueller*, 38 Minn. 497; *Lathrope v. State*, 51 Ind. 192; *Com. v. Nichols*, 10 Met. 259, 43 Am. Dec. 432; *Com. v. Dunbar*, 9 Gray, 208.

And evidence in a prosecution for the illegal sale of intoxicating liquor, that the sale was made by a young man behind the counter of the defendant's saloon, is not sufficient to establish the proprietor's guilt. In the absence of evidence to show his presence, or approval of the sale, or guilty knowledge of the offense. *Wreidt v. State*, 48 Ind. 579; *Anderson v. State*, 39 Ind. 553.

And the rule is the same when the sales were made in his absence, and against his express orders. *Wadsworth v. State*, 35 Tex. Crim. Rep. 594; *Com. v. Johnston*, 2 Pa. Super. Ct. 817.

One who keeps liquors with the intent that they shall be sold for lawful purposes only, and who himself makes only lawful sales, is not criminally liable for keeping a place for the unlawful sale of intoxicating liquors, under Iowa Code, § 1543, on account of unlawful sales thereof made by his clerk, as the unlawful intent is an essential ingredient of the crime. *State v. Hayes*, 67 Iowa, 27.

And a duly registered pharmacist having a merchant's license, but no license as a dramshop keeper, who kept a drug store, is not criminally liable for a sale of intoxicating liquor to a person, made in his store, in the absence of evidence that such person was in charge of the store, or that he was in the general, or even temporary, employment of the accused, where the evidence was consistent with the conclusion that he may have done the act as an unauthorized or officious person. *State v. Quinn*, 40 Mo. App. 573.

And refusal to instruct, in a prosecution against two persons for unlawfully selling intoxicating liquors, that a permit to one would be a protection to the other if he were acting as agent or employee, is not error where, on the separate trial of the latter, he is shown to have sold liquor at the time and place named, but there is nothing to show that he was acting as such agent or employee. *State v. Sterns*, 28 Kan. 154.

In *State v. Sterns*, 28 Kan. 154, *Stephens v. State*, 14 Ohio, 386, *supra*, III. b. 1, was criticised, the court saying that it did not commend itself to its judgment.

But a principal is criminally liable for a sale of intoxicating liquor by an agent under a statute forbidding a person from selling by himself, 41 L. R. A.

clerk, servant, or agent, the proprietor being liable thereunder by whomsoever liquor was sold. *State v. Stewart*, 31 Me. 515; *Noecker v. People*, 91 Ill. 494; *State v. McConnell*, 90 Iowa, 197; *Riley v. State*, 43 Miss. 397.

Though the sale was made without his knowledge and against his express orders. *Riley v. State*, 43 Miss. 397.

And no matter what might have been his instructions to them; and evidence as to what instructions he gave his clerks in relation to such sales is not admissible in a prosecution therefor. *Noecker v. People*, 91 Ill. 494.

And under Ill. Rev. Stat. 1874, chap. 43, § 14, the owner of liquor is liable for illegal sales thereof made by his clerk, though made without his knowledge or authority, as that statute expressly declares that it shall not be necessary to show knowledge of the principal to convict for an act of the agent or servant. *Mullinix v. Peoule*, 70 Ill. 211.

So, the rule has been laid down that the unlawful selling of intoxicating liquor by a servant is a selling by the master. *United States v. Voss*, 1 Cranch, C. C. 101; *United States v. Birch*, 1 Cranch, C. C. 571.

And that an employer is criminally liable for sales of intoxicating liquors made by his clerk, agent, or employee in the ordinary line of his duty as such, the same as if made by him in person. *State v. Skinner*, 34 Kan. 256; *Thompson v. State*, 5 Humph. 138.

Within this rule, it is not necessary to prove that a sale of liquor made by a slave in his master's place of business was done by the actual command of the master, or whether he took the profits, to render him criminally liable therefor. *Com. v. Major*, 6 Dana, 293.

And a druggist is liable criminally for unauthorized sales of liquor by his clerk, if such sales were made by the clerk within the scope of the authority delegated to him by the druggist, or the authority which may fairly be presumed from the instructions of the druggist or the course of dealing by him with reference to such matters. *United States v. White*, 42 Fed. Rep. 138.

Thus, one who keeps liquors and employs clerks to deal them out in common with other commodities is as liable for such sales as he would be if they were made in person. To subject him to the penalty imposed by statute for the sale of intoxicating liquors it is not necessary that the sales should have been made in person, or in his presence, or by his express command. *State v. Dow*, 21 Vt. 484.

Where an agent is set to do the very thing which, and which only, the principal's business contemplates, namely, the dispensing of liquors to purchasers, the principal is chargeable with the agent's violation of the legal restrictions on that business. *Carrull v. State*, 63 Md. 551.

And whether an unlawful sale of intoxicating liquor was made by the defendant in person, or by a clerk, servant, or agent, need not be alleged or proved on a prosecution therefor. *State v. Brown*, 31 Me. 520.

So, though a person whose agent sells liquor

in the county where said offense was committed. . . . Id. § 2. The trial court refused to direct a verdict for the plaintiff, and also refused to instruct the jury that the plaintiff was entitled to a verdict for at least the minimum sum mentioned in the law, and charged the jury, among other things, to the effect that it was undisputed that one of the waiters refused to serve the plaintiff; that such action of the waiter was inexcusable under the circumstances, and in violation of the law, and, if the evidence satisfied them that such act of the waiter was ratified by the defend-

ants, then the defendants would be liable to the plaintiff for damages. And the trial court further charged the jury that "if you find, however, that the defendants did not ratify such action of their servant, and that the defendants did what they could reasonably be expected to do under the circumstances to enforce their orders to such servant, or, by not so doing, did not intend to, and did not, aid their waiter in carrying out his said purpose, then your verdict will be for the defendants." These portions of the charge, as well as others, are based upon the theory that the defendants

to one intending to sell it in violation of law, with knowledge of such intent, had no actual personal intent to enable the purchaser to violate the law, yet the law will conclusively presume that the agent had communicated his knowledge to the principal, and will hold them liable for the consequences. *Fishel v. Bennett*, 56 Conn. 40.

Where a statute prohibits the sale of spirituous and intoxicating liquors by sample, by soliciting or procuring orders therefor in any town where such liquors may not lawfully be sold, and provides that no action shall be maintained for the price of liquors sold with intent to enable any person to violate a law of the state relating to a sale of intoxicating liquors, one who sends an agent into the state with authority to take orders for liquors, and to ascertain in what towns the same may or may not be lawfully sold, who takes an order for a bill of liquors, knowing that the person giving it intends to sell the same in violation of the law, is chargeable with the knowledge of his agent, and the transaction is a sale with intent to enable the purchaser to violate the law, rendering the vendor criminally liable. *Fishel v. Bennett*, 56 Conn. 40.

And the fact that the agent had no authority to make the sale does not affect the criminal liability of the principal. *Fishel v. Bennett*, 56 Conn. 40.

Selling without license.

1. By partners.

A license to retail spirituous liquors by small measure under the North Carolina statute, name of the firm, or in the name of each partners, will, during the year, protect one of the partners against the penalty for retailing spirituous liquors, although the other partner may have retired from the firm. *State v. Gerhardt*, 48 N. C. (3 Jones, L.) 178.

But a permit to sell intoxicating liquors, preliminary to which it is required that the applicant shall publish notice of his intention to apply therefor and to prove citizenship, and that he has not violated the liquor law, is a special trust to the permit holder, and a person selling liquor is not protected by a permit granted to his partner. A permit for the sale of intoxicating liquors to a partnership should run in the name of the firm, or in the name of each partner. *State v. McConnell*, 90 Iowa, 197.

And under Miss. Rev. Code, 199, art. 9, which subjects to indictment any person selling intoxicating liquor without a license in less quantities than one gallon, and any person having any interest in the liquors thus sold, partners jointly indicted for such sales may be convicted and punished, though one of them was wholly ignorant of the illegal act, as each is responsible for the illegal acts of the other, whether he participated in them or not. *Gathings v. State*, 44 Miss. 848.

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Two or more persons may be jointly charged in the same indictment with the offense of selling spirituous liquors without a license. *Com. v. Sloan*, 4 Cush. 52.

And a joint fine may be assessed against two persons jointly indicted for carrying on the business of retailing spirituous liquors without a license, if they acted as a firm in carrying on the business, and a separate fine against each may be imposed where they acted individually. *Lemons v. State*, 50 Ala. 130.

And proprietors of a store doing business together, and present in the store daily, in which sales of intoxicating liquor were made without a license by small measure by a clerk, some of which occurred in their presence, are jointly liable for the penalties incurred. *Hall v. McKechnie*, 22 Barb. 244.

But while two persons may be jointly guilty, and jointly convicted, of the offense of retailing spirituous liquors without a license when jointly engaged in the business, the judgment must be several against each for the whole, as each must for himself and alone bear the penalty. *People v. Walbaum*, 1 Dak. 306. And see *Stephens v. State*, 14 Ohio, 286, *supra*, III. b. 1.

And a sale of liquor by one of two persons engaged as partners in keeping a recess and selling liquor without a license is the act of both, and may be given in evidence in an action against the other alone for the penalty imposed for such act. *Smith v. Adrian*, 1 Mich. 406.

But while a single action for a penalty may be sustained against several who join in selling liquors without a license, if several concur in the commission of the act for which a penalty is given, only one penalty can be recovered, either in one or in several actions. *Ingersoll v. Skinner*, 1 Denio, 540.

But error in charging that each defendant, in a prosecution against two persons jointly indicted as common sellers of intoxicating liquors, might be convicted under the same indictment for any sale made by him without reference to any joint participation or privity, when the charge should have been with reference to either defendant, is not prejudicial as against one of two defendants, who was convicted upon evidence competent for that purpose. *Com. v. Cook*, 12 Allen, 542.

Where a partner of a wholesale and retail licensed liquor dealer in one county visited another county, however, and there solicited orders, which orders were taken and filled by the firm, shipping the liquor in jugs which were delivered to an express agent in the former county for transportation to the purchasers in the latter county, and they received it in the latter county and paid express charges, subsequent to which the partner collected the price in the latter county, he cannot be indicted therein for selling spirituous liquors without license, as such sales were made in the former county, and were complete when the jugs of liquor

were not liable in damages for such wrongful and unlawful acts of their servants, unless they either ratified the same, or aided or incited or encouraged their servants in such non-performance of duty. Such theory was in direct conflict with a well-settled rule of law constantly being applied by this and other courts, to the effect that "a master is liable for a wrong done by his servant, whether through negligence or the malice of the latter, in the course of an employment in which the servant is engaged to perform a duty which the master owes to the person injured." *Craker v.*

Chicago & N. W. R. Co. 86 Wis. 657, 17 Am. Rep. 504; *Bass v. Chicago & N. W. R. Co.* 89 Wis. 636, 43 Wis. 654, 24 Am. Rep. 487; *Schaefer v. Osterbrink*, 67 Wis. 495, 58 Am. Rep. 875; *Rogahn v. Moore Mfg. & Foundry Co.* 79 Wis. 573; *Reinke v. Bentley*, 90 Wis. 457. In such a case, where the wrongful act of the servant, though wilful, is strictly within the scope of his employment, it is unnecessary that the master should at the time sanction or know or subsequently ratify the unlawful act, in order to be held liable for mere compensatory damages. *Ibid.* See also *Spaulding v. Chi-*

were delivered to the express agent for transportation. *State v. Hughes*, 23 W. Va. 743.

But a transaction by which a liquor dealer in New York, in response to an order from a customer in Vermont, sends liquor by express with instructions to the express company to deliver it to the person to whom it was addressed only on being paid for it, makes the express company agent of the seller, and passes title only upon the delivery, so as to render it a sale in Vermont, and subject to the Vermont prohibitory liquor laws. *State v. O'Neill*, 58 Vt. 140, 66 Am. Rep. 566.

2. By agent or servant.

The master, as well as the servant, may be indicted for a sale of intoxicating liquors by the servant in the grocery of the master, where the master had no license to make such sale. *Schmidt v. State*, 14 Mo. 137.

And retailing intoxicating liquors in a man's kitchen by his servant and in his presence with his consent and approbation may be deemed his own act, as well as the act of the servant, within the meaning of a law prohibiting the sale of intoxicating liquor without a license. *Forrester v. State*, 63 Ga. 349.

So, a husband whose wife in his presence retails spirituous liquors without a license, who receives the money therefor, is criminally liable for such act. *Gueing v. State*, 1 McCord, L. 573.

And a husband who directed his wife, who aids behind the counter in a grocery store, neither of them having a license, to give liquor to certain men who came in, which she did, and accepted payment therefor, is criminally liable therefor, though she was the exclusive owner of the store, and he was in no wise connected with it, and had an independent employment. *Mulvey v. State*, 43 Ala. 316, 94 Am. Dec. 684.

And a husband is liable for the sale of spirituous liquors without a license in a store owned by his wife, by a clerk in the store, if he was present at the time, controlling and managing it. *Faircloth v. State*, 73 Ga. 423.

Under the general rule, however, a husband is not criminally liable for selling spirituous liquors without a license, where the sale was made by his wife during his absence without authority from him. *Peunybaker v. State*, 2 Blackf. 484; *State v. Baker*, 71 Mo. 475.

To authorize the conviction of a husband for the illegal act of his wife in selling spirituous liquors in his store in his absence without a license, the jury must be satisfied from the evidence, beyond a reasonable doubt, that her illegal act was done by his authority; that it was done by her as his clerk or agent without his knowledge is not enough. *Selber. v. State*, 40 Ala. 60.

And an instruction in a prosecution for selling

liquor without a license, authorizing the conviction of the accused upon a sale made by another regardless of any legal relationship between them which would make one responsible for the acts of the other, is erroneous. *State v. Kolb*, 39 Mo. App. 45.

To warrant a conviction on an indictment for retailing spirituous liquors without a license, the proof must show that the accused made the sale in person or authorized such sale. *State v. Borgman*, 2 Nott & M'C. 34.

And where an employer in good faith instructs his clerk to sell intoxicating liquors for medical purposes only, and such clerk sells liquor in his absence in violation of his instructions, he is not criminally responsible therefor on a prosecution for selling without a license. *State v. McGrath*, 73 Mo. 181.

And a grocer and dry-goods merchant, who did not keep intoxicating liquors for sale, and who had expressly charged his clerks not to sell any intoxicating liquors, is not criminally liable for the act of his clerk in selling drinks of whisky in his absence and without his knowledge, when such act upon the part of the clerk was not in the general line of the duties of his employment. *Grosch v. Centralia*, 6 Ill. App. 107.

So, evidence that one who had a merchant's license, and was a dealer in drugs and medicines, forbade his brother and wife, whom he left in charge of his store, to sell liquor in less quantities than one gallon except for medicinal purposes, is admissible in a prosecution against him for selling liquor without a license as a dramshop keeper, as the act of the wife in selling liquor was her independent act for which he was not responsible. *State v. Baker*, 71 Mo. 475.

And trustees and members of the managing committee of a club are not criminally liable under the license act for selling liquor without a proper license, to persons not members of the club, where the liquor was sold in the club rooms by the steward, who, in selling it, acted contrary to the orders of the committee, and without their knowledge or assent, though the moneys received by him therefor were paid by him to the account of the club. *Newman v. Jones*, L. R. 17 Q. B. Div. 132, 55 L. J. M. C. N. S. 113, 55 L. T. N. S. 327, 50 J. P. 373.

In the above case, Atty. Gen. v. Siddon, 1 Crompt. & J. 220, 1 Tyrw. 41, *supra*, II. d, was distinguished upon the ground that in that case the judgment proceeded upon the ground that whatever a servant does in the course of the employment with which he is intrusted and as part of it is the master's act, while in the present case it was shown that the appellants did not authorize the act of the steward.

And it was said that all that was decided by *Mullins v. Collins*, L. R. 9 Q. B. 292, 43 L. J. M. C. N. S. 67, 29 L. T. N. S. 838, 22 Week. Rep. 207, *infra*, III. 7, was that a licensed victualler is liable for the act of his servant with-

cago & N. W. R. Co. 83 Wis. 582; *Evans v. Davidson*, 53 Md. 245, 36 Am. Rep. 400; *Burmah Trading Corp. v. Mirza Mahomed Ally Sherazee*, 81 Moak, Eng. Rep. 782; *Limpus v. London General Omnibus Co.* 32 L. J. Exch. N. S. 84. This is upon the theory that what

one does by his servant acting within the scope of his employment and for his benefit is the same, in legal effect, as though done by himself. But, in order to recover exemplary damages, it is otherwise, as indicted in several of the cases cited, especially *Bass v. Chicago*

in the scope of his employment, and that it has no authority whatever for the liability of the master for the act of his servant outside the authority given; and *Cundy v. LeCocq*, L. R. 13 Q. B. Div. 207, 53 L. J. M. C. N. S. 125, 51 L. T. N. S. 285, 48 J. P. 590, 32 Week. Rep. 769, *infra*, III. e, was distinguished, the court saying that in that case neither master nor servant knew that the constable furnished with liquor was on duty, and it does not therefore establish liability where the servant acts in direct contravention of the orders given; and *Davies v. Harvey*, L. R. 9 Q. B. 483, 43 L. J. M. C. N. S. 121, 30 L. T. N. S. 629, 22 Week. Rep. 733, *supra*, II. k, was distinguished upon the ground that that case was decided upon the ground that, although the defendant did not know for what purpose the goods were required, yet that his partner did, and the goods were supplied by the partner, within the scope of the partnership authority for the profit of both partners, while in the present case the articles were manifestly beyond and without the scope of the authority given.

Upon the other hand, it has been held that a druggist having spirituous liquors in his store, whose clerk makes a sale thereof in violation of the law requiring a license for the sale of such liquors, is criminally responsible therefor, and may be fined pursuant to the statute, though it was made without his knowledge and contrary to his instructions. *State v. Denoon*, 81 W. Va. 122.

Within this rule a man who keeps a tobacco and refreshment shop, having no license, is criminally liable for the act of his wife in selling bottles of ale to his customers, though there is no evidence that he knew anything of her so doing. *Ailen v. Laumb*, 57 J. P. 377.

And a brewer cannot establish an agency for the sale of beer of his own manufacture in a town away from his place of business, and sell to such persons as desire to purchase through such agency, without obtaining a license for carrying on such business, from the town, city, or village authorities in which the sales are made. *Pelts v. State*, 68 Wis. 538.

And evidence that liquor was ordered from one town by a resident of another, and the quantity ordered was delivered to the person ordering it in the latter town, and was there paid for by him, taking a receipt for the amount from the man who delivered it, is sufficient evidence of a sale in the latter town to bring it within the liquor law applicable thereto. *Com. v. Shurn*, 145 Mass. 150.

To make a delivery in an unlicensed town of liquors sold in another town a sale in the town where delivered, such delivery need not be made by the vendor himself, a delivery by an authorized agent being the same as a delivery by the principal himself. *State v. Basserman*, 54 Conn. 68.

And a transaction by which liquor was agreed to be sold in a county where such sale was not unlawful, to a person residing in another county in which it was unlawful, the agreed price for which was then paid, but the liquor contracted for was not separated from the general stock of the vendor, after which it was so separated and sent by an employee of the vendor to the purchaser and delivered by such employee to him in his barroom in the latter county, is a

sale in the latter county rendering the vendor criminally liable therefor. *Dooster v. State*, 93 Ga. 43.

And while sales of intoxicating liquors effected by drummers from another state are usually, if not always, consummated by a delivery at the vendor's place of business to a common carrier for all police purposes, it is competent for the legislature to say that the acts done by the drummer shall of themselves constitute a sale, and therefore an offense. *State v. Ascher*, 54 Conn. 299.

d. Selling to minors.

1. By partners.

A partner in a saloon or dramshop is criminally liable for an illegal sale of liquor to a minor by his copartner or agent, under act March 8, 1879, declaring that persons interested in a sale of ardent spirits will be criminally responsible for illegal sales thereof. *Waller v. State*, 38 Ark. 656; *Robinson v. State*, 33 Ark. 641.

Though he was absent at the time. *Robinson v. State*, 38 Ark. 641.

And when both members of a firm of liquor dealers are present when intoxicating liquor is sold to a minor in their place of business an indictment will lie against both or either of them. *State v. Scoggins*, 107 N. C. 959, 10 L. R. A. 542.

So, a saloon or dramshop keeper is liable for an illegal sale of liquor by his copartner to a minor, under Ark. act March 8, 1879, in effect declaring that persons interested in a sale of ardent spirits, etc., shall be criminally responsible for illegal or forbidden sales, whether made by themselves or their partners or employees, though he was absent at the time of the sale, and had no knowledge of it. *Robinson v. State*, 38 Ark. 641; *Cloud v. State*, 38 Ark. 151; *Edgar v. State*, 45 Ark. 356.

Though the owner of liquor could not be punished criminally for an unauthorized sale thereof to a minor by his clerk or partner in his absence and without his authority or consent, under the previous act, *Gault's Ark. Dig. § 1609*, imposing a penalty upon any person who shall sell liquor to a minor without the written consent of his parent or guardian. *Cloud v. State*, 38 Ark. 151.

2. By agents or servants.

The proprietor of a saloon where beer was sold to minors by a bartender is responsible therefor, where he was present at the time and made no effort to prevent the sale, though he did not see them buy it, and had given his bartender no authority to sell beer to minors. *State, Higgins, v. Beloit*, 74 Wis. 287.

And the exclusion of evidence of general instructions from a liquor dealer to his clerk, in a prosecution against the liquor dealer for selling liquor to a minor, is not error where the sale in question was made with his assent. *State v. Mueller*, 38 Minn. 497.

And a charge in an indictment that a liquor dealer sold or furnished a minor with liquor, instead of charging that he permitted it to be done, is not reversible error where there is sufficient evidence to show that he was present when the liquor was sold by his clerk, that being the same as if he had done it himself. *Johnson v. State*, 83 Ga. 553.

& *N. W. R. Co.* 39 Wis. 636, 43 Wis. 654, 24 Am. Rep. 437. On the first appeal in that case a verdict for \$4,500 was held to be excessive, because the charge of the court precluded exemplary damages. On the second appeal the aggregate findings of the jury were for the

The rule has been laid down, however, that the proprietor of a saloon is not guilty of a violation of the act relating to the sale of intoxicating liquors, where his bartender in charge of the saloon sells liquor to a minor in his absence and without his knowledge. *Hanson v. State*, 43 Ind. 550; *Thompson v. State*, 45 Ind. 495; *Lauer v. State*, 24 Ind. 131; *Com. v. Rooks*, 150 Mass. 59.

And that a druggist, one of whose clerks made a sale of intoxicating liquors to a minor, is not criminally responsible therefor where he was not present and had instructed all his clerks not to make sales to minors. *Com. v. Stevens*, 153 Mass. 421, 11 L. R. A. 357.

And that the statutory guilt of a clerk in a liquor store who sells liquor to a minor, reasonably and honestly believing him to be an adult, and that the sale might lawfully be made, should not be imputed to his employer. *Com. v. Stevens*, 153 Mass. 421, 11 L. R. A. 357.

Within this rule, a person under a prosecution for selling intoxicating liquor to a minor may rebut the presumption of prima facie agency arising from evidence for the state that the sale was made by the agent of the accused in charge of his establishment, by showing that the sale was in fact made without his authority and against his direction. *Anderson v. State*, 22 Ohio St. 305.

And a liquor dealer is not answerable criminally, in a prosecution under the Connecticut statute of 1822, for the act of his servant in selling to a student of Yale college on credit, without his knowledge or consent and against his express directions, though he afterwards assented to such act. *Morse v. State*, 6 Conn. 9.

And the provision of § 14, Mich. Pub. Acts 1887, No. 313, making it unlawful for any person by himself or his clerk or agent to permit any student, minor, etc., to play at cards, dice, billiards, or any game of chance, does not apply to a prosecution for permitting a minor to remain in a saloon unaccompanied by his father or his guardian, under § 15 of that act, so as to hold the proprietors responsible for the act of the clerk or agent in admitting minors in their absence and without their consent. *People v. Hughes*, 86 Mich. 180.

And orders given by a liquor dealer to his employees in good faith for the purpose of having them obeyed, forbidding sales to minors, constitute a good defense in a prosecution for such a sale made by his employees. *Com. v. Newhard*, 3 Pa. Super. Ct. 215.

But direction by a liquor dealer to his agent, forbidding a sale of intoxicating liquors to minors, to relieve him from criminal responsibility for the acts of his agent, must be given in good faith, no matter how notorious or formal they may have been. *Anderson v. State*, 22 Ohio St. 305.

And a conviction against a liquor dealer for selling liquor to minors will not be disturbed on the ground that his wife was behind the bar and dealt out the drinks to the boys in his absence and contrary to his orders, where it appears that the boys were known to them both, and had frequented the saloon and bagatelle room, and were permitted to play bagatelle for drinks, and there was evidence that they had been furnished with liquor in his presence. *Com. v. Newhard*, 3 Pa. Super. Ct. 215.

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same amount, but the judgment thereon was affirmed, because the jury found that the wrongful act of the brakeman had been ratified by the company, and the charge permitted punitive damages by reason of such ratification.

But a requirement by a dealer in intoxicating liquor that his clerk shall determine the question of the minority of a customer simply from his appearance cannot be affirmed, as a matter of law, to be an unreasonable test, or to indicate bad faith or negligence, though it might be proper for the consideration of the jury. *Com. v. Stevens*, 153 Mass. 421, 11 L. R. A. 357.

And the fact that the clerk of a druggist, who makes a sale of intoxicating liquors to a minor contrary to his instructions, is expected to determine the question of minority simply from the appearance of the customer, and makes a mistake in so doing, does not render the druggist criminally liable for such selling. *Com. v. Stevens*, 153 Mass. 421, 11 L. R. A. 357.

It is the duty of the court, in a prosecution against a liquor dealer for a sale of intoxicating liquor by his employees to minors, to instruct the jury as to the effect of alleged orders not to make such sales if given in good faith, leaving to them the question as to the bona fides of the orders. *Com. v. Newhard*, 3 Pa. Super. Ct. 215.

The fact of agency to charge a principal with the act of his alleged agent in selling liquor to a minor, however, must be determined by the real understanding between the principal and agent. *Anderson v. State*, 22 Ohio St. 305.

And a licensed hotel owner may be convicted for unlawful sales of liquor to minors, made in his temporary absence by his bartender, or by his wife, whom he had put especially in charge of the bar, although he had no knowledge of the particular sales, unless such unlawful sales were prohibited by him. *Com. v. Newhardt*, 5 Northampton Co. Rep. 177.

The fact that a liquor dealer, accused of unlawfully selling liquor to a minor, did not sell it himself, but that it was sold by his clerk, does not make any difference in his criminal responsibility, under a statute providing that no person, by himself or another, shall sell or cause to be sold or furnished, or permit any other person or persons in his employ to sell or furnish, spirituous or intoxicating or malt liquors of any kind to minors without written authority from their parents or guardians. *Snider v. State*, 81 Ga. 753.

And the proprietor of a saloon is responsible for a sale of intoxicating liquor therein to a minor, under Miss. Code 1898, § 1112, imposing a penalty upon one who sells intoxicating liquor to a minor, or who is interested in such sale, whether it was made by himself or his clerk or agent. *Fahey v. State*, 62 Miss. 432.

But the absence of the proprietor of a saloon when his bartender sold liquor to a minor, and the fact that he had given directions to him to refuse to make such sales, do not excuse him from liability under a statute making it a misdemeanor to be interested in a sale of liquor to a minor without the written consent or order of the parents or guardian, and cannot aid him further than to commend a mitigation of the punishment the law imposes. *Mogler v. State*, 47 Ark. 109.

So, under Ga. Code, § 4540a, providing that no person or persons, by himself or another, shall sell or cause to be sold, or furnish or permit any other person or persons in his, her, or their employ to sell or furnish any minor or minors spirituous or intoxicating or malt liq-

The act of the legislature in question is entitled "An Act to Protect All Citizens in Their Civil and Legal Rights." It may be, as argued by counsel for the defendants, that the 1st section of this act adds nothing to the rights and privileges which are secure to all by the provisions of the Constitution of the United States, which declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const. Amend. art. 14, § 1. Assuming

that the act is no broader than the constitutional provisions quoted, yet it prohibits the persons therein mentioned from doing what the state is thus prohibited from doing, and makes the offender "liable to the person aggrieved thereby, in a sum not less than \$5 as damages, with costs," to be recovered as there-in prescribed. The minimum damages thus prescribed are to be regarded as compensatory damages, as distinguished from exemplary or punitive damages. Whether the plaintiff is entitled to anything more than compensatory damages must necessarily depend upon the evidence to be given upon the trial, and the principles of law applicable.

The judgment of the Superior Court for Milwaukee County is reversed, and the cause is remanded for a new trial.

uors of any kind without first obtaining written authority from the parents or guardian of such minors, it matters not whether the proprietor sells or furnishes the liquor directly by himself or it is furnished by another in his employment, or whether he was present or not, or knew of the fact, or consented to it. *Loeb v. State*, 75 Ga. 258; *Johnson v. State*, 83 Ga. 553; *Boatright v. State*, 77 Ga. 717.

But a statement that his offense is complete whenever it is shown that intoxicating drink was sold or furnished to a minor by one acting in his place of business in any capacity whatever, is too broad. *Johnson v. State*, 83 Ga. 553.

Where liquor is sold or furnished to a minor by a person other than the proprietor of a saloon or drinking place, and not by his order or direction, which he permits to be done, however, it is a different offense under the Code from the offense of personally selling or furnishing such minor with liquor. It was his duty to prevent it from being done, and his failing to do so makes him liable as permitting it to be done, and he should be so charged in the indictment. *Johnson v. State*, 83 Ga. 553.

The Missouri statute concerning dramshops, providing for a forfeiture by the seller of \$50 to the parent, master, or guardian of any minor to whom liquors are sold without permission, is made applicable by statute to sales by a clerk or agent, as well as sales by the proprietor himself. *Edwards v. Brown*, 67 Mo. 377.

And a sale of intoxicating liquor by a barkeeper to a minor without the written permission of the minor's parents makes a case against the saloon keeper, under Mo. Rev. Stat. § 5454, providing that every dramshop or wine and beer house keeper who shall sell, give away, or otherwise dispose of, or suffer the same to be done, about his premises any intoxicating liquor to any minor without the written permission of the parents, master, or guardian of such minor, shall forfeit and pay to such parent, master, or guardian for every offense the sum of \$50, regardless of any directions or instructions of the accused to his barkeeper. *State v. McGinnis*, 38 Mo. App. 15.

In *State v. McGinnis*, 38 Mo. App. 15, *supra*, *State v. Baker*, 71 Mo. 475, *supra*, III. c. 2, was distinguished upon the ground that the legislature had provided a different rule for this class of offenses.

The maxim of *respondet superior* applies in an action by a parent or guardian to recover the penalty provided for by Mo. Laws 1885, p. 160, for selling intoxicating liquor to a minor, so that proof of sale by the defendant's barkeeper establishes a cause of action therefor 41 L. R. A.

against defendant. *Draper v. Fitzgerald*, 30 Mo. App. 518.

An action for the recovery of a penalty for the sale of intoxicating liquors to a minor is a civil action in which the defendant is responsible for the tortious acts of his barkeeper, and he cannot defend on the ground that the latter disobeyed his orders. *Draper v. Fitzgerald*, 30 Mo. App. 518.

And an action upon a dramshop bond for selling intoxicating liquor to a minor is neither criminal nor a quasi-criminal action, but strictly a civil statutory action, for the recovery of damages for a wrong done for which damages are liquidated by statute, in which the master is answerable for the torts of his servant while acting within the general scope of his employment, and the rejection of evidence therein that the sale was made by a barkeeper against the positive instructions and without the knowledge of the proprietor is not error. *Greene County, Sims v. Wilhite*, 29 Mo. App. 450.

In *Greene County, Sims v. Wilhite*, 29 Mo. App. 450, *supra*, *Casey v. State*, 6 Mo. 646, and *Kirkwood v. Antenreith*, 11 Mo. App. 515, 21 Mo. App. 73, *infra*, III. h. 8, were distinguished upon the ground that the rule had been altered. So, the doctrine that an agent's knowledge is the knowledge of his principal applies, on a sale of intoxicating liquor to a minor by a clerk, to the statutory presumption of knowledge as to the age of the purchaser. *State v. Kittelle*, 110 N. C. 500, 15 L. R. A. 694.

And it has been held that the principal is held bound for the act of his agent in selling liquor to a minor in violation of law while pursuing his ordinary business as such agent, upon the ground that the intention is not an essential element of the offense. *Carroll v. State*, 63 Md. 551.

Within this rule when an agency for the transaction of the business of selling liquors generally is established or admitted, and in the conduct of that business a prohibited sale is made by the agent to a minor, the principal cannot shield himself from liability to a fine imposed for such offense on the ground that his agent violated his general instructions, and did not inquire, or was deceived by the purchaser, as to his age. *Carroll v. State*, 63 Md. 551.

And the proprietor of a barroom is criminally liable for the unlawful sale of intoxicating liquor to a minor by his clerk, although it is made in his absence without his knowledge and in violation of his instructions. *State v. Kittelle*, 110 N. C. 500, 15 L. R. A. 694.

In *State v. Kittelle*, 110 N. C. 500, 15 L. R. A. 694, *supra*, *State v. Shortell*, 93 Mo. 123, *infra*.

WEST VIRGINIA SUPREME COURT OF APPEALS.

W. T. HALL

NORFOLK & WESTERN RAILROAD
COMPANY, *Pff. in Err.*

(..... W. Va.)

- *1. A penal statute is one which imposes a forfeiture or penalty for transgression of its provisions, or for doing a thing prohibited.
2. Penal statutes must be construed strictly.
3. A penalty is in the nature of punishment for the nonperformance of an act, or for the performance of an unlawful act, and involves the idea of punishment, whether enforced with a civil or criminal action or procedure.

*Headnotes by BRANNON, J.

III. e, was distinguished upon the ground that in that case the statute failed expressly to prohibit sales made through another, and the decision was put on that ground; and *State v. Hayes*, 67 Iowa, 27, *supra*, III. b, 2, was distinguished upon the ground that in that case the defendant was discharged for want of proof to support an averment of the indictment drawn under another clause of the act, to the effect that the proprietor kept the spirits with an unlawful intent; and *State v. Privett*, 49 N. C. (4 Jones, L.) 100, *supra*, II. l, was criticised and explained, the court saying that the charge in that case was not brought up for review, though the court took occasion to say that it was as favorable to the accused as it could have been, but intimated, if the correctness of the charge had been before the court the judgment would have been reversed.

e. *Selling to habitual drunkards.*

A liquor dealer who knows that his clerks are selling to improper persons, or who in any manner assents to or permits illegal sales of liquors, is as guilty as though such sales were made by himself directly. *Zeigler v. Com.* (Pa.) 12 Cent. Rep. 407.

But a single unlawful sale made by a clerk in the place of business of his employer, who carried on a licensed liquor business, to an habitual drunkard in the absence of the proprietor, is not alone sufficient to raise a presumption that the clerk was authorized by him to make it. *State v. Mahoney*, 23 Minn. 181.

And a saloon keeper is not criminally liable for the sale of liquor by his barkeeper to one whom he knew to be in the habit of becoming intoxicated, made in his absence and without his knowledge or consent, and against his express direction. *O'Leary v. State*, 44 Ind. 91; *Hipp v. State*, 5 Blackf. 149, 33 Am. Dec. 463; *People v. Parks*, 40 Mich. 353.

And evidence is admissible, in a prosecution against a liquor dealer for selling spirituous liquors to a common drunkard in which such a sale by his clerks is claimed, that the liquor dealer had given his clerks specific directions to sell no liquor to common drunkards. *Barnes v. State*, 19 Conn. 398.

Upon the other hand, it is held that guilty knowledge that one is acting in violation of law is not essential to the offense of unlawfully selling intoxicating liquor, and one who has a license is bound at his own peril to keep within the terms of it, whether he conducts his business personally or by servants. *Com. v. Uhrig*, 138 Mass. 492.

Within this rule a liquor dealer is criminally
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4. A railroad company is not liable for the penalty of \$500 for overcharge of freight or passenger rates under clause 5, chap. 54, p. 559, Code 1891, for the mere charge of it by a conductor, unless the company authorized or approved the act.

(November 20, 1897.)

ERROR to the Circuit Court of Mercer County to review a judgment in favor of plaintiff in an action brought to recover the statutory penalty for charging more than a prescribed rate of fare on a railroad train. *Reversed.*

The facts are stated in the opinion.

Messrs. A. W. Reynolds and Johnston & Hale, for plaintiff in error:

liable for sales made by his clerk or agent in charge of his saloon, under a prohibition against selling any intoxicating liquor, to any person in the habit of becoming intoxicated, the same as though the sales were made by himself, though made in violation of the instructions, where such clerk was employed to determine who among those applying to purchase was in such habit, his act not consisting in what was beyond the scope of his agency, but in doing improperly what was within it. *Dudley v. Sautbline*, 49 Iowa, 650, 31 Am. Rep. 165; *Com. v. Uhrig*, 138 Mass. 492; *Police Com'rs. v. Cartman* [1896] 1 Q. B. 655, 65 L. J. M. C. N. S. 113; *Cundy v. Le Cocq*, L. R. 13 Q. B. Div. 207, 53 L. J. M. C. N. S. 125, 51 L. T. N. S. 285, 32 Week. Rep. 769, 48 J. P. 590.

In *Dudley v. Sautbline*, 49 Iowa, 650, 31 Am. Rep. 165, *supra*, *Pennybaker v. State*, 2 Blackf. 484, *supra*, III. c, 2, was distinguished, upon the ground that in that case the wife acted entirely outside of her duty, as she was not employed to sell liquor at all; and it was said that it was doubted whether the case of *Hipp v. State*, 5 Blackf. 149, 33 Am. Dec. 463, *supra*, I. is supported by the authority on which it is based.

So, in *Zeigler v. Com.* (Pa.) 12 Cent. Rep. 407, which was a prosecution for wilfully furnishing liquor to persons of known intemperate habits, in which it was alleged that the liquor was furnished by a clerk without authority, it was held that since there are no accessories in misdemeanors, but all implicated are principals, the question of agency has nothing to do with the case.

And, previous to the enactment of III. Rev. Stat. 1874, chap. 43, § 14, expressly declaring that it shall not be necessary to show knowledge of the principal to convict for an act of the agent or servant, the principal was liable for the acts of his agent and servant although he had no knowledge, as, where he employed a clerk to sell liquor, in doing so it was his duty to see to it that the clerk was prudent and discreet, and would observe the requirements of the statute, but if he in good faith were to employ a clerk believing him to have prudence and discretion, and were to forbid his selling liquors to persons prohibited, and the clerk were to disregard such orders, a different question would arise. *Mullinix v. People*, 76 Ill. 211.

The Missouri statute providing that any dramshop keeper, druggist, or merchant selling or giving away or otherwise disposing of any intoxicating liquor to any habitual drunkard after notice not to do so shall be deemed guilty of a misdemeanor, however, is not unconstitutional as authorizing the conviction of a dram-

Clause 5 refers only to "any railroad corporation" without mentioning officers and agents. This is significant of the intention of the legislature that the corporation should be found guilty of the violation of law before either of these penalties could be imposed, and that its trial and conviction should be conducted and secured under the same rules of evidence that govern in other trials of corporations for a criminal offense.

State v. Baltimore & O. R. Co. 15 W. Va. 362, 36 Am. Rep. 808.

The conductor had no right to fix and charge passenger tariffs. His duty was to collect the

tariffs which had been fixed and charged by the company as per its schedule of rates. He acted in direct violation of the rules of the defendant company. How, in common justice and reason, can the defendant be bound by his act under such circumstances?

Sutherland, Stat. Constr. § 358; 18 Am. & Eng. Enc. Law, p. 270; 5 Wait, Act. & Def. pp. 156-158; *Bond v. Wabash, St. L. & P. R. Co.* 67 Iowa, 712; *Murray v. Gulf, C. & S. F. R. Co.* 68 Tex. 407, 51 Am. Rep. 650; *Whitehead v. Wilmington & W. R. Co.* 87 N. C. 255; *Hines v. Wilmington & W. R. Co.* 95 N. C. 484; *Allen v. Stevens*, 29 N. J. L. 509; *Brooks*

shop keeper for the acts of his agent done in violation of his direction and without his consent, as it does not authorize such conviction. *State v. Shortell*, 38 Mo. 123.

f. Selling on Sunday.

To warrant the conviction of a licensed tavern keeper for selling liquors on Sunday, it is not sufficient to prove merely that liquor was sold in his house on Sunday; it must be shown that he did the act personally, or that it was done by his direction or with his consent. *People v. Utter*, 44 Barb. 170; *State v. Meagher*, 49 Mo. App. 571.

The presumption of innocence of the accused in a prosecution against a licensed tavern keeper for selling liquor on Sunday is not overcome by merely showing that the sale was made on his premises by his bartender, in the absence of evidence to show that he in some manner participated in, connived at, or assented to it. *People v. Utter*, 44 Barb. 170.

And the proprietor of a liquor store is not criminally liable for a sale made by a porter in his store on Sunday, whose duty it was to do menial work therein, where the liquor was not sold in his presence or with his consent, and he had forbidden his employees to sell liquor, as the sale was beyond the functions of the porter's employment. *Minden v. Silverstein*, 36 La. Ann. 916.

If liquor was sold in the saloon of the accused on Sunday by a man temporarily employed to scrub the floor, who had not been employed for the purpose of selling liquor at all, or authorized to do so, it might be regarded as an officious act for which the proprietor would not be liable. *State v. Meagher*, 49 Mo. App. 571.

And the mere probability that the proprietor of a saloon authorized sales made therein by others on the Sabbath is not sufficient to authorize his conviction for violation of the statutes for the observance of the Lord's day. *Com. v. Mason*, 12 Allen, 185.

So, evidence that liquor was sold in the bar-room of the accused by his barkeeper will not sustain a prosecution for engaging in common labor on Sunday by unlawfully selling spirituous liquors, in the absence of evidence tending to show that the accused was present when the sales were made, or had any knowledge whatever of the selling when it was done. *Wetzler v. State*, 18 Ind. 35.

But a liquor dealer, to free himself from a criminal charge of keeping his place of business open upon the Sabbath where the door was kept open by his clerk, must show, not only that he did not consent, either expressly or impliedly, but also that he did not know, that it was kept open. *Klug v. State*, 77 Ga. 734.

A sale of liquor on Sunday, by a bartender or clerk, is the act of the proprietor for which he is criminally liable unless it was made by such bartender or clerk without his knowledge or

consent and against his orders and directions. *State v. Meagher*, 49 Mo. App. 571.

And an instruction in a prosecution for selling liquor on Sunday, claimed to be the act of a clerk, to find the accused not guilty if the clerk went to the saloon for the purpose of scrubbing out the place and not for the purpose of selling liquor, is erroneous, as the purpose would be immaterial if he opened the place so that customers could come in, and sold liquor to them. *State v. Meagher*, 49 Mo. App. 571.

Where liquor is sold or given away on Sunday by persons employed by the dramshop keeper to sell liquor for him at that place, and the sale is in violation of the statute, a prima facie case is made out against the proprietor, which he must rebut by showing that in making the sale his agent acted either without authority or contrary to orders. *State v. Meagher*, 49 Mo. App. 571; *Martin v. State*, 30 Neb. 421.

And a saloon keeper whose saloon is kept open on Sunday is criminally responsible therefor on a prosecution for violating a law requiring all saloons to be closed on Sunday, though the opening was the act of his bartender and without his knowledge or authority, as the intent in allowing it to be opened is immaterial. *People v. Blake*, 52 Mich. 566; *State v. O'Connor*, 58 Minn. 183.

The owner of a saloon is criminally liable under the Michigan statute for failure to keep his bar closed on Sunday where the clerk of the hotel was in the barroom on the day in question with a servant who was scrubbing it out when a person came in from the street and wanted whisky which he got, handing pay for it to the servant, though there was no evidence to show that the proprietor assented to the opening of the bar on that day, as the statute makes the crime to consist, not of the affirmative act of any person, but of the negative conduct of failing to keep the saloon closed. *People v. Roby*, 52 Mich. 577, 50 Am. Rep. 270.

In *People v. Roby*, 52 Mich. 577, 50 Am. Rep. 270, *supra*, *People v. Parks*, 49 Mich. 333, *supra*, III. e. was distinguished upon the ground that in that case the facts are not fully given in the report, and there was positive evidence to negative the intent of the accused that the criminal act should be committed.

g. Violation of other miscellaneous provisions.

The criminal intent involved in the commission of the crime of keeping and maintaining a tenement for the illegal sale and unlawful keeping of intoxicating liquors is the intent to keep the tenement knowing and suffering it to be a common nuisance, and it is immaterial who does the other unlawful acts which make it a common nuisance. The keeper's knowledge that it is a nuisance, unaccompanied by active efforts to prevent its being offensive to the law, is guilty knowledge which makes him punishable. *Com. v. Walsh*, 165 Mass. 62.

v. Western U. Teleg. Co. 56 Ark. 324; *Louisville & N. R. Co. v. Com.* 99 Ky. 182, 88 L. R. A. 182; 2 Elliott, Railroads, § 715.

The statute under which this action is brought is highly penal in its nature, and should be strictly construed.

United States v. Harris, 78 Fed. Rep. 290.

Messrs. H. G. Woods and B. F. Keller for defendant in error.

Brannon, J., delivered the opinion of the court:

Hall brought an action of debt against the Norfolk & Western Railroad Company to re-

cover the fixed penalty of \$500 imposed upon railroads by clause 5, chap. 54, § 82c, Code 1891, for overcharge of rates, and recovered judgment, and the company sued out this writ of error. The first question of decisive importance is whether the act of the conductor in making the alleged overcharge binds the company in the absence of evidence that it was ordered or ratified by it. It is clear that the principal is liable for a tort done by its agent in an action for the recovery of damages to compensate one injured by such tort when committed in the course of the agent's employment, though the principal did not author-

And while a person charged with keeping and maintaining a tenement for the illegal keeping and sale of intoxicating liquors would not be responsible for sales made by his barkeeper without his knowledge, he in no way participating therein or approving or countenancing them, where nothing to the contrary appears, evidence of a sale by a servant in his master's shop, of his master's goods there kept for sale, would, if believed, warrant the jury in finding that the sale was authorized by the master, even though he was not on the premises at the time the sale was made. *Com. v. Houle*, 147 Mass. 380.

And while a servant of the proprietor of a saloon cannot be convicted on evidence of his sale of intoxicating liquor on the premises in the presence or under the actual personal supervision of his employer, if the servant, in carrying on the business of his employer, and in his absence, was authorized by him to make illegal sale of intoxicating liquor, and he made them, both may be found guilty of maintaining a tenement for the illegal sale of intoxicating liquors. *Com. v. Galligan*, 144 Mass. 171.

But proprietors of a saloon are not liable, under *Mich. Pub. Acts 1887, No. 313, § 15*, providing that it shall not be lawful for any person to allow a minor to visit and remain in any room where liquors are sold unless accompanied by his father or guardian, where they were not in the saloon in question at the time two minors were there, and had no knowledge of the presence of the minors at the time when they were there. *People v. Hughes*, 68 Mich. 180.

A prosecution for permitting a minor to remain in a place where liquors are sold under that statute is in the nature of a criminal prosecution, and the provision of the statute is not enlarged by § 24 thereof, providing that all persons engaged in liquor selling, etc., whether as owner or clerk, agent, servant, or employee, shall be equally liable with the principal for any violation of the provisions of the act, and any person or principal shall be liable for the acts of his clerk, servant, agent, or employee, as such provision applies only to liability in civil actions. *People v. Hughes*, 68 Mich. 180.

A person holding a license for the sale of spirituous or intoxicating liquor containing a condition that no such sale shall be made between the hours of 11 at night and 6 in the morning cannot be convicted for an unlawful sale in violation of such condition upon proof of a sale by one of his waiters, after 11 o'clock at night, in opposition to his will, and against his orders, and without his knowledge. *Com. v. Wachendorf*, 141 Mass. 270.

So, the proviso of the Massachusetts statute relating to the use and management of premises licensed for the sale of liquors, designed to procure an unobstructed view of the interior at all times by persons outside, is addressed to

the licensee only, forbidding him to do or permit to be done the prohibited act, whether by himself in person or by his agent or servants left by him in charge of the business. *Com. v. Kelley*, 140 Mass. 441.

But the facts that a person selling intoxicating liquor was the clerk of the person prosecuted as a common seller of spirituous liquors, and that the defendant knew of the sale, are not sufficient to warrant his conviction, as he might have had knowledge and dissented or forbidden it: there must be evidence from which the jury could infer assent. *Com. v. Putnam*, 4 Gray, 16.

And the exemption from the prohibition against the sale of intoxicating liquor, in Mass. Pub. Stat. chap. 100, § 1, of sales of cider by the makers thereof, extends to sales by the makers through their servants or persons hired by them for the purposes, and protects the servants as well as the master. *Com. v. Mahoney*, 152 Mass. 403.

And the violation of the Texas bell punch law, providing that if any liquor dealer, his clerk, agent, or employee, who shall, on the sale, barter, or giving away of any vinous, spirituous, or malt liquors, fail to turn the crank of the proper register as therein required, the person so offending, for each failure shall be deemed guilty of a misdemeanor, and fined a designated sum, does not subject a liquor dealer to indictment and fine thereunder, where the evidence shows that his bartender made the sale in his absence, and there was no proof of the proprietor's complicity in the bartender's failure to register the drink. *Galocchio v. State*, 9 Tex. App. 387.

So, to warrant a conviction for a sale of liquor under the act of Congress of May 17, 1884, prohibiting such sales in Alaska except for designated purposes, it must be established that liquor was sold, and that it was intoxicating, and that the sale was made by the accused either in person or through his agents, servants, or employees acting for him, or under his direction, management, or control. *United States v. Ash*, 75 Fed. Rep. 651.

But an action to abate a liquor nuisance will not be defeated on the ground that the liquor was sold by the owner's clerk, and that he had discharged the clerk and thereby terminated the nuisance, where it appears that the proprietor not only knew of the illegal sales, but also that he appeared to have made some of them. *Elwood v. Price*, 75 Iowa, 223.

And a licensed victualler whose servant knowingly supplies liquor to a constable upon duty without the authority of his superior officer is criminally liable, under 35 & 36 Vict. chap. 94, § 16, subd. 2, though he had no knowledge of the act of his servant. *Mullins v. Collins*, L. R. 9 Q. B. 292, 43 L. J. M. C. N. S. 67, 29 L. T. N. S. 838, 22 Week. Rep. 297.

ize, participate in, or ratify the act, and though it was done without his authority, and even against his orders. This liability is based, not on the idea of the agent's authority, but on public policy. One without fault is hurt by another's agent in the course of the principal's business, and that principal must make reparation. The test is whether the act was done in the course of the performance of the principal's business, not whether the agent had authority to do the act. 1 Am. & Eng. Enc. Law, 2d ed. p. 1151; 1 Elliott, Railroads, §§ 213, 214; *Gregory v. Ohio River R. Co.* 37 W. Va. 606; *Gillingham v. Ohio River R. Co.* 35 W. Va. 588, 592, 14 L. R. A. 798.

b. Evidence of.

1. Presumption and burden of proof.

The rule in Massachusetts, and perhaps in some of the other states, is that while a jury might be warranted in inferring that a sale of intoxicating liquors made by a servant in his master's shop in the regular course of his master's business was authorized by the master, the court cannot rule that there is a presumption of fact that it was so. *Com. v. Briant*, 142 Mass. 464, 56 Am. Rep. 707; *Com. v. Hayes*, 145 Mass. 289; *Com. v. Stevenson*, 142 Mass. 466.

Nor is there a presumption of law either way. *Com. v. Houle*, 147 Mass. 380.

In *Com. v. Briant*, 142 Mass. 464, 56 Am. Rep. 707, *supra*, it was said that *Com. v. Holmes*, 119 Mass. 195, *infra*, III. h. 3, went no further than to decide that the evidence that the defendant's son and clerk sold intoxicating liquors in a public house kept by the defendant, was evidence of a sale by the defendant sufficient to be submitted to a jury.

So, where, on a prosecution against the proprietor of a saloon for selling liquor in violation of the statutes for the observance of the Sabbath, it does not appear who the persons were that made the sales complained of, and no connection between the proprietor and such persons, is shown, an instruction that the jury have a right to consider whether it was probable that a mere stranger to the defendant would or could get access to and possession of the saloon in the daytime, and continue to do so for the length of time spoken of by the witness, is error, as the burden rests with the government to establish the fact that the persons who made the sales were agents of the defendant. *Com. v. Mason*, 12 Allen, 185.

Where the act of a servant amounts to a crime, or is of a wilful and malicious character, the law prima facie presumes that it was not authorized before nor sanctioned afterwards by the principals, and the presumption continues until repelled by proof to the contrary. *Gulf, C. & S. F. R. Co. v. Reed*, 80 Tex. 362.

And a person charged with selling intoxicating liquor to a minor, if the act of his servant, should be acquitted if the government fails to prove that the sale was within the scope of the servant's authority. *Com. v. Books*, 150 Mass. 50.

Upon the other hand, it has been held that it rests with the accused, in a proceeding for the recovery of a fine and the forfeiture of his license for selling intoxicating liquors on Sunday, to show that a sale made by his clerk was unauthorized, and was forbidden. *State v. Heckler*, 81 Mo. 417.

And the rule is nearly general that a sale by a servant or agent is prima facie evidence

of a sale by the master or principal. See cases *infra*, III. h. 2.

It is different in cases of contract. The act must be within the authority there. It is also clear that while the principal is liable civilly for the acts of the agent, he is not liable criminally; he is liable for acts civil in their nature, not those criminal or penal in nature, unless done by his authority, or assent, or approval. 1 Am. & Eng. Enc. Law, 2d ed. p. 1161; *Lewis's Case*, 4 Leigh, 664. Such being the law, what is the cast of the act done by the conductor in this case, if it was done? If an overcharge in passenger or freight rates is made by a railroad company, the act is made a misdemeanor by clause 15a, Code, p. 565, with very severe punishment, and for the act

of a sale by the master or principal. See cases *infra*, III. h. 2.

And in *McCutcheon v. People*, 69 Ill. 601, it was held that a principal is liable to the penalties imposed by law for an illegal sale of intoxicating liquor by his agent or servant in his place of business; that the agent having no license to sell to anyone, it is only lawful for him to do so under the authority of his principal; and that the presumption must be deemed conclusive that the agent acted within the scope of his authority in making the sale.

2. Admissibility.

The purchase of wines and liquors in the shop of one who had control thereof, and suffering the same to be drunk in such shop, are affirmative evidence that it was done with his permission. *Kirkwood v. Autenreith*, 11 Mo. App. 515.

And proof of sales of intoxicating liquor by a master is competent, in a prosecution against him for an illegal sale made by his clerk, for the purpose of showing that his servant was authorized to make such sale. *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 683.

And evidence of sales of liquor on the premises by other persons in the absence of the defendant, in a prosecution for keeping a tenement for the illegal sale of intoxicating liquor, is admissible without other evidence that they were agents of the proprietor except that tending to show that he kept the tenement. *Com. v. Edds*, 34 Gray, 406.

So, evidence in a prosecution for the illegal sale of liquor alleged to have been made by the servant for the accused at his bar, that the accused was at the same time engaged in the business of selling liquors at that place, and that he had stated that he had sold and should continue to do so, is admissible as tending to show that he was authorized to make such sale. *State v. Bonney*, 39 N. H. 206.

And evidence of a conversation between the person apparently in control of a saloon at the time of an alleged sale on Sunday and the purchaser is admissible on the question whether the saloon was open, and the sale made, with the proprietor's consent, on a prosecution against the proprietor therefor, though it occurred in the absence of the proprietor. *Pierce v. State*, 109 Ind. 535.

And the testimony of a witness that he sometimes attended the store of the accused as his clerk or agent, and that he left the witness on the afternoon in question in the general charge of the store, and that he sometimes sold rum for him there, but did not recollect having sold brandy, and that there were rum and brandy on tap in the cellar, and that he sold a quart of brandy that afternoon, is competent to go to the jury in a prosecution for the illegal sale of intoxicating liquor as tending to

an indictment lies, and the fine goes to the state. For the very same act a penalty of \$500 is given the party aggrieved, by clause 5, in addition to the fine to the state, and in addition to the right to recover the amount of excessive charge collected by the company, as this penalty is cumulative, and does not deprive the party of his civil action for money had and received in wrong. 4 Elliott, Railroads, § 1564; 8 Am. & Eng. Enc. Law, p. 924; Hutchinson, Car. § 756. Thus, for mere compensation the wronged party has his civil action for money had and received for his wrong, and also a right to demand the \$500 penalty. They are in their nature different

things. No one would say that upon an indictment for the misdemeanor the act would be treated otherwise than a criminal act. The very same act carries with it a penalty of \$500 to the individual, not for compensation to him to redress his actual loss, but purely for punishment. In this case Hall was overcharged, if at all, only 88 cents on a ride of 4 miles, and of course the penalty is not for compensation but punishment. The act thus has two punitive penalties, one to the state, the other to the individual, for one and the same act which is a public wrong entailing two penalties. You cannot make two civil actions for compensating the party out of that act, but you can out

show that the witness had authority to sell brandy for the accused. *State v. Foster*, 23 N. H. 348, 55 Am. Dec. 101.

So, evidence in a prosecution for selling intoxicating liquor to a certain minor, that the witness had seen him going into the defendant's saloon, and that on one occasion the defendant was sitting in the front window, and that as the boy went in he got down from the window and in a few minutes after the boy came out, is admissible, where the defendant denied that the boy was ever in the shop or permitted to be there, as tending to show that sales made by the bartender had been made with his knowledge and consent. *Com. v. Rooks*, 150 Mass. 59.

And evidence that liquors were kept on the premises of the accused for sale for medicinal purposes during the preceding month, and that his clerk during such time had made sales to other persons, is relevant to the issue on the prosecution of an indictment for sales of spirituous liquors made by the clerk. *State v. Shaw*, 56 N. H. 73.

Evidence as to the possession of whisky in the cellar of his store by the proprietor of a drug store is admissible in a prosecution against him for selling liquor without a license on Sunday, and as a druggist without a regular prescription, as a link which, if connected with other links, would constitute a chain of evidence justifying his conviction. *Com. v. Johnston*, 5 Pa. Super. Ct. 585.

And a sale of nerve tonic by a liquor dealer or his clerk under his authority and direction is relevant on a prosecution for unlawfully selling liquor, where there is evidence tending to show that the nerve tonic was rye whisky. *Klinnebrew v. State*, 80 Ga. 232.

So, a record of the county court showing that a license had been granted to the accused to keep a dramshop at the place where liquor was sold to a minor is admissible in evidence in a prosecution therefor, in connection with other evidence, where the sale was made by a co-partner or agent, as tending to prove his ownership of the saloon and interest in the sale. *Waller v. State*, 38 Ark. 656.

And the receipt for payment for liquor delivered to a purchaser, purporting to be signed by an agent for the vendor, which the counsel for the vendor asks for in his presence on the trial of a prosecution against him for the unlawful sale of spirituous and intoxicating liquors, insisting on his right to retain it, and which, when subsequently demanded by the prosecuting attorney, was not produced, affords some evidence that the transaction with the purchaser was a sale by the accused through his agent. *Com. v. Shurn*, 145 Mass. 150.

So, the fact that a husband and wife lived together, and that the house was his, there being no evidence that she carried on a separate trade, is competent to go to the jury in a prosecution against the husband for the sale of liquor.

execution against the husband for an unlawful sale of intoxicating liquor to prove that she acted as his agent. *Com. v. Coughlin*, 14 Gray, 380.

And evidence in a prosecution for unlawfully keeping intoxicating liquors with intent to sell that when the defendant was absent, while a woman was tending the bar a man took a bottle from the bar and put it in his basket, and the woman at the same time took some money from the bar, may be submitted to the jury, with other evidence that liquors were kept in the shop for sale, on the question as to whether the woman was there by the defendant's authority. *Com. v. Fitzgerald*, 14 Gray, 14.

So, the question as to the knowledge of the proprietor of a drug store of sales made therein on Sunday is a fact for which a witness may be properly asked in a prosecution for the illegal sale of liquor on Sunday. *Com. v. Johnston*, 5 Pa. Super. Ct. 585.

And evidence as to who assumed to be the proprietor of, and to control, the premises where intoxicating liquors were obtained, is not objectionable in a prosecution for the illegal sale of such liquors as an opinion, but if it is to be regarded as an opinion, it is of such a character as may be stated by a person who witnessed the conduct and conversations of the parties upon the premises at the time. *State v. Skinner*, 34 Kan. 256.

So, evidence that a dealer in drugs and medicines, holding a merchant's license, forbade his wife and brother, whom he left in charge of his store, to sell liquor except for designated purposes, is admissible in a prosecution against him for selling liquor without a license as a dramshop keeper. *State v. Baker*, 71 Mo. 475.

And where, in a prosecution against a master for the sale of intoxicating liquors in his store by his servant, he denies the authority of the servant to sell intoxicating liquor, and testifies that he forbade his selling it, it is competent on cross-examination to ask him if he had spirituous intoxicating liquors in his shop, and if he had sold them. *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688.

3. Sufficiency.

Proof, in an action for a penalty for selling intoxicating liquor without a license, that the defendants were proprietors of a store, doing business together, and present in the store daily, and that sales, by small measure, of spirituous liquors were made there by a clerk, some of which occurred in their presence, warrants the inference that they were made by their authority, and that they thereby incurred the penalty in like manner as if they had sold personally. *Hall v. McKechnie*, 22 Barb. 244.

And proof of sales of intoxicating liquor by

of one act of public wrong make two penalties. The defendant has been held liable for the crime of its conductor, when it neither ordered it, nor ratified it, nor knew of it, but the act was against its published rates and in violation of its directions to the conductor to collect only lawful fares by the tariff rates furnished him. If he did that act, he did it by mistake or in violation of orders. I take it that the legislature did not intend to punish the corporation, if innocent, with such severe penalties. I can readily see that it is just and good policy to thus punish a railroad company for such wrong if done by its authority or with its approval, but we ought not to give that liberal-

ity of construction to the statute which imposes such injustice, because it is a highly penal statute, and its words do not make the company liable for unauthorized acts of agents, nor does reason or justice call for it, and penal statutes are to be strictly construed and applied only to cases plainly within them and their reasonable intent. Under this principle it must be shown that the company ordered or approved the act, as it was held that the company must have approved running cars on Sunday, or authorized it to make it liable for the penalty fixed for such act in *State v. Baltimore & O. R. Co.* 15 W. Va. 362, 389, 36 Am. Rep. 803. There the acts of its officers did not

a clerk without a license makes a prima facie case against his employer, and if he wishes to escape he must rebut it by proof showing that the sale was made without his knowledge or authority. *State v. Durkem*, 23 Mo. App. 387; *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688; *State v. Reley*, 75 Mo. 521.

And where, in a prosecution for selling liquor without a license, a prima facie case is made by proof of a sale of beer by the bartender, the burden rests with the proprietor to show that the bartender acted without his knowledge or consent. *Kirkwood v. Autenreith*, 11 Mo. App. 515.

So, sales of liquor at the bar of a steamer by a person apparently in charge thereof as clerk or agent will be deemed to be a sale by the owner thereof, for which he is criminally responsible, in the absence of any countervailing testimony. *Fullwood v. State*, 67 Miss. 554.

And the facts that a person was in possession of a shop, and that he was the owner of liquors sold therein, and that the sale was made by his servant, furnish evidence which, unexplained, is sufficient to authorize a jury to find him guilty of illegally selling intoxicating liquor. *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 288.

And proof that a saloon was fitted up as drinking shops usually are, and that the bartender drew beer from a spigot in a keg fitted in an ice-chest, and sold it over the counter, calling it sarsaparilla, makes a prima facie case of the owner's knowledge and consent thereto. *Kirkwood v. Autenreith*, 11 Mo. App. 515.

The facts that the accused was owner of the liquor sold, and that it was illegally sold by his servant, furnish strong evidence to authorize and require the jury to find him guilty of making such sale, and, unexplained, they would be sufficient to convict. *Com. v. Nichols*, 10 Met. 259, 43 Am. Dec. 432.

But see Massachusetts cases with reference to presumption and burden of proof, *supra*, III. b, 1.

So, proof that the sale of the intoxicating liquor in question was made at the defendant's saloon in which he transacted a retail liquor trade, by a person who was his servant in conducting that trade, in a prosecution for retailing intoxicating liquor without a license, sufficiently connects the accused with the commission of the offense. *Molihan v. State*, 30 Ind. 268.

And although an action brought by overseers of the poor against a person for selling liquors without a license is for the recovery of a penalty, it is a civil, and not a criminal, action, and for its purpose a sale by an agent or servant in the shop of his master is prima facie a sale by the principal or master. *Amerman v. Kall*, 34 Hun, 126.

And employment of a clerk or agent in a

store may be inferred, for the purposes of a prosecution for the illegal sale of intoxicating liquors, against the proprietor thereof from the relative situation of the parties and the nature of the employment, without proof of any express employment, either written or verbal. *State v. Foster*, 23 N. H. 348, 55 Am. Dec. 191.

So, evidence of a sale by a servant in violation of a license, made in his master's shop in the ordinary course of the master's business and from liquors owned by him, and there kept for sale, may be sufficient, in Massachusetts, to warrant a jury in inferring as a fact that the sale was made by the authority or with the consent of the master. *Com. v. Hayes*, 145 Mass. 289; *Com. v. Stevenson*, 142 Mass. 466.

And evidence that the son of a keeper of a public house, who was clerk therein, sold intoxicating liquors to a person therein, is sufficient to be submitted to the jury, on the question as to whether the sale was made by the father, or his son as his agent, and will warrant a conviction. *Com. v. Holmes*, 119 Mass. 185.

So, evidence, in an action brought by overseers of the poor to recover penalties for selling intoxicating liquors without a license, tending to show that liquors were sold by a husband in a saloon which he carried on as agent for his wife, is prima facie evidence of a sale by her, and is sufficient to sustain a recovery. *Amerman v. Kall*, 34 Hun, 126.

And evidence that two persons entered the dramshop of the accused on Sunday from the back door without obstruction or objection, and purchased liquor therein from a man who had long been the bartender and in charge of such saloon, and to whom had been largely committed the management of his business, and that the liquor was drank at the counter, makes a very clear prima facie case against the defendant for selling intoxicating liquor on Sunday contrary to law. *State v. Meagher*, 49 Mo. App. 571.

And where purchases of liquor have been made from the wife of the accused in a prosecution against the husband for maintaining a liquor nuisance, and the place where the sales were made was the tenement where he lived with his wife, the jury may disbelieve his evidence that he had not sold any intoxicating liquor or authorized anyone to sell for him; and in that case the fact that he and his wife lived together in his tenement is competent evidence to prove that she acted as his agent. *Com. v. Hyland*, 155 Mass. 7.

And the testimony of a witness in a prosecution for an unlawful sale of intoxicating liquor, against a husband, that he entered the kitchen of the accused, where he found a woman supposed to be his wife, and asked her for "hard stuff," and she brought him a glass of rum, and that he did not see the accused, but that the

bind it for the penalty because it did not appear that the company authorized or approved the act. That case settled this one in favor of the defendant. The latest work on railroads, of high and standard authority, 2 Elliott, Railroads, § 715, says: "On the other hand, it is held that statutes relating to criminal offenses, and all statutes which impose as punishment any penalties, pecuniary or otherwise, or forfeitures of money or other property, or which provide for the recovery of damages beyond just compensation to the party injured, whether recovered in a suit by the state or by a private individual, are penal in the sense that they fall under the rule of strict construction. This is

the only doctrine that can be defended on principle." Statutes of the character involved in this case, imposing penalties for overcharges, have been held penal and subject to rigid construction. *Hines v. Wilmington & W. R. Co.* 95 N. C. 484; *Louisville & N. R. Co. v. Com.* 99 Ky. 132, 33 L. R. A. 209. So, a statute giving a penalty for leaving a gate swing open over a highway was held penal in *Allen v. Stevens*, 29 N. J. L. 509. In *Brooks v. Western U. Tele. Co.* 56 Ark. 224, an act imposing a penalty for refusing to transmit telegrams over the line was held penal, and not to include the act of refusing to deliver a telegram after its transmission. The opinion very appropriately

woman offered to call her husband, saying that he was in the next room, but got no reply upon calling to him, is sufficient to warrant an instruction that if the jury should find that the wife sold the rum as the agent of her husband they could find him guilty, and will warrant a conviction. *Com. v. Lafayette*, 148 Mass. 130.

So, sales of intoxicating liquor made by an employee may be deemed to have been made with the consent of the employer, though she had directed that no such sales should be made, where from the nature of the business and the character of the servants employed in it she could not reasonably expect her directions to be obeyed, and she took no care, and exercised no supervision, for the purpose of ascertaining that they would obey them, it being competent in such case for the jury to find that they were not given in good faith. *Com. v. Hayes*, 145 Mass. 289.

And evidence in a prosecution for selling intoxicating liquors on Sunday, that a sale, or what amounted to a sale, had been made on that day in the saloon of the accused, which was in a building which he himself occupied, by a person who was apparently in control of the saloon at the time, authorizes the jury to infer that the saloon was open and the sale was made with his consent, and it is not necessary that he should have authorized or directed the particular sale in question. *Pierce v. State*, 109 Ind. 535.

And evidence in a prosecution for the sale of intoxicating liquor on Sunday, that the defendant kept a hotel in which a saloon was situated, the room in which the saloon was located being devoted exclusively to that purpose, leaving no occasion for keeping it open on Sunday in carrying on the business of the hotel, and that a witness went into the hotel office on a Sunday and passed through into the saloon, where he found one of the porters of the hotel with other persons standing some distance from the bar and inquired of the porter whether he had any beer, to which the reply was "There is a bottle, why don't you take it?" and the witness thereupon took a bottle of beer standing with a glass upon the counter and drank it, leaving a nickel on the counter, and passed out the way he entered,—is sufficient to uphold a conviction. *Pierce v. State*, 109 Ind. 535.

So, evidence in a prosecution against a saloon keeper for the sale of liquor to a minor, made by his barkeeper, that on other occasions the barkeeper had sold to infants with the defendant's knowledge, and that the latter made no objection and still continued him in his employ, would warrant the jury in inferring that he did so by the defendant's authority. *Hanson v. State*, 43 Ind. 550, *dictum*.

And evidence, in a suit on a retail liquor bond for the recovery of the penalty therein provided for a sale by the dealer to a minor, that

a youth under eighteen years of age went into his room and bought intoxicating liquor from a person standing behind the bar transacting the business, is sufficient, *prima facie*, to show a breach of the bond. *O'Flinn v. State*, 66 Miss. 7.

And a clerk, agent, or employee of a person on trial for the illegal sale of liquors made by such clerk, agent, or employee need not be shown to have had no permit to sell such liquors. *State v. Skinner*, 34 Kan. 256.

In Massachusetts, however, a sale by a servant of intoxicating liquors to a minor in his master's shop and in the regular course of his master's business is not *prima facie* a sale by the master. *Com. v. Stevenson*, 142 Mass. 466; *Com. v. Briant*, 142 Mass. 464, 56 Am. Rep. 707.

And a sale made by the servant of an innkeeper at the back door of licensed premises is *prima facie* one for which the employer is not liable, and requires affirmative proof that it was made in the presence, or with the consent, of the employer. *Com. v. Rooks*, 150 Mass. 59.

And the fact that a man employs a servant to conduct a business authorized by law, and that the servant makes an unlawful sale in the course of it, does not necessarily overcome the presumption of innocence, merely because the business is liquor traffic, and may be carried beyond statutory limits. *Com. v. Briant*, 142 Mass. 464, 56 Am. Rep. 707.

And generally, on the other hand, a sale by an employee is only *prima facie* evidence of the employer's liability, in an action for selling liquor without a license. *Kirkwood v. Autenreith*, 21 Mo. App. 73.

Or for a penalty for violating the statute prohibiting such sale. *Com. v. Nichols*, 10 Met. 250, 43 Am. Dec. 452.

And evidence that the occupant of a house, and servants of the owner, sold liquor there, is not sufficient to sustain a conviction against the owner for illegally selling intoxicating liquors, and refusal to instruct that such evidence is insufficient, and instructing that it was a question for the jury to decide, is error. *Com. v. Dunbar*, 9 Gray, 208.

And evidence, in a prosecution for the sale of liquor to be drank on the premises in violation of law, that the liquor was sold in the house of the accused and at his bar by his son, in the absence of any other evidence of agency, does not make a *prima facie* case of authority to the son to do an illegal act. *Parker v. State*, 5 Ohio St. 563.

So, under this rule, the sale of whisky in the back room of a store is not alone sufficient to justify a conviction of the proprietor, under a statute prohibiting such sale, unless the jury is satisfied beyond a reasonable doubt that he was interested in the sale, and that the man who made it was acting as his clerk or employee. *Perkins v. State*, 92 Ala. 66.

says what is applicable to this case that "the statute is penal, and its terms cannot be extended beyond their obvious meaning. Where there is a doubt, such an act ought not to be construed to inflict a penalty which the legislature may not have intended. This is a familiar rule of construction. Applied to this case, it resolves the question in favor of the company, for it cannot be said that the language plainly implies the intention to visit a penalty for a refusal to deliver a message after it has been transmitted." All penal statutes are construed strictly and not "extended by mere implication to include cases or acts not clearly described by the words." 23 Am. & Eng. Enc. Law, pp. 374, 375; 18 Am. & Eng. Enc. Law, p. 270. "Penal statutes are those by which punishments are imposed for transgressions of the law. They are construed strictly, and more or less so according to the severity of the penalty. When a law imposes a punishment which acts upon the offender alone, and not as a reparation to the party injured, and where it is entirely within the discretion of the law-giver, it will not be presumed that he intended it should extend further than is expressed; and humanity would require that it should be so limited in the construction." Sutherland,

Stat. Constr. § 208. It does not make the statute any the less penal that the penalty is enforced by an action in form civil. That matter relates only to the procedure. A penalty "is in the nature of a punishment for the nonperformance of an act or for the performance of an unlawful act. Involves the idea of punishment . . . whether [enforced] by a civil or a criminal prosecution." Anderson, Law Dict. 768, quoted in an excellent case on the subject, *Woolterton v. Taylor*, 132 Ill. 197. Endlich, Interpretation of Statutes, § 331, says: "It is immaterial, for the purpose of the application of the rule of strict construction, whether the proceeding prescribed for the enforcement of the penal law be criminal or civil. Thus, an act giving a party injured a civil action for the recovery of a penalty imposed upon a public officer for charging illegal fees, is a penal act; so that the taking of excessive fees by a person after the expiration of his office, for services done while in office, is beyond the reach of the act." In Virginia the statute against usury has been several times held to be penal, requiring proof beyond rational doubt. *Brockenbrough v. Spindle*, 17 Gratt. 21, 33.

I think my construction of clause 5 is

And evidence that the sale of intoxicating liquor in question was made by a person who was behind the counter of the saloon of the accused acting as barkeeper at the time is not sufficient to show the guilt of the proprietor beyond a reasonable doubt, in a prosecution for the illegal sale of intoxicating liquor, where it does not also show that such person was the agent of the accused, or was employed by him, or that the accused had any knowledge of the sale. *Anderson v. State*, 39 Ind. 553.

And the fact that the son of a liquor dealer was in his place of business acting as clerk for him on week days raises no presumption of law that he was his clerk on Sunday, and authorized to make sales on that day, so as to hold the proprietor criminally responsible for the acts of his servant or agent, unless he in some way participated in, countenanced, or approved the criminal act of the agent. *Com. v. Johnston*, 2 Pa. Super. Ct. 317.

L. Question for jury.

It is a question of fact, solely for the jury to determine, whether an unlawful sale of intoxicating liquors made by the barkeeper had been authorized by his employer; there is no presumption of law either way in Massachusetts, and the jury may be permitted to infer authority where there is evidence on the subject if, under all the circumstances, they see fit to do so. *Com. v. Houle*, 147 Mass. 380; *Com. v. Stevenson*, 142 Mass. 468.

And the weight of such evidence, and the inferences to be drawn from it, are for the jury to decide. *Com. v. Hayes*, 145 Mass. 289; *Com. v. Stevenson*, 142 Mass. 468.

So, generally, while the question whether the jury would be legally authorized to infer from a given state of facts the existence of a general authority from a liquor dealer to a clerk to sell liquor unlawfully, is one of law for the court, the legal sufficiency of the facts to warrant the inference, and the existence of the facts themselves, should be left to the jury for determination. *Kinnebrew v. State*, 80 Ga. 232.

And the question whether directions given by a master to his clerk not to sell any spir-

ituous liquors were given in good faith, or were merely colorable and given with intent that they should be disobeyed, is one for the determination of the jury, in a prosecution for an illegal sale. *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688.

So, the question as to what circumstances would be sufficient to establish the fact of knowledge on the part of an employer of an illegal sale of intoxicating liquor by his employee is one for the determination of the jury, and it is error to tell the jury that certain facts stated would, as a matter of law, raise a presumption of knowledge. *Neidelsner v. State*, 6 Baxt. 490.

And the question whether a licensed tavern keeper assented to a sale of liquors made by his bartender on Sunday is one of fact for the jury, and not one of legal presumption. *People v. Utter*, 44 Barb. 170.

And submitting the case to the jury in a prosecution for selling liquor on Sunday is not error, where the sale is claimed to have been made by someone in the accused's saloon, though the accused and his bartender testified that the bartender was under orders not to open the place on Sunday, and not to sell any intoxicating liquors therein, as such evidence comes from the mouths of interested witnesses. *State v. Meagher*, 49 Mo. App. 571.

So, a statement by the court to the jury, in a prosecution against the proprietor of a drug store for selling liquor without a license, and on Sunday, and without a regular prescription, that there had been a violation of the law in defendant's drug store by somebody, is improper as an interference with the province of the jury. The most that could be judicially said was that if certain of the witnesses who had testified to sales made there were believed, the law had been violated, but the credence to be given to the testimony is to be left to the jury. *Com. v. Johnston*, 5 Pa. Super. Ct. 585.

See also *Atty. Gen. v. Riddle*, 2 Crompt. & J. 493, 2 Tyrw. 523, *supra*, II. d. and *Queen v. Holbrook*, L. R. 3 Q. B. Div. 60, 47 L. J. Q. B. N. S. 35, 37 L. T. N. S. 530, 28 Week. Rep. 144, 13 Cox, C. C. 650, *supra*, II. c.

F. H. B.

strengthened by looking at clauses 15 and 15a as all are *in pari materia* and in the same act. Clause 15 enacts that any wilful violation of the act by any railroad corporation shall be deemed a forfeiture of its franchise. Would any reasonable person say that a paltry overcharge of 38 cents as in this case, by a conductor without authority or approval of the company, would visit upon it the dreadful penalty of forfeiture of its franchise? You would not by liberal construction do this. Then why, for the very same act, impose the heavy penalty of \$500 to the individual, not for compensation, but for punishment? Clause 15a enacts that "any railroad company or corporation . . . their officers or agents, who shall charge, demand, or receive more than the lawful charges for transportation or travel upon their railroad, shall, for each offense, be guilty of a misdemeanor, and upon conviction shall be fined not less than \$100 or more than \$500." That means that where the corporation authorizes it, it shall be liable, but where it is the unauthorized act of the agent, he is liable. The agent or officer is not liable to the \$500 penalty under clause 5; he is not mentioned there, and to impose it on the corporation, it must be authorized or approved. It must be its wilful act, like the act required under clause 15 to lose its franchise. Indeed it may be a question whether any officer's unauthorized act, whether he be high or low, could subject a corporation to these severe penalties—whether it would not require company action, or action by someone authorized to fix rates, to bind the company; for a mere subaltern could not.

Under these principles error was committed prejudicial to the defendant upon the trial in giving plaintiff's instructions 1 and 2, the former telling the jury that it was not incumbent

upon the plaintiff to prove his case beyond a reasonable doubt, but by a mere preponderance of the evidence; the latter stating that the mere collection of 60 cents by the conductor rendered the company liable. And error was committed in refusing defendant's instructions 1 and 2; the former instructing that if the conductor collected 60 cents, and that the company had a schedule of rates from the government of its conductors in collecting fares from passengers, and that a duplicate of it was furnished to the conductor, and that it was against the rules of the company for the conductor to charge the plaintiff more than the rates fixed by said schedule, and if said rates were not more than the law allowed, then the jury must find for the defendant; and No. 3, instructing that before the jury could find for the plaintiff they must believe from the evidence, to the exclusion of every reasonable doubt, that the company charged the plaintiff more than was allowed by law, and that notwithstanding the conductor charged 60 cents, which was more than the law allowed, if the jury believed that the rules of the company did not allow the conductor to charge the plaintiff more than was allowed by law, and that he acted in violation of the rules of the company, the act of the conductor was not the act of the company. The court erred in not setting aside the verdict of the jury as there was no evidence tending to show that the company authorized or ratified the act, and, on the contrary, it was clearly shown to be against the rules of the company. I think there was no error in rejecting pleas 1 and 2, fixing one year as a limitation. If any statute applied it would be five years under Code, chap. 104, § 12.

Reversed, and new trial granted.

NORTH DAKOTA SUPREME COURT.

Joseph J. O'LEARY, by Guardian, *Appt.*,
v.
BROOKS ELEVATOR COMPANY, *Resp.*

(.....N.D.....)

***1. Every man has the absolute right to use his own property** for any of the purposes to which such property is usually applied, and in such manner as he sees proper, provided he exercises proper care and skill to avoid unnecessary injury to others up to the point where such use becomes a nuisance.

2. A landowner owes no duty of protection to a trespasser upon his land when such trespass is unknown to the landowner, and where it is in no manner induced by any negligence on his part.

3. Actionable negligence is a failure to observe a legal duty existing in favor of the person who brings the action. Where there is no duty, there can be no actionable negligence.

*Headnotes by BARTHOLOMEW, J.

NOTE.—With respect to dangerous attractions for children, see *Missouri, K. & T. R. Co. v. Edwards* (Tex.) 33 L. R. A. 825, and other cases cited 41 L. R. A.

See also 44 L. R. A. 655.

4. A child is responsible for its own torts although committed by direction of another; and a child is no less a trespasser because the trespass was committed under the control or coercion of a parent or guardian.

(May 27, 1896.)

A PPEAL by plaintiff from a judgment of the District Court for Traill County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Carmody & Leslie and J. P. Galbraith, for appellant;

Defendant was guilty of gross negligence which was the direct cause of plaintiff's injuries.

Negligence is defined by our statute as: "A want of such attention to the nature or probable consequences of the act or omission as a

in note thereto; also *Moran v. Pullman Palace Car Co.* (Mo.) 33 L. R. A. 756, and *Kaumeier v. City Electric R. Co.* (Mich.) 40 L. R. A. 385.

prudent man ordinarily bestows in acting in his own concerns."

N. D. Rev. Codes, § 7714.

Is there any doubt but what if the defendant's agent in charge of the elevator had had boys of his own, he would have covered up the rod or mended the knuckle and taken off the wire,—at least after his attention had been called to the fact that it was dangerous?

The claim that a man can do as he pleases on or within his own premises is not correct. A technical trespass by plaintiff does not bar a recovery.

Fisher v. Clark, 41 Barb. 329; *Radeliff v. Brooklyn*, 4 N. Y. 195, 58 Am. Dec. 357.

In any case, where under all the circumstances of the case the defendant should, in the exercise of ordinary care and prudence, and of a thoughtful regard for the safety and rights of others, have foreseen the probability of accident, and where the danger could be removed without interfering with his business or incurring any unreasonable expense or trouble (expense or trouble which would be incommensurate with the probability of danger), the defendant is liable for his neglect in not protecting the public from such danger.

Brinkley Car Co. v. Cooper, 60 Ark. 545; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393; *Nagel v. Missouri P. R. Co.* 75 Mo. 653, 42 Am. Rep. 418; *O'Malley v. St. Paul, M. & M. R. Co.* 43 Minn. 289; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434; *Hydraulic Works Co. v. Orr*, 58 Pa. 332; *Kansas O. R. Co. v. Fitzsimmons*, 81 Am. Rep. 208; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154; *Harriman v. Pittsburgh, O. & St. L. R. Co.* 45 Ohio St. 11; *Heaven v. Pender*, L. R. 11 Q. B. Div. 503; *Young v. Harvey*, 16 Ind. 314; *Penso v. McCormick*, 125 Ind. 116, 9 L. R. A. 313; *Kinchlow v. Midland Elevator Co.* 57 Kan. 374; *Malloy v. Hibernia Soc. & L. Soc. (Cal.)* 21 Pac. 525; *Lynch v. Nurdin*, 1 Q. B. 29; *Lowe v. Salt Lake City*, 13 Utah, 91; *Daley v. Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 413; *Lane v. Atlantic Works*, 107 Mass. 104; *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb. 90; *Durham v. Musselman*, 2 Blackf. 96, 18 Am. Dec. 133.

An innocent trespasser could recover, the danger being a concealed one.

Kinchlow v. Midland Elevator Co. 57 Kan. 374.

This case comes within the rule of the *Turntable Cases*.

The child is not held to the degree of care that a grown person is.

Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. ed. 745; *Brinkley Car Co. v. Cooper*, 60 Ark. 545.

Riordan's negligence would not prevent the plaintiff from recovering.

Lynch v. Nurdin, 1 Q. B. 29; *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67; *Daley v. Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 413; *Rauch v. Lloyd*, 31 Pa. 358, 72 Am. Dec. 747; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154; *Walters v. Chicago, R. I. & P. R. Co.* 41 Iowa, 78; *Bellevue & I. R. Co. v. Snyder*, 18 Ohio St. 408, 98 Am. Dec. 175; 41 L. R. A.

Cleveland, O. C. & I. R. Co. v. Manson, 30 Ohio St. 451; *North Pennsylvania R. Co. v. Mahoney*, 57 Pa. 187; *Whirley v. Whiteman*, 1 Head, 620; *Norfolk & P. R. Co. v. Ormsby*, 27 Gratt. 455; *Huff v. Ames*, 16 Neb. 139, 49 Am. Rep. 716; *Galveston, H. & H. R. Co. v. Moore*, 59 Tex. 64, 46 Am. Rep. 265; *Erie City Pass. R. Co. v. Schuster*, 118 Pa. 412, 57 Am. Rep. 471; *Roland v. Missouri R. Co.* 36 Mo. 489; *Bettishill v. Humphrey*, 74 Mich. 494; *Wymore v. Mahaska County*, 78 Iowa, 396, 6 L. R. A. 545; *Newman v. Phillipsburg Horse Car R. Co.* 52 N. J. L. 446, 8 L. R. A. 843; *Beach, Contrib. Neg.* §§ 41-43.

Meers, Swenson & Norman and F. W. Root for respondent.

Bartholomew, J., delivered the opinion of the court:

Action for damages for a personal injury caused by the alleged negligence of defendant. When the evidence was closed, the court, on defendant's motion, directed a verdict in its favor. The facts admitted, and which plaintiff's evidence tended to establish, are as follows: The plaintiff, Joseph J. O'Leary, is a minor, and was eleven years old at the time of the trial, which was in January, 1897. J. D. O'Leary is plaintiff's duly appointed guardian. The defendant is a corporation, and at the time of the injury complained of, and for several years prior thereto, owned and operated a grain elevator in the city of Hillsboro, in this state. The railroad track passes through the city, running north and south. Main street is west of the railroad track, and runs parallel therewith, the east line of the street being identical with the west line of the right of way. Fifth avenue, running east and west, crosses Main street and the railroad track at right angles. The defendant's elevator property stands in the northeast corner formed by the intersection of Main street and Fifth avenue. The building nearest the corner was the engine house. This was a brick building between 8 and 9 feet wide, and 28 feet long, the front end facing west on Main street, but back from the street 8 or 10 feet. North from the north line of the engine house, 20 feet distant, was the elevator proper. Starting in front of the engine house, and extending to and along the front of the elevator, was an elevated driveway for hauling grain to the elevator. This driveway was not more than 2 feet high where it left the engine house, and raised to about 5 feet in height at the elevator. There was a railing on the driveway, and on the inside or east side it was boarded up from the ground to the driveway, but there were boards off, so a man could pass through. The elevator at the south end was 30 feet wide. The south side of the engine house ran back along the walk on the north side of Fifth avenue. The first side track of the railroad was 8 or 10 feet east of the east end of the engine house. The machinery in the elevator was connected with the engine by means of a shaft or tumbling rod extending across the space between the two buildings about 15 inches from the ground, and 6 or 8 feet from the driveway. About the middle of this shaft was a knuckle connecting two separate pieces of the shaft. This knuckle was bolted over the ends of the shaft, and by

means of slots in the knuckle and in the shaft, into which iron wedges were fitted, a solid connection was made. These wedges would sometimes work loose, and, to avoid that, a wire, about the size of a large fence wire or telegraph wire, had been used to wind around the shaft and the knuckle in such a manner as to hold the wedges in place. The end of this wire was left standing out about 6 inches from the knuckle. Neither the shaft nor the knuckle was in any manner boxed or covered. When the shaft was in motion, the protruding end of the wire could not be seen, or, if seen at all, only as a dim outline. The shaft had been used by defendant in this uncovered condition for a number of years. Just how long the wire had been used does not appear. In the summer time, boys at play sometimes went upon this space between the engine house and the elevator, and over and around this shaft. The object that seems to have been attractive to children was an escape pipe that came out of the engine house a few feet distant from the shaft. The spot would seem also to have been something of a resort for tramps, as the evidence shows them to have been there on several occasions. These facts were all known to the defendant.

Late in the evening of July 19, 1896, the plaintiff, in company with one Riordan, reached Hillsboro. This man Riordan was plaintiff's uncle, and was at that time his guardian. His sight was defective. He could see sufficiently well for all purposes of locomotion, but he represented himself as blind, and was going through the country soliciting charity. Ostensibly, he was cared for by plaintiff, who led him whithersoever he went. Plaintiff was completely under Riordan's control. They stopped at an hotel that night, on Main street, and nearly opposite the elevator. The next morning, after breakfast, Riordan directed plaintiff to take him to some box cars that stood on the track, where he would smoke. They crossed over Main street on the north side of Fifth avenue, and followed the sidewalk going east until they had passed beyond the east end of the engine house far enough to permit Riordan to look into the space between the engine house and the elevator. There he saw a ladder lying on its side, and leaning against the boards that extended from the ground up to the driveway. He indicated that he would use that as his smoking place, and accordingly they passed into the space, crossed over the shaft, and sat down on the ladder. As they sat down, Riordan dropped his cane in such a manner that it passed under the shaft. The shaft was in motion, and was revolving about 160 times per minute. After Riordan had finished smoking, he directed plaintiff to get his cane. In endeavoring to get the cane, plaintiff's clothes were caught by the protruding and practically invisible end of the wire, and he was instantly whirled around the revolving shaft and knuckle. The outcry caused the man in charge of the elevator to stop the engine as speedily as he could. The plaintiff was frightfully injured, but ultimately recovered, with the loss of one leg at the knee. The sole proposition involved in the case is whether or not defendant is lia-

ble, under the facts stated, in damages, for the injury to plaintiff.

The precise principles of law that should measure the liability of the landowner to persons injured upon his lands are difficult of ascertainment. This arises in part from the inherent intricacies of the subject, and in a greater degree from the circumstances that the facts in nearly every case are so clearly differentiated from the facts in every other case that it has not been possible for courts to establish many general rules governing such cases. More particularly has this been true when, as in this case, the injured person was a child; and, as capacity and responsibility on the part of the injured persons are elements that always enter into the consideration of contributory negligence, it follows that with children the age and mental development make it still more difficult to establish general rules. In cases of this class, where the defendant has been held liable, the case of *Lynch v. Nurdin*, 1 Q. B. 29, is quite generally cited as an authority in favor of a recovery. On the other hand, and in the interest of landowner defendants, it has been urged that this case is not such an authority, because the injury in that case occurred in the public street, where the injured child had a legal right to go. In that case a horse and cart were left unhitched and unattended in the street, and the plaintiff, a lad seven years of age, climbed upon the cart; another boy led the horse away; and the plaintiff, in attempting to get down, was run over and injured. The owner of the horse and cart was held liable, on the ground of negligence in leaving the horse and cart unhitched, and with no person to take care of it, in a street where children were playing. While it is true that plaintiff was not a trespasser by being in the street, yet he was a trespasser when he climbed upon the cart. In *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745, the Supreme Court of the United States, in speaking of *Lynch v. Nurdin*, says: "The child was clearly a trespasser in climbing upon the cart, but was allowed to recover." We think that case is a clear authority in favor of allowing a technical trespasser to recover by reason of the negligence of defendant. The case of *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745, was the first of a series of cases now known as the "Turntable Cases," wherein railroad companies have been held liable for injuries received by children while playing upon or around turntables by reason of the fact that the turntables were left unfastened and unguarded. Among these cases may be mentioned *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393; *O'Malley v. St. Paul, M. & M. R. Co.* 43 Minn. 299; *Barrett v. Southern P. Co.* 91 Cal. 296; *Fort Worth & D. C. R. Co. v. Meisler*, 81 Tex. 474; *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Union P. R. Co. v. Dunden*, 37 Kan. 1; *Nagel v. Missouri P. R. Co.* 75 Mo. 653, 42 Am. Rep. 418; *Iluaco R. & Nav. Co. v. Hedrick*, 1 Wash. St. 446. All of these cases practically, and some of them expressly, treat the plaintiff as a technical trespasser; and they establish the principle that such a trespasser may recover, although the

be no wilful act or gross negligence on the part of the defendant. But these cases are *suu generis*. They have for their foundation the assumption that a defendant landowner must know that children will follow their childish instincts and inclinations, and that they are without capacity to clearly discriminate between things that are dangerous and things that are not dangerous; and, therefore, if he leave upon his premises a dangerous piece of machinery unguarded and fully exposed, and in a position where it will probably be seen by children, and of a character that would naturally attract and entice children, he must anticipate that children will go around and upon it; and he is therefore bound to use ordinary care to protect these unconscious trespassers from being unnecessarily injured by such dangerous machinery. Nor has the application of this principle been confined to this one line of cases. It was applied in *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Rep. 261, where the injury was produced by a gate; in *Brinkley Car Co. v. Cooper*, 60 Ark. 545, where the child was scalded in a pool of hot water; in *Harriman v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11, where the dangerous object was a signal torpedo; in *Mullaney v. Spence*, 15 Abb. Pr. N. S. 319, an elevator worked by steam; in *Pekin v. McMahon*, 154 Ill. 141, 27 L. R. A. 206; 484, a deep pit filled with water and floating materials; in *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, where the injury was caused by a dynamite cartridge, but there was a question of license in the case also; in *Whirley v. Whiteman*, 1 Head, 610, cog wheels outside of a paper mill, but operated by a shaft from within; in *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193, lumber pile; in *Mackey v. Vicksburg*, 64 Miss. 777, where the injury was caused by falling into an excavation made by the city. Many other cases might be cited, but these are sufficient to show the wide diversity of facts to which this principle has been applied. These cases bear upon the case under consideration only in the fact that they establish the principle that a trespasser on land, and who is injured thereon, may, under some circumstances, recover therefor from the landowner, on the ground of the negligence of the latter. But the general ground upon which these recoveries were allowed exclude this case from the operation of the principle. In each case cited, it was held that the landowner placed or created upon his premises a dangerous object or condition, which was attractive to children, and which he had reason to believe would attract children, and which did in fact draw the injured child to it. While the plaintiff in this case is a child, and doubtless subject to the instincts and inclinations of children, and while the evidence tends to show that the place where he was injured was attractive to children, yet it clearly appears that plaintiff was not in fact attracted to the spot, and was not induced to go there by reason of his childish instincts and inclinations. There is another well-recognized line of authority under which a trespasser has been permitted to recover. It covers the cases where, after the trespass is known and the danger perceived, the landowner fails to use ordinary diligence to protect the trespasser from injury.

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See cases cited in note 7, § 1253, vol. 8, Elliott, Railroads; also, *Louisville & N. R. Co. v. Coleman*, 86 Ky. 556; *Columbus & W. R. Co. v. Wood*, 86 Ala. 164; *Bostwick v. Minneapolis & P. R. Co.* 2 N. D. 440. But the facts in this case likewise exclude it from that line of authority. A trespasser may also recover for injuries inflicted upon him by the wanton or wilful acts of the defendant. This is elementary. These classes, generally speaking, cover all the conditions under which a trespasser, whether knowingly and wilfully such, or only technically such, is permitted to recover from the landowner.

It is a fundamental principle of law that the absolute right of every man to use his own property as he pleases, for all purposes to which such property is usually applied, provided he exercises proper care and skill to prevent any unnecessary injury to others, is unlimited and unqualified up to the point where the particular use becomes a nuisance. *Fisher v. Clark*, 41 Barb. 329. It is equally true that a landowner owes no duty of protection to a trespasser, at least up to the time when the trespass is known. In other words, he is under no legal duty to keep his premises in such condition that they may be trespassed upon with safety to the trespasser, provided their condition does not unnecessarily invite injury. We think that it is under this proviso that the *Turntable Cases* and others of that class must be placed where no question of license is involved. They cannot be placed upon the ground of implied invitation because the attractive object that allured the child, and wrought the injury, was not placed on the premises for the purpose of alluring children, but it was placed there or left there, unfastened or unguarded, with knowledge that it would allure children. We are aware that able courts have very recently refused to follow the principle of the *Turntable Cases*. *Frost v. Eastern R. Co.* 64 N. H. 220; *Daniels v. New York & N. E. R. Co.* 154 Mass. 849, 13 L. R. A. 248; *Walsh v. Fitchburg R. Co.* 145 N. Y. 301, 27 L. R. A. 724.

In this case we neither adopt nor reject the principle of the *Turntable Cases*, our object being to show that in no event do they apply to the case at bar. But it is urged that in their general scope they do apply to this case; that the shaft and knuckle could have been boxed or covered at small expense; that exposed they were dangerous, as the accident in this case proves; and that, as children and tramps were attracted to the spot, defendant was bound to anticipate such an accident, and its failure to guard against it was actionable negligence. But actionable negligence is simply a failure to exercise that diligence and skill that was imposed by some legal duty. In *Indianapolis v. Emmelman*, 103 Ind. 590, 53 Am. Rep. 65, it is said: "The first requisite in establishing negligence is to show the existence of the duty which it is supposed has not been performed." And Judge Mitchell says, in *Akers v. Chicago, St. P. M. & O. R. Co.* 58 Minn. 544: "Actionable negligence is the failure to discharge a legal duty to the person injured. If there is no duty, there is no negligence. Even if the defendant owes a duty to someone else, but does not owe it to the

person injured, no action will lie. The duty must be due to the person injured." What duty did this defendant owe to this plaintiff? Let us concede (and no decided case has gone so far) that children *non sui juris* were attracted, not by the dangerous machinery, but by the escape pipe, and that defendant knew they were so attracted, and that the proximity of the escape pipe to the knuckle was such as to endanger the safety of children so drawn to the escape pipe, and as to them defendant owed the duty of covering the knuckle; yet such duty extended only to such children as were drawn to or enticed upon the premises by the dangerous attraction that the defendant had placed or suffered thereon. As to persons who went upon the premises solely for their own convenience, and to subserve their own ends and purposes, no such duty could exist. Defendant had no reasonable cause to anticipate or apprehend that its premises would be thus used by trespassers; and, if defendant owed no duty of protection to such persons, no actionable negligence can be predicated upon its failure to furnish such protection.

That the plaintiff was placed in the dangerous situation by one under whose control he was is his misfortune,—and a most deplorable misfortune it is in this case,—but that fact does not change the defendant's legal duty. Children are liable for their torts even when

committed under the express orders of their parents or guardians. *Scott v. Watson*, 46 Me. 862, 74 Am. Dec. 457; *Kilpatrick v. Hall*, 67 Me. 543; *Smith v. Kron*, 96 N. C. 392; *Chandler v. Deaton*, 87 Tex. 406; *Huchting v. Engel*, 17 Wis. 281, 84 Am. Dec. 741; *School Dist. No. 1 v. Bragdon*, 23 N. H. 507.

The directions of Riordan did not make plaintiff less a trespasser. It does not appear, and is not claimed, that his trespass was known to defendant, or that maintaining the shaft and knuckle in the condition in which they were, in the locality in which they were, was an act of wanton or wilful negligence, that manifests an indifference to consequences, or disregard for the property or persons of others. The question of contributory negligence does not enter into this case. None can properly be attributed to plaintiff, nor can actionable negligence be attributed to defendant. The plaintiff's misfortune—and it is indeed a sad one—resulted from one of those accidents for which the law can cast the blame upon no one.

Several errors were assigned upon the rulings upon the evidence. The view of the law as herein expressed renders them all immaterial.

The judgment of the District Court is affirmed.

All concur.

OHIO SUPREME COURT.

Sarah E. KEYS *et al.*, *Plffs. in Err.*,
v.

PITTSBURG & WHEELING COAL
COMPANY.

(53 Ohio St. 246.)

*1. Where coal lands are owned by tenants in common, one of which being engaged in mining coal under adjoining lands, his cotenants being infants, and the former enters into a contract with the father of the infants for purchasing the interest of the latter in the common estate; and the purchaser, acting in good faith under a belief that the title will be perfected by proceedings instituted in the probate court for that purpose or by the infants when they arrive at full age, enters upon the common estate, and mines and sells coal therefrom,—the measure of damages in an action brought against him on that account by a guardian of the infants is the value of the coal in place at the time it was mined.

2. If, in such case, the purchaser, in the course of operating coal mines on his own lands that surround or abut on the common estate, has constructed entries, tramways, etc., conveniently located for removing from the common estate coal that may be mined there, that circumstance, as well as every other one,

natural or artificial, which tends to enhance or diminish the value of the coal in place, should be considered by the jury in fixing such value.

(Williams and Minshall, JJ., dissent.)

(March 29, 1898.)

ERROR to the Circuit Court for Belmont County to review a judgment reversing a judgment of the Court of Common Pleas in favor of plaintiffs in an action brought to recover the value of coal taken from plaintiff's property by defendants. *Affirmed.*

Statement by Bradbury, J.:

This action was brought by plaintiffs in error to recover of defendant in error damages on account of the latter having mined and removed coal belonging to the former. The plaintiffs in error recovered a judgment in the court of common pleas, which, on being taken on error to the circuit court, was there reversed for error in the charge of the court. Thereupon the plaintiffs in error brought the cause here to reverse the judgment of the circuit court and reinstate that of the court of common pleas.

Messrs. C. L. Weems, A. H. Mitchell, and W. Mitchell, for plaintiffs in error:

The rule given by the court of common pleas was fair, and if error it was prejudicial to plaintiffs in error.

It is wholly immaterial whether plaintiffs

*Headnotes by the COURT.

NOTE.—For the similar question of the measure of damages for injury to or destruction of trees, see *Bailey v. Chicago, M. & St. P. R. Co.* (S. D.) 19 L. R. A. 658; *Whiting v. Adams* (Vt.) 25 L. R. A. 568, 41 L. R. A.

entry would run against the "dip" of the vein of coal, rendering drainage of the mine and transportation of the coal both inconvenient and expensive.

The defendants had, in the course of their operations, approached quite near to this coal, and it could be conveniently mined by them, and a way through it to other coal owned by it would be valuable to them, but, of course worthless to others. The tract of land had belonged to one Hugh Giffin, who, by will executed in 1861, devised to his wife, Jane Giffin, a life estate therein, and at her death the fee to his four children. In the year 1884 the defendant purchased the life estate of Jane Giffin, and soon afterwards $\frac{2}{3}$ of the fee therein, and attempted to purchase of their father the $\frac{1}{3}$ that belonged to the plaintiffs. There seems to have been little or no material controversy respecting these negotiations. The plaintiffs are children of Alexander Keys, and an exchange of their interest in this coal for certain surface was effected by him and a representative of the defendant, the terms of which are given by Ross J. Alexander, Esq., then an attorney residing in Belmont county, in a deposition in the following language: "The children of Mr. Alexander Keys were to receive, in exchange for their interest in this coal, property—about 24 acres of land—out of what was called the 'Falke section,' being surface only, the coal underlying the same being reserved. The Falke section had been previously purchased, and was then in the name of Selah Chamberlain, trustee. Mr. Keys and his children were to have, and did take, immediate possession of this land. Mr. Keys came very often to see me about this coal; not less than a dozen times, I think; and was very anxious to effect the sale of this coal." Mr. Keys also testified that he entered into the possession of and had ever since possessed and cultivated, the surface which his children were to receive in exchange for this coal. The general agent of the defendant testified on this subject as follows (cross examination):

When he came with Keys, you understood that these Keys children were minors?

A. Yes, I knew they were minors.

You knew, as a business man, that Keys could only sell his own interest as an individual?

A. I knew that Mr. Alexander was representing to me that he was the father of these children, that after this agreement was consummated he was to be appointed guardian, or act as guardian.

You knew, as a business man, that Mr. Keys as an individual had no right to sell any interest except his own?

A. Of course, I knew that.

You knew that, as the father of these children, he had no power to sell their interest?

A. Not as their father.

You knew the only legal way it could be done would be to apply to the probate court and get authority from that court to make the sale, and then have a sale made, and have it confirmed by that court, you knew that?

A. I thought that was the arrangement made.

You understood that would be necessary?

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A. Yes, sir.

And, without waiting for that, you turned over to Mr. Keyes, as an individual, this surface land—24 acres of surface?

A. I do not remember the exact number of acres.

Well, 25 perhaps?

A. Yes, sir.

And you took possession of the coal, or your company did. You did not wait until the transaction in probate court was completed, did you?

A. No, sir.

At that time you went to mining your coal you did not know it had been done?

A. I just took Mr. Alexander's and Mr. Keys's word for it that the title would be perfect.

You understood you were to get a good title through the action of the probate court?

A. Yes, sir.

And when you got it, then you would convey to him the land?

A. Yes, the titles were to be exchanged.

You did not give him a title to the 25 acres of land?

A. Not that I know of.

And you never got a title—you knew that you never had any title—for these children's interest?

A. I reported to Mr. Chamberlain the transaction and asked to have a deed prepared and signed, but never to my knowledge was it done.

As far as your personal knowledge goes, you never at any time had any reason to know this land had been conveyed to Keys, and you never saw anything that came through the probate court?

A. I never gave it any further attention.

The other deeds from the other Giffin interests, you had it put on record yourself?

A. I do not know whether I had them put on record, or whether I had sent them to Mr. Chamberlain, and he sent them here.

At any rate you handled the other deeds?

A. Yes, they passed through my hands.

You knew all the time you were taking out this coal that no deed for these children's interest had passed through your hands?

A. I knew it had not passed through my hands.

You expected it to come to you because you had handled all the other deeds?

A. I was dividing my time so as to attend to my private business and also to look after that railroad work. There was a good deal of work done in the main office in Cleveland, and it might come without my knowing it.

You expected it; you were dealing with Alexander Keys, and you were general agent of the company?

A. Yes, sir.

You expected the deed to be delivered to you?

A. Yes, I naturally supposed it would be.

You knew it never came to you?

A. I never thought anything more of it.

When you started to mine that coal, you knew you did not have a right to do it when you had not got the deed?

A. I knew I simply had this arrangement with Keys.

Did you not know as a business man, when you started to mine that coal, that you did not have a right to do it until you got a conveyance through the probate court, and from a guardian?

A. No, I supposed when they had their pay that we had a right to take the coal.

Do you say to the jury that you believed that without making a deed for it, when you turned over this surface land to their father, that you had a right to mine their interests in the coal without first getting a deed from the probate court? Do you say that to the jury?

A. I will say that I did not have any doubt but what the deed would be gotten very soon.

Did you not know that would have to be done, and that you had no right to mine it?

A. I knew the transaction would not be complete until it was done.

Do you say you did not know you had no right to the coal until that was done?

A. No, sir; I did not know that.

Do you say to the jury that you believed that you had a right to take the coal before you had a guardian's deed for it?

A. I believed we had a perfect right to take the coal under the land.

Redirect examination:

You had paid for the coal by the exchange?

A. We gave Mr. Keys that land for the children.

Subsequent to that did Mr. Alexander say, in pursuance of that arrangement, that he had filed a petition for the purpose of making a legal conveyance?

A. He showed me a petition which he said he was going to file.

Already drawn by him?

A. Yes, sir.

This statement of the evidence is sufficient to show that while, as a matter of law, the transaction did not divest the plaintiffs of their ownership of the coal in question, a jury might well have found that it was mined in good faith under a belief that the purchase would be ultimately completed. If the jury had thus found, by what rule should the damages have been assessed? The court of common pleas in its charge to the jury, laid down the rule applicable upon such finding as follows: If they acted inadvertently under the honest belief that they were entitled to mine it, and to remove and sell it, and convert it to their own use, then in that case the plaintiff will be entitled to recover the value of the coal immediately after the same was severed from the realty, less the cost of making such severance. If the coal, when severed and lying on the floor of the mine, is to be considered a chattel jointly owned by the plaintiffs and defendant, the rule of damages thus given by the court is as favorable to the defendant as any which the authorities support. Further still, a very little reflection on the subject will be sufficient to show that the rule as thus stated does not materially differ from one that fixes as the measure of damages the value of the coal in place; for the value of the coal in place is just equal to its value when severed less the cost of severance. In the very nature of things the only

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difference between the value of coal in place and that which lies on the floor of the mine is the cost of hewing it. Therefore, if we can fix its value while in place, then by simply adding the cost of severing it we can ascertain its value when severed. If, on the other hand, any certain rule is shown by which its value when severed and lying on the floor of the mine can be ascertained, then, by deducting the cost of severance, we will have its value in place. The real difficulty encountered in this class of cases is in ascertaining the fair value of the coal or other mineral substance in place or when severed and lying on the floor of the mine. If, when in place or on the floor of the mine, it is immediately accessible to a public highway or common carrier, the difficulty is practically overcome, or rather has no existence; for usually there is no serious impediment met in ascertaining the market value of a commodity that occupies a place in the commerce of the world as important as that filled by fuel coal. And, having ascertained its market value, if the coal is so situated with reference to public highways or common carriers that, when severed, the means of transportation to that market are open to all persons alike, and upon equal terms, its value in place or on the floor of the mine can be ascertained with reasonable certainty. In the case of coal severed and lying on the floor of the mine its value would be ascertained by deducting from the market price the full cost attending its transportation and marketing, while the value of the coal in place would be the market price less the total expense required to sever, transport, and market it. The coal of the plaintiffs, which was mined by the defendant, however, was not thus situated. When the defendant had extended its entry, and laid a track therein up to the line which divided its other coal from the coal in question, the means of transportation thus afforded was the private way of the defendant, and any coal that passed along or over it would be unloaded or dumped at the defendant's tipples, and passed through or over its screens into the railroad cars into which it was hauled to market. Whether the railroad track on which these cars stood when the screened coal fell into them belonged to the defendant or to a common carrier does not clearly appear. This, however, is not material to the question, for, whether this track belonged to the defendant or not, the screens and tipples did, as well as the entry and tramway that led from the tipples to the coal, which is the subject of controversy. The means of transportation thus created being the private property of defendant, were available to the plaintiffs only upon the consent of the former. Doubtless the circumstance that this entry had been completed added something to the value of the plaintiff's coal. This increased value, it is true, resulted solely from the expenditure thus incurred by the defendant, and rested on the probability that the latter would find it advantageous to its future operations to possess the property, and would therefore desire to purchase it. The strength of this desire and consequent value of the plaintiffs' interest therein would depend to a great extent upon certain conditions of a local character, which are quite apparent to one who is at all familiar with coal-mining operations.

For instance, if the defendant had exhausted the coal already owned by it which could be removed along this entry, and had coal lying beyond this land to which it wished to penetrate, and which it could only reach by crossing this land, the value of this coal for immediate mining, together with the value of the right to cross this tract of land to its other coal, might be very great to the defendant, and the value of the tract enhanced accordingly; while on the other hand, if defendant still had coal in abundance that might be mined and transported through this entry, or even other entries owned by it, and could thus continue for a considerable period its mining operations without resorting to this coal, its value may not have been materially enhanced by the construction of the entry. The record discloses quite clearly that, but for this entry, the location of the land is such it cannot be deemed to possess any considerable value for mining purposes. The record discloses further that only a year or two before the defendant began to mine this coal it purchased of Elizabeth A. Forsythe an undivided fourth of these premises for \$700, of Nancy M. Giffin an undivided one fourth for the same price, and of James Giffin an undivided one fourth for \$600, aggregating \$2,000 for three fourths. For the $\frac{1}{4}$ owned by the plaintiffs the defendant was to convey 24 or 25 acres of surface. The value of this surface is not stated, but enough appears in the record to raise a strong inference that it did not exceed \$500 or \$600. The exact quantity of mineral coal which the land contains is not stated, but it seems to have been about 150 acres in all; 48.29 acres were mined. Just how great a proportion of the coal should be left to support the roof of the mine does not appear, but certainly not more than one half of the mineral coal had been removed; and of that removed $\frac{1}{4}$ only, which equals about 8 $\frac{1}{2}$ acres, belonged to plaintiffs, and yet a verdict for \$9,500 was rendered for them,—a sum far in excess of the value of the entire tract, but for this entry, and which could not have been awarded to the plaintiffs if the principle of compensation had been kept steadily in view. If the defendant acted in good faith,—and, as we have seen, the evidence justified a finding that it did so,—it should be held to full compensation, but nothing more.

We are not disposed to question the wisdom of applying to cases of this character that severe rule of damages countenanced by the authorities, where bad faith or a wilful disregard of the rights of others is shown. In such cases, upon principles of public policy that seek to discourage wilful or wanton encroachments on private property, the principle of mere compensation is not followed. The circumstances under which the rule of mere compensation should be disregarded, as well as the rules by which compensation itself may be ascertained, have long occupied the attention of the courts of this country and of England, and the cases where discussions of its several phases may be found are numerous. Among the more important of them may be classed: *Martin v. Porter*, 5 Mees. & W. 851; *Morgan v. Powell*, 8 Q. B. 278; *Wild v. Holt*, 9 Mees. & W. 672; *Llynvi Co. v. Brogden*, L. R. 11 Eq. 41 L. R. A.

188; *Jegon v. Vivian*, L. R. 6 Ch. 742; *Wood v. Morewood*, 8 Q. B. 441; *Ecclesiastical Comrs. v. North Eastern R. Co.* L. R. 4 Ch. Div. 845; *Fothergill v. Phillips*, L. R. 6 Ch. 770; *Hilton v. Woods*, L. R. 4 Eq. 482; *Re United Merthyr Collieries Co.* L. R. 15 Eq. 46; *Trotter v. Maclean*, L. R. 18 Ch. Div. 574; *Illinois & St. L. R. & Coal Co. v. Ogle*, 83 Ill. 627, 25 Am. Rep. 342; *Robertson v. Jones*, 71 Ill. 405; *Maye v. Tappan*, 28 Cal. 806; *Goller v. Felt*, 30 Cal. 481; *Barton Coal Co. v. Cox*, 89 Md. 1, 17 Am. Rep. 525; *Forsyth v. Wells*, 41 Pa. 291; *Lyon v. Gormley*, 53 Pa. 261; *Waters v. Stevenson*, 18 Nev. 157, 29 Am. Rep. 293; *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 86; *Austin v. Huntsville Coal & Min. Co.* 72 Mo. 535, 37 Am. Rep. 446. Many of the cases on the subject were reviewed by Judge Wright in *Lake Shore & M. S. R. Co. v. Hutchins*, 32 Ohio St. 571, 30 Am. Rep. 629. In that case, however, trespassers had cut timber from the lands of another, and converted it into railroad ties and cordwood, and it is quite evident that the means of transporting the ties and cordwood were as available to the owners as to anyone else, so that no difficulty in applying the rule of damages such as occurs in the case before us arose out of the situation and conditions surrounding the timber after severance. There the wood and ties into which the timber had been converted rested on the surface of the earth, was on the land of the owner of the timber, and, in the nature of things, could have been reached by teams, and hauled to market direct, or to the line of a common carrier. For this purpose the construction of elaborate and expensive entries, tramways, and tipples was not necessary. And it is quite apparent that the absence of this necessity enhanced the value of the timber, and that its value, whether as standing trees, felled timber, or manufactured into railroad ties and cordwood, would have steadily diminished in the same ratio that access to it would become difficult; and, if situated so as to be practically inaccessible, would possess little or no value whatever. So, with the coal lands of the plaintiffs. Before an entry had been extended in their direction, it must be manifest to everyone that their value, owing to their unfavorable situation for the purposes of mining, was comparatively small. Reference has already been made to the effect that may have been produced respecting its value by the defendant extending an entry and tramway from its tipple to the line of this coal. The difficulty of determining this effect, depending as it does upon circumstances the force of which is uncertain, is apparent. In this connection it may be well to advert to the situation the plaintiffs would be in respecting the coal when severed. To them it was without value except for the probability that defendant would remove it. They could not themselves transport it, or their share of it, over the defendant's tramway, nor could they reach it by an independent entry, even if that had been in its nature practicable, because the defendant owned $\frac{3}{4}$ of the land through which the entry must have been extended. These considerations show the impracticability of attaining the ends of justice by applying a technical rule of damages to the circumstances of this case. The supreme

court commission refused to apply a rule of that character to the circumstances shown in *Lake Shore & M. S. R. Co. v. Hutchins*, 32 Ohio St. 571, 30 Am. Rep. 629. The right of property in the ties and cordwood which were the subject of that action, while they remained on land where cut or made, was in the owner of the timber. By a well established principle the trespassers who felled the trees, and by their labor turned them into cordwood and railroad ties, did not by these unlawful acts, transfer the property therein to themselves. The wood and ties remained the property of the owner of the timber, and he could have gone upon his land, and hauled them to market, sold them, and retained the proceeds. Still further, if he could have identified them after they had been sold and delivered to the railroad company, he could have reclaimed them *in specie* if he had desired to do so. This he could do because they were his, and he could not be deprived of his property in them without his consent. The railway, by taking and using them, converted them to its own use without his consent. This constitutes trover, and by the well-settled rules of law the measure of damages is the value of the property. If these well-settled rules of law had been technically applied in that case, the measure of damages would have been at least the value of the ties and wood when converted to its use by the railroad company. The court there, however, paid more regard to the principle of just compensation than to those technical rules which the owner of the wood and ties sought to have applied, and instead of allowing him, in accordance with those technical rules, the value of those articles at the time of conversion, limited his compensation to value of the timber as it lay upon the earth immediately after being felled. The principle that underlies this case and those cases which support its conclusions, and upon which all of them rest, is that of fully compensating one who has suffered injury to his property without doing injustice to others. This case was again before this court in 37 Ohio St. 282, and beginning on page 292, McIlvaine, J., says: "As we understand the rule laid down by the commission, the value of the timber as enhanced by the labor of cutting down, was the true measure of damages. And surely, as the labor of felling the trees was a trespass on the real estate of the plaintiff, who has waived the wrong done to his realty, such labor was not an accession to the value of his personal property, which the trees first became after they were cut down and severed from the land. The value, at least, of the property after it became personal, was the measure of the injury complained of by the plaintiff." This rule, when applied to the circumstances of that case, is reasonable (the mere felling of the trees did not require any appliance beyond an ax, and was an inconsiderable proportion of the labor necessary to convert the timber into either cordwood or railroad ties), and did not extend beyond compensating the plaintiff for his timber, and the trespass (which seems to have been wilful), which he had waived, to his real estate. Judge McIlvaine, in the course of the opinion, says further, on page 294: "Indeed, it appears to me to be axiomatic that, as be-

tween man and man, where no wrong was intended, equal and exact justice is done when the party wronged is made whole for all that he has lost by reason of being deprived of property." If this principle had been pursued in ascertaining the damages suffered by the plaintiffs on account of the coal mined and removed by the defendant, a verdict many times greater in amount than the value of the entire coal in place, could not have been rendered. This result could have been accomplished only in one of two ways: (1) Either by applying to the case some technical rule of damages, which though usually applicable to actions of this class, and generally with just results, was in fact inapplicable here by reason of some particular circumstance that distinguished it from its class; or (2) by a misconception of the principles by which the market value of the coal should have been ascertained.

The court, in its instructions to the jury, regarded the coal as a chattel from the instant of severance, and authorized the jury to find its market value there, as if no restrictions whatever in respect of its removal existed. It said to the jury that if the defendants acted "inadvertently under the honest belief that they were entitled to mine it [the coal], and remove and sell it, and convert it to their own use, then in that case the plaintiffs will be entitled to recover the value of the coal immediately after the same was severed from the realty, less the cost of severance." It also instructed the jury that "in considering the case in this view, gentlemen, you are not to consider how much it would cost the plaintiffs to have mined the coal under the circumstances, where it laid, but how much did it cost the defendant to mine it under the circumstances as you may find them from the testimony;" and refused to give to the jury each of the following instructions, which the defendant requested, to which refusal defendant excepted: "(1) If you find from the evidence that the only place where the vein of coal in question in this case outcrops is at the northwest corner thereof, and you find from the evidence that it is impracticable or expensive to mine and remove the coal by an opening at such place, these facts must be considered as affecting the value of the coal. (2) If you find from the evidence that the defendant mined the coal, believing in good faith it owned it, and that it had reasonable grounds for such belief, and that the defendant had no notice or knowledge of any claim or interest of the plaintiffs, or any of them, therein, then the plaintiffs will be entitled to recover the value of the coal in place before it was disturbed. (3) The value of the coal in place, or on the floor of the room, is its market value there, exclusive of the facilities and conveniences afforded by defendant's passageways, tracks, cars, tipples, and other fixtures, in removing it."

It is perfectly clear that when the entry and tramway constructed by defendant was extended up to and touched the line of the coal in question, no right to use these means of transportation accrued to the plaintiffs below. True, the entry and tramway were there, and that circumstance, as before shown, may have tended to enhance the value of the coal in place; not, however, because the plaintiffs had

a right to use them, but because the defendant might want the coal. If the plaintiffs, while their coal was in place, had no right to the use of the facilities for transportation thus belonging to the defendant, how can it be said that such right would accrue to them in case the defendant, in good faith, supposing it had bought the coal, should sever a portion of it? We think such right would not accrue under those circumstances. If not, then the coal thus situated, and considered as a chattel, would possess little, if any, value. Reference to these considerations has been made because they afford an additional illustration of the difficulties that follow an attempt to adjust the rights of these parties by applying to the facts of the case technical rules respecting the measure of damages. Treat the coal as a chattel; hold the acts of the defendant to constitute a conversion of it; and assess the damages as though the owners before and at the moment of its conversion had an unrestricted right to transport it to market, although in fact it was totally inaccessible to them. The verdict in this case shows the injustice that may be thus produced.

The only rational course to pursue in such a case as this, where the defendant is a joint owner of the coal in place with the plaintiffs, and acts upon the bona fide belief that he has acquired by purchase the interest of his cotenant, and has mined it, or a portion of it, is to ascertain the full value of the coal in place at the time it was mined. The severing, removing, screening, and marketing the coal should be treated as one continued transaction, and the defendant charged with its value at the time he began to mine it. This must be determined by considerations, some of which are quite obvious,—as, for instance, quality of the coal; the thickness of the vein, or veins, if more than one; its situation with reference to existing facilities, natural or artificial, for mining and marketing it. Doubtless other circumstances exist that bear more or less strongly on this question of value in place; but among them should not be classed the necessity, if any exists, that the defendant may be under to use these lands, after the coal has been exhausted, in its future operations, for a right to such use of the land would not accrue to defendant upon the exhaustion of the coal, but by purchase only. In *Hilton v. Woods*, L. R. 4 Eq. 492, the value of the coal in place was made the measure of damages against a defendant who had mined it under a belief he was its owner. He had bought of one who had no title, and, having mined a part of it, an action was brought against him by its owner to restrain further mining, and for an account of the coal already mined. The syllabus reads: "In assessing compensation for coal already gotten by the defendant, the court, being of opinion that he had worked it inadvertently and not fraudulently, held that he was to pay only the fair value of such coal, as if he had purchased the mine from the plaintiff." This rule was applied by Parke, B., in *Wood v. Morewood*, 8 Q. B. 440. The coal in that case had been mined by the defendant under a claim of title that was held invalid in an action to recover its value. Parke, B., "told the jury that if they found for the plaintiff, they were to determine

what damages should be given; that, if there was fraud or negligence on the part of the defendant, they might give as damages under the count in trover the value of the coals at the time they first became chattels, on the principle laid down in *Martin v. Porter*; but, if they thought that the defendant was not guilty of fraud or negligence, but acted fairly and honestly in the full belief that he had a right to do what he did, they might give the fair value of the coal as if the coal fields had been purchased from the plaintiff." The jury adopted the latter estimate, and found for plaintiff, damages £210 per acre. This rule of damages, in substance, was applied in *Jegon v. Vivian*, L. R. 6 Ch. 742. We cannot say that the court of common pleas erred in saying to the jury that the value of the coal when severed, less the cost of severance, would be the measure of damages, in case it found the defendant had acted in good faith, because there is, in substance, no difference between the rule as thus stated and a rule which would fix the measure of damages at the value of the coal in place, for the very simple and obvious reason that the value of the coal in place is just equal to its value when severed, less the cost of severance. The statement of the rule as given by the court doubtless was a principal cause which led the jury to find the excessive verdict rendered by it. Because it was not accompanied by sufficient qualification, the jury was suffered to enter the field of conjecture and speculation, without any certain guides by aid of which its conclusions should be reached. Instead of saying to the jury that "in considering the case in this view, gentlemen, you are not to consider how much it would cost the plaintiffs to have mined the coal under the circumstances, where it laid, but how much did it cost the defendant to mine it under the circumstances as you may find them from the testimony," the court should have said that the difficulties attending its mining and transportation by the plaintiffs might be very material in fixing its value. If the principle of compensating them was to be followed, if they were to be given the value of what they had lost, a consideration of all the conditions that surrounded their property, and tending to affect its value, was material. In this connection, and for the foregoing reasons, the request No. 1 should have been given. It reads: "If you find from the evidence that the only place where the vein of coal in question in this case outcrops is at the northwest corner thereof, and you find from the evidence that it is impracticable or expensive to mine and remove the coal by an opening at such place, these facts must be considered as affecting the value of the coal." In the nature of things the value of the coal would be affected by the circumstances recited in this proposition. The second of the three propositions before referred to, which the court refused to give to the jury, prescribed the rule of damages, if the defendants acted in good faith, at "the value of the coal in place before it was disturbed." This rule, as already shown, did not differ in substance from that given, but it was much easier applied to the circumstances of the case than the one given, where compensation is the end in view; and we think the defendant was entitled to have the question of damages consid-

ered from that point of view, and that the verdict was materially affected by the refusal of the court to instruct the jury according to the principle there announced.

The last of the three propositions above noted which the court declined to give relates to the conveniences afforded by the entry, tramway, etc., constructed by defendant for mining and removing the coal. The proposition denied to the jury the right to consider these facilities and conveniences at all in fixing the damages. This proposition is too broad, for, to the limited extent already adverted to which these facilities and conveniences might enhance the general value of the coal, they should be considered. The purpose to be kept in view is that of compensating the plaintiffs for all they have lost, and that compensation should be full, for without their consent their property has been taken. And to accomplish that purpose every circumstance that may tend to increase its value should be regarded as material.

Judgment affirmed.

STATE of Ohio, *Plff. in Err.*,

v.

John M. GARDNER.

(58 Ohio St. 599.)

***1. The right to labor and enjoy the rewards thereof is a natural right,** which may not be unreasonably interfered with by legislation. Where, however, the pursuit concerns, in a direct manner, the public health and welfare, and is of such a character as to require a special course of study or training, or experience, to qualify one to pursue such occupation with safety to the public interests, it is within the competency of the general assembly to enact reasonable regulations to protect the public against evils which may result from incapacity and ignorance.

2. The business of plumbing is one which is so nearly related to the public health that it may, with propriety, be regulated by law, and reasonable regulations, tending to protect the public against the dangers of careless and inefficient work, and appropriate to that end, do not infringe any constitutional right of the citizen pursuing such calling.

3. But it is essential to the validity of an act undertaking to regulate the business that it shall, in its requirements, operate equally.

4. That part of the act of April 21, 1896, entitled "An Act to Promote the Public Health and Regulate the Sanitary Construction of House Drainage and Plumbing," which requires any plumber, whether master or employing plumber or journeyman, before engaging in the business, to undergo an examination as to fitness, and obtain a license, but permits all members of a firm to pursue the business where one only has procured such license, and all

*Headnotes by the COURT.

NOTE.—As to state regulation of plumbers, see also *People, Nechameus, v. Warden of City Prison* (N. Y.) 27 L. R. A. 718.

For equal privileges and protection, see *note to Louisville Safety Vault & T. Co. v. Louisville & N. St. Co.* (Ky.) 14 L. R. A. 579.

41 L. R. A.

members of a corporation to pursue it where the manager only has procured such license, does not operate equally upon all of a class pursuing the calling under like circumstances, and is invalid.

(June 21, 1898.)

EXCEPTIONS to rulings of the Court of Common Pleas for Summit County reversing a judgment of the mayor of Akron convicting defendant of violating the statute against engaging in the plumbing business without a license. *Overruled.*

Statement by **Spear, Ch. J.:**

May 27, 1897, John M. Gardner was convicted, before the mayor of Akron, Summit county, of a violation of the act of April 21, 1896, entitled "An Act to Promote the Public Health and Regulate the Sanitary Construction of House Drainage and Plumbing" (92 Ohio Laws, p. 263), and sentenced to pay fine and costs. It was shown by the agreed statement of facts that for two years Gardner had been a master plumber, and that for ten years prior thereto had been a journeyman; that he was skilled and competent; that at that time he had worked at the trade and was still working; that on May 7, 1897, he was engaged in that business at Akron, as an individual; that he was not a member of any firm or copartnership or corporation; that on that day he put in a certain sink, sewer, and water connection in Akron; and that at the time he had not procured a license therefor from the board of health of said city. Exceptions having been taken by Gardner to the sentence and judgment of the mayor, the same were presented to the court of common pleas of Summit county, the Honorable Jacob A. Kohler presiding, at the October term, 1897, and, on consideration, that court reversed the judgment of the mayor, holding the act on which the charge was founded to be unconstitutional, and discharged the defendant. To this ruling the prosecuting attorney duly excepted, and, on leave, filed his bill of exceptions in this court for its decision upon the points presented, and to establish the law in any similar case.

Mr. R. M. Wanamaker, for plaintiff in error:

The presumption is always in favor of the constitutionality of a statute. If any doubt existed, the benefit of the doubt is to be given to the law.

Sykes v. Columbus, 55 Miss. 143; *Com., Wolfe, v. Butler*, 99 Pa. 535; *Wilkins v. State*, 113 Ind. 514; *Central Iowa R. Co. v. Wright County Supers.* 67 Iowa, 199; *State v. Moore*, 104 N. C. 714; *Fletcher v. Peck*, 6 Cranch, 128, 8 L. ed. 175.

The object and spirit of the statute are clearly within the police power of the state.

Thorpe v. Rutland & B. R. Co. 27 Vt. 140, 62 Am. Dec. 625; *Com. v. Alger*, 7 Cush. 58; *Cooley, Const. Lim.* pp. 7049 *et seq.*; *People, Nechameus, v. Warden of City Prison*, 144 N. Y. 529, 27 L. R. A. 718; *Singer v. State*, 73 Md. 464, 8 L. R. A. 551.

If the court should find that the provision of § 2, was in itself unconstitutional, we do not believe that this is sufficient to warrant a hold-

ing of unconstitutionality as to the remainder of the act.

Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615; *Mobile & O. R. Co. v. State*, 29 Ala. 573; *State v. Ezenicios*, 38 La. Ann. 253; *People v. Angerstein, v. Kenney*, 96 N. Y. 294; *Com. v. Hitchings*, 5 Gray, 432; Black, Const. Law, 2d ed. pp. 64, 65; Cooley, Const. Lim. 6th ed. pp. 197, 209.

Messrs. Musser & Kohler, for defendant in error:

The statute is repugnant to the 1st section of the Bill of Rights, which declares, that among the inalienable rights of the individuals are "those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness." This court has construed this section to embrace "the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare."

Palmer v. Tingle, 55 Ohio St. 423.

By the absolute rights of individuals, we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it.

1 Bl. Com. p. 124.

That this statute interferes with the "inalienable," or "absolute," rights of enjoying liberty and of acquiring and possessing property is clear.

A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit. And as incident to this is the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue, and give evidence, and to inherit, purchase, lease, sell, and convey property of every kind. The enjoyment or deprivation of these rights and privileges constitute the essential distinction between freedom and slavery; between liberty and oppression.

State v. Goodwill, 33 W. Va. 179, 6 L. R. A. 621; *People v. Marx*, 99 N. Y. 386, 52 Am. Rep. 34; *Bertholf v. O'Reilly*, 74 N. Y. 515, 30 Am. Rep. 323; *Re Jacobs*, 98 N. Y. 114, 50 Am. Rep. 636; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585.

The statute discriminates against the individual in favor of firms and corporations.

The statute discriminates in favor of members of the board of examiners.

State v. Goodwill, 33 W. Va. 179, 6 L. R. A. 621; *State v. Hinman*, 65 N. H. 103; *State v. Penoyer*, 65 N. H. 113, 5 L. R. A. 709; *Fick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220; *Ex parte Westerfield*, 55 Cal. 550, 36 Am. Rep. 47; *Re Jacobs*, 98 N. Y. 114, 50 Am. Rep. 636.

Spear, Ch. J., delivered the opinion of the court:

The 1st section of the act in question requires that every person, firm, or corporation, engaged in the business of plumbing, either as master or employing plumber

or journeyman, shall first secure a license. The 2d section requires that any person desiring to engage in or work at the business of plumber shall apply to the president of the board of health or other officer having jurisdiction in the locality where he intends to engage in, or work at, such business, and be examined as to his qualifications. But "in case of a firm, or corporation, the examination and licensing of any one member of such firm, or the manager of such corporation, shall satisfy the requirements of this act." Section 3 provides that in every city, and in each town having a system of water supply or sewerage, there shall be a board of examiners consisting of the president of the board of health, the inspector of buildings, if any there be, and three practical plumbers. In localities where the required number of plumbers cannot be secured, such vacancy can be filled by the appointment of reputable physicians. The members shall be appointed by the board of health, and, if there be no such board, then by the health officer. If there be no inspector of buildings, then a practical plumber shall be added. Section 4 directs as to time, etc., of examinations, and that "the board shall examine said applicants as to their practical knowledge of plumbing, house-draining, and plumbing ventilation, and if satisfied of the competency of the applicant, shall so verify to the board of health." The board is then to issue a license. The fee for a master or employing plumber is to be \$5 and a journeyman \$1, to be renewed annually. Section 5 provides for the appointment by the board of health of one or more inspectors of plumbing, who shall be practical plumbers, their term of office, their compensation, and their duties. The 6th section requires the board of health to prescribe rules and regulations for the construction, alteration, and inspection of plumbing and sewerage placed in or in connection with any buildings, subject to approval by ordinance of the council, and the board shall further provide that no plumbing work shall be done, except in case of repairs or leaks, without a permit. Section 7 prescribes punishment, of a fine from \$5 to \$50, for any violation, and that the license may be revoked for incompetency, etc., after hearing before the board, subject to appeal to the state board of health. All money derived from examinations shall go to the board of health.

Applying to the case the general presumption that the acts of the general assembly are to be held valid unless the contrary clearly appears, the natural order of inquiry leads to a consideration of the objections urged against this act. Two are deemed worthy of special notice: First, that the statute deprives of liberty and property without due process of law, and that it unreasonably interferes with the natural right of the individual to labor and enjoy the fruits thereof; second, that the statute discriminates against the individual in favor of firms and corporations, and thus imposes unequal burdens upon persons of the same class.

1. Does the act unreasonably interfere with the right to labor? That the right to labor and enjoy its fruits is a natural right, which may not be unreasonably interfered with, is we presume, not denied by anyone. But it is

equally well settled that it is one of the rights which may, under some circumstances, be subject to reasonable regulation. This principle finds examples in our laws termed "Sunday Laws," in those acts which regulate apprenticeships, the employment of children in factories and in theatrical and other exhibitions, and in a number of other instances which will readily occur. The acts referred to fall within the exercise of the police power of the state; that power, conceded to reside in the people's representatives, which is rightfully exercised by the regulation of the use of private property, or so restraining personal action, as to secure or tend to the comfort, health, or protection of the community. Further examples of its exercise are found in the laws which require study and examination before one is permitted to practice law, or medicine, or engage in the occupation of a dentist or a pharmacist. If, then, the regulation of the business of plumbing, and the performance of the work of a plumber, may naturally be expected to promote the health of a community, or relieve of dangers to health which otherwise might follow its careless exercise, and the legislation be appropriate to accomplish the object sought, it cannot be said that such regulation interferes with a natural right or unreasonably prevents its exercise.

We are aware that an opinion prevails in some quarters, and has found expression in judicial utterances, that the pursuit of plumbing is a mere trade, which may be easily mastered by anyone possessed of ordinary intelligence; that the plumber is not, nor is he expected to be, an expert in the science of sanitation; and hence his work cannot have such relation to the public health as to justify its regulation.

True it is that the business of the plumber is not ranked with the learned professions, and that much of his work is mechanical merely, calling for the exercise of deftness of the hands rather than the possession of scientific knowledge. Yet a certain degree of training and experience is absolutely necessary to render one intelligent as to the groundwork of his calling as well as competent and skilful in its exercise. He is required to put into our dwellings and public buildings tanks, pipes, traps, fittings, and fixtures for the conveyance of gas, water, and sewage, which require, among other essentials, the keeping out and protection against gases which are destructive of health, and not infrequently of life itself. That it is of the highest importance that the drainage and sewerage of our public buildings and private tenements should be as skilfully planned and executed as the modern standard of science admits would seem not to be open to question. And surely it is reasonable to suppose that one who has been educated to understand the scientific principle necessarily involved in work of this character, and to comprehend the reasons and teachings of experience upon which it is based, and the evil results which may follow neglect to observe it, will be more likely to provide the needful safeguards than one who is ignorant upon the subject. It is conceded by those who doubt the power as well as the propriety of regulation of the work itself that the legislature has power to provide for a careful sanitary inspection of plumbing work, and in this

way secure a result, as to its system and sufficiency, which will tend towards the protection of the health of the general public. But it is difficult to perceive a reason for the exercise of the power last referred to which does not as well apply to the other, for, if it be wise to devise means by which a good result may be obtained by careful inspection, it would seem clear that methods which are calculated to reduce the hazards of careless inspection would tend in the same direction. And defects revealed by inspection would, it would seem, be more likely to be remedied if the hands which should be called upon to do the work of correction were guided by minds trained in the science of the business as well as skilled in the mere manipulation of the tools. The question really is, Does the requirement of examination as to the fitness reasonably tend to accomplish the object,—is it appropriate to that end? Not, necessarily, Does it fully accomplish it? nor, Does it make further care in the same direction unnecessary? We think it does so tend and is appropriate to the purpose, and that, therefore, the act does not unreasonably interfere with the right to labor. It is not here contended that the same high qualifications as to scientific acquirement should be required of the journeyman, one whose principal work is manual, as is required of the master plumber, the one who makes the plans and specifications for the work, and passes judgment upon the strength, durability, and quality of the material and the devices for perfect work; nor does that seem to be the import of the act, especially when it is noted that the fee for license charged is in the one case \$1 and in the other \$5. If the examination be sufficiently searching to show that the journeyman understands the principles governing his trade, and is sufficiently skilful to be able to produce good results, that would seem to satisfy the scope of this act.

This conclusion finds support in the case of *People, Nechemus. v. Warden of City Prison*, 144 N. Y. 529, 27 L. R. A. 718, and is distinctly sustained in *Singer v. State*, 72 Md. 464, 8 L. R. A. 551, where it is held that an act which provides that no person shall engage in the business of plumbing, unless such person shall have received from the state board of commissioners of practical plumbing a certificate as to his competency and qualification, and providing a penalty for violation, does not violate, in any sense, the constitutional rights of the workman, but is but the ordinary exercise of the police power of the state. See also *Soon Hing v. Crowley*, 118 U. S. 708, 28 L. ed. 1145; *Mugler v. Kansas*, 128 U. S. 623, 81 L. ed. 205; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 258; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 36, 32 L. ed. 585, and *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 628.

2. But a graver objection inheres in the claim that the act imposes unequal burdens upon those of the same class. It will be recalled that the 1st section requires that all who engage in the business of plumbing, whether master or employing plumber or journeyman, shall first secure a license, and that § 2 provides that, in case of a firm or corporation, the examination and licensing of any one member

of such firm, or the manager of the corporation, shall satisfy the requirements of the act; that is, a journeyman, for whomever he works, must have a license, and an employing plumber, if not a member of a firm or a corporation, may not pursue the calling without a license. But a master or employing plumber, if he be a member of a firm, another member of which has procured a license, is exempt, although he may be one who has, as a journeyman, applied for a license and failed for incompetency. So, too, in case of a corporation, if the manager is licensed, other members of the corporation may work without a license, without reference to their competency.

Our bill of rights prohibits the granting of privileges to one which are denied to others of the same class, and the imposition of restrictions or burdens upon certain citizens from which others of the same class are exempt, and § 26 of article 2 of the Constitution requires that all laws of a general nature shall have a uniform operation throughout the state. A statute, therefore, which imposes special restrictions or burdens on, or grants special privileges to, persons engaged in the same business, under the same circumstances, cannot be sustained, because it is in contravention of the equal right which all are entitled to in the enforcement of laws and in the enjoyment of liberty, and in the enjoyment of an equal right in the acquisition and possession of property, and so is not of uniform operation.

The constitutional objection to this statute is that it operates unequally, in that it imposes the burden of an examination and license fee upon certain persons, and exempts others of the same class, pursuing the same business, in

the same way. It is contended that the act permits firms and corporations to employ such journeymen as they may choose, whether they be licensed or not, but we are not impressed that it will bear this construction. It is further suggested that the act does not prohibit the doing of plumbing work wholly by apprentices. If it is open to this construction, an additional reason is thus offered for holding it invalid, but the spirit of the act would not, we think, permit this.

Objection is made to the composition of the examining board, on the ground that one who has been appointed a member of the board, although possibly inexperienced and incompetent, may, without any test whatever, continue his occupation. We deem it enough to say, as to this, that the act does not so provide. It would be possible, of course, that one appointed on the board might meet with greater favor from his fellows in his examination than another, but this possibility would not render the act itself invalid. It also might seem, at first blush, that the appointment of a board to examine others as to fitness and qualifications, the members of which may not have themselves been examined as to their qualifications, is a trifle incongruous. It is possible that the law in this respect might be improved. Yet there must be a start some where along the line, and the objection goes to the efficiency of the service rather than to the power of the legislature to authorize the method.

Believing that the act does discriminate unjustly between persons in the same calling, we agree with the conclusion of the learned judge of the court of common pleas, and, for the reasons stated, *the exceptions are overruled.*

OREGON SUPREME COURT.

STATE of Oregon, *ex rel.* James McCAIN,
Respt.,
v.
Phil. METSCHAN, State Treasurer, *Appt.*

(.....Or.....)

1. The owner of a state or county warrant is a necessary party to a suit to enjoin its payment.
2. A demurrer does not distinctly specify the objection under Hill's Anno. Laws, § 68, by stating that there is "a defect of parties plaintiff and defendant."
3. All expenditure of public money at a place prohibited by the Constitution is a misapplication thereof which may be prevented by injunction for the reason that it is against the declared will of the people.
4. The validity of a location by the legislature of a public institution is not beyond review in the courts on the ground that it is a legislative question, under Const. art. 14, § 3, which amounts to a location of such institutions at the seat of government.

5. An insane asylum maintained by the state is a public institution of the state within the meaning of Const. art. 14, § 3, locating such institutions at the seat of government.

(November 9, 1896.)

A PPEAL by defendant from a judgment of the Circuit Court for Marion County restraining him from paying a state warrant. *Affirmed.*

The facts are stated in the opinion.

Mr. J. C. Moreland for appellant.

Messrs. James McCain, W. W. Thayer, Henry St. Rayner, H. J. Bigger, and W. H. Holmes, for respondent.

It does not appear from the complaint that there are other parties who should have been made parties plaintiff or defendant in the suit, and if it had so appeared a demurrer would not lie unless it also appeared that such party was living.

Bliss, Code Pl. § 411; *Brainard v. Jones*, 11 How. Pr. 569; *Scofield v. Van Syckle*, 28 How. Pr. 97.

NOTE.—For injunction against use of money to build a state institution, see also *State, Taylor, v. Pennoyer* (Or.) 25 L. R. A. 853.

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For injunction against illegal appropriations of public money, see also *Russell v. Tate* (Ark.) 7 L. R. A. 180, and cases cited in note thereto.

The demurrer should state specifically in what the defect consists. It is not sufficient if it merely follows the words of the statute.

Irwine v. Wood, 7 Colo. 477; *Kent v. Snyder*, 80 Cal. 666; *Skinner v. Stuart*, 13 Abb. Pr. 442; *Baker v. Drury*, 29 Wis. 580; *Dewey v. State, McCollum*, 91 Ind. 182; *Marz v. Croisan*, 17 Or. 398.

An individual taxpayer, whose burdens would be increased by the wrongful acts of public officers, and where a fraudulent or illegal diversion or misapplication of the public funds is about to be consummated, has such an interest, by reason of the special and peculiar injury he would sustain, as would give him a standing in a court of equity by injunction to restrain such acts and prevent such diversion of the public funds.

Sherman v. Bellows, 24 Or. 553; 2 High, Inj. § 1327.

Courts cannot, and will not, shun the discussion of a constitutional question when fairly presented and the case cannot be disposed of without considering it.

Cooley, Const. Lim. p. 163; *State, Taylor v. Pennoyer*, 26 Or. 205, 35 L. R. A. 862.

The appellant, by his demurrer, admits that he is about to, and will, pay out the public money for an unconstitutional purpose, unless he is restrained by order of the court; therefore, the only question that is left for consideration, since the appellant admits that if he is not restrained that he will pay this money under color of the act in question is: Is this a public institution? That it is one of the public institutions contemplated by the constitution, there can be no question.

State, Pennoyer v. Torth, 34 N. J. L. 377.

State officers will be restrained by injunction from the commission of a breach of trust, or from committing some illegal act under color of right, which will affect public rights.

10 Am. & Eng. Enc. Law, p. 968, and cases cited; 2 High, Inj. § 1327; *Wood v. Brooklyn*, 14 Barb. 425; *Davis v. American Soc. for Prevention of Cruelty to Animals*, 75 N. Y. 869; *People v. New York*, 32 Barb. 102; *Blake v. Brooklyn*, 26 Barb. 301; *Self v. Jenkins*, 71 N. C. 578; *Aurora & C. R. Co. v. Lawrenceburgh*, 56 Ind. 80; 2 Dan. Ch. Pl. & Pr. p. 1573; *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 526; *Green's Brice*, *Ultra Vires*, 2d ed. 708, 712; *Ellis v. Grey*, 6 Sim. 214; *Doolittle v. Broome County Supers.* 18 N. Y. 155; *Brewster v. Syracuse*, 19 N. Y. 116.

Courts will compel public officers to perform ministerial duties.

United States, Goodrich v. Guthrie, 17 How. 809, 15 L. ed. 108; *Brashear v. Mason*, 6 How. 92, 12 L. ed. 357; *Murbury v. Madison*, 1 Cranch, 187, 3 L. ed. 60; *United States v. Schurs*, 102 U. S. 378, 26 L. ed. 167; *Butterworth v. United States*, *Hoe*, 112 U. S. 50, 28 L. ed. 656; *United States, Dunlap v. Black*, 128 U. S. 40, 32 L. ed. 354; *Cohens v. Virginia*, 6 Wheat. 264, 5 L. ed. 257.

Bean, J., delivered the opinion of the court:

This is a suit, commenced by the district attorney of the third judicial district, in the name of and on behalf of the state, to enjoin the defendant, as state treasurer, from paying

a \$25,000 state warrant, issued on account of the purchase of certain land in Union county for the site of an insane asylum, under an act of the legislature of 1893 (Laws 1893, p. 186), on the ground that the act in question is void, because in contravention of the provision of the Constitution locating such institution at the seat of government. A demurrer to the information, for the reason that it does not state facts sufficient to constitute a cause of suit, and "that there is a defect of parties plaintiff and defendant," was overruled; and, defendant declining to plead further, a decree was entered as prayed for in the information, and hence this appeal.

In support of the demurrer it is contended that there is a defect of parties defendant, because the owner of the warrant, the payment of which is sought to be enjoined, is not a party to the suit. If this is true, and the objection had been properly taken, it would have been fatal. The rule undoubtedly is that the owner of a state or county warrant is a necessary party to a suit to enjoin its payment, and in some instances the courts, deeming him an indispensable party, refuse to proceed to a final determination of such a suit until he is brought in, although the parties to the record make no objection on that account, or even consent to proceed without him. *Anthony v. State*, 49 Kan. 246; *Buie v. Cunningham* (Tex. Civ. App.) 29 S. W. 801; *King v. Throckmorton County Commissioners* Ct. 10 Tex. Civ. App. 114; *State v. Anderson*, 5 Kan. 90; *Graham v. Minneapolis*, 40 Minn. 436; *Ship Channel Co. v. Bruly*, 45 Tex. 6; *Board v. Texas & P. R. Co.* 46 Tex. 316. But in this case, while it is not apparent, from the face of the information, to whom the warrant was issued, or by whom it was owned at the time the suit was brought, the undertaking and order for a preliminary injunction and the decree appealed from all state that it was issued to the present defendant; so that the court would hardly be justified in holding that it affirmatively appears there is a defect of parties. But, however this may be, the demurrer itself is insufficient, both in form and substance, to raise the question. The statute provides that objections apparent upon the face of the complaint, other than such as go to the jurisdiction of the court and that it does not state facts sufficient to constitute a cause of action or suit, are waived, unless taken by demurrer (Hill's Anno. Laws, § 71), and that a demurrer shall be disregarded unless it distinctly specifies the grounds of objection (Id. § 68). At common law a demurrer for want of necessary parties defendant was required to point out, either by name, or in some other definite way, from the facts stated in the bill, those who should have been, and who were not, made parties to the suit, so as to enable the plaintiff to obviate the objection by bringing them in (Story, Eq. Pl. § 548; *Dias v. Bouchaud*, 10 Paige, 445); and this rule has not been abrogated by the provisions of the Code (1 Rumsey, Pr. p. 383; 1 Van Santvoord, Pl. p. 75; *Durham v. Bischof*, 47 Ind. 211; *Dewey v. State, McCollum*, 91 Ind. 178; *Baker v. Hawkins*, 29 Wis. 576; *Kent v. Snyder*, 80 Cal. 666; *Irwine v. Wood*, 7 Colo. 477). Now, the language of the demurrer in this case is "that there is a defect of parties plaintiff and

defendant," and this, as we have seen, is insufficient; so that the question is not raised by the demurrer, nor can the case be classed with those in which the courts have refused to proceed to the determination of a suit to enjoin the payment of a state or county warrant without the owner or holder thereof being a party to the suit. As already suggested, the record indicates that the warrant in question was issued to the defendant, and, if so, there is no defect of parties. *Dorothy v. Pierce*, 27 Or. 373. But, whether it was or not, the questions involved do not depend upon controverted facts for their solution, but are questions of law, which have been ably and exhaustively argued, and can be determined on this appeal without affecting the interests of the warrant holder, should he prove to be other than the defendant, except so far as the doctrine of *stare decisis* may apply to any future proceeding which may be instituted by him to enforce its payment. The demurrer for want of proper parties was, therefore, properly overruled; and if, by reason of the facts, the warrant holder should have been made a party to the suit, either on his own account or as a protection to the defendant, it should have been made apparent by answer, and, if necessary, the court could have stayed the proceedings until he could be brought in.

It is next contended that the information does not state facts sufficient to authorize a court of equity to interfere by injunction to restrain the payment of the warrant in question, for the reason that it does not appear that the state would be peculiarly injured or damaged by the construction of an insane asylum in eastern Oregon, instead of at the seat of government. The question as to when and by whom a suit can be maintained to prevent the construction of public buildings at a place other than the seat of government has been before this court several times, and it has been held that a private individual cannot do so without showing some special injury to himself (*Sherman v. Bellows*, 24 Or. 553) and that the same rule applies when a suit is instituted in the name of the state upon his relation (*State, Taylor, v. Pennoyer*, 26 Or. 205, 25 L. R. A. 862, and 26 Or. 214; *State, Taylor, v. Lord*, 28 Or. 498, 31 L. R. A. 473). But these cases are not in point in the present controversy. The one first referred to was a suit instituted by a private citizen in his individual capacity, without showing any special injury to himself; and the other was a proceeding against the board of commissioners of public buildings by a private citizen, who undertook to use the name of the state without authority, and was decided on the ground that it was not brought by nor against the proper parties. But this is a suit by the state in its sovereign capacity as the guardian of the rights of the people, instituted by its executive law officer, and can, in our opinion, be maintained without showing any special injury to the state. It is enough that the public funds are about to be applied in a manner prohibited by the Constitution. At common law the attorney general of England could, by information in the name of the Crown, call upon the courts of justice to prevent the misapplication of funds or property raised or held for public use, and, in the ab-

sence of statutory regulations, the district attorney in this state is vested with like powers. *State v. Douglas County Road Co.* 10 Or. 198; *Dollar Sav. Bank v. United States*, 19 Wall. 239, 23 L. ed. 82. Indeed, the right of the state, through its proper officer, to maintain such a proceeding, would seem to be one of the necessary incidents of sovereignty. Without it the rights of the citizen cannot be protected or enforced in cases where he is unable to act for himself. In a suit by an individual he is required to show some special injury to himself; and when, as in this case, the wrong complained of is public in its character, affecting no one citizen more than another, it is impossible for him to do so, and for that reason he is without remedy, although he may be injured in common with the other members of the community. In such cases the state has a right, by virtue of its high prerogative power, to call upon the courts, through its proper law officer, to protect the rights of its people. And to support a proceeding for that purpose it is sufficient that the grievance complained of is a threatened invasion of the right of the people to determine what disposition shall be made of the public funds exacted from them by the extraordinary power of taxation. Now, every use of such funds in violation of the provisions of the Constitution or organic law must necessarily be of this character. The legislature is but an instrumentality appointed by the state to exercise a part of its sovereign powers. In that capacity it holds the public funds in trust for the people. Except as limited by the Constitution, its action within its legitimate sphere is the action of the people; but, when it undertakes to apply such funds in a manner or at a place prohibited by the organic law, it is not only exercising a power expressly withheld, but violating its trust, and a court of equity will interfere at the suit of the sovereign power to prevent or restrain such an application without being required to show any other injury. It is enough that the threatened disposition is in violation of the will of the people, as expressed in the supreme law of the land. There are some *dicta* in paragraph 7 of the opinion in the case of *State, Taylor, v. Lord*, 28 Or. 498, 31 L. R. A. 473, in which the writer thereof did not concur, apparently in conflict with this doctrine; but it was not necessary to a decision of the case, and, after more mature reflection, we are now all agreed that it was erroneous. It is based upon the false premises (1) that the location and construction of an asylum at some place other than the seat of government is not a misapplication of the public funds, unless it appears that the burden of taxation will be increased by so doing; and (2) that the location of such an institution is a legislative question. Manifestly, neither of these positions is sound. The expenditure of public money at a place prohibited by the Constitution is a misapplication thereof, for the simple and very satisfactory reason that it is against the declared will of the people; and the location of a public institution, within the meaning of that term as used in the Constitution, is not in any sense a legislative question, but has been determined by the people themselves. A sufficient injury, therefore, to enable the state in its sovereign capacity to call upon a court of equity for re-

It is shown whenever it is made to appear that public funds are about to be applied to a use, for a purpose, or at a place prohibited by the Constitution. We conclude, therefore, that the court has jurisdiction, and the only remaining question is whether the act of the legislature authorizing the construction of an insane asylum in eastern Oregon is in violation of the provisions of the Constitution.

By § 1, art. 14, of that instrument, it is provided that the legislature shall not have the power to establish a seat of government, but that such question shall be submitted to and determined by the people at the polls. And § 8 of the same article declares that, when the seat of government is so established, it shall "not be removed for the term of twenty years from the time of such establishment, nor in any other manner than as provided in the 1st section of this article: provided, that all the public institutions of the state, hereafter provided for by the legislative assembly, shall be located at the seat of government." Although the language of the section quoted is somewhat involved, the evident intention of the framers of the Constitution, and of the people when they adopted it, was to declare that all the public institutions of the state thereafter provided for by the legislature should be located at the seat of government. It amounts to, and is, in effect, a constitutional location of such institutions, and the only power vested in the legislature is to determine the necessity for and the amount of money to be used in their construction and maintenance. Any attempt by that body to expend the public revenue for the erec-

tion or maintenance of such an institution elsewhere is a mere nullity, and of no more force or validity than a legislative attempt to change the seat of government. All such institutions must be located at the place designated in the Constitution, although it may now seem desirable to do otherwise, until the consent of the people is obtained in the form of a constitutional amendment. In their sovereign capacity the people have so provided, and no other power can alter or change their decree. That an insane asylum is a public institution of the state, within the meaning of the Constitution, is too clear for argument. In view of the practical construction of that instrument by the legislative and executive departments for almost, if not quite, a quarter of a century, as evidenced by the erection of educational institutions away from the seat of government, it no doubt should now be construed so as to include only such institutions as are strictly governmental in their character. But an asylum for the insane comes clearly within this construction. When, therefore, the legislature assumed to authorize the expenditure of the public funds for the erection of such an institution in eastern Oregon, it attempted to exercise a power expressly withheld by the people, and an injury to the state will be conclusively presumed from a threatened application of the public funds to such a purpose.

It follows that *the decree of the court below must be affirmed*, and it is so ordered.

Rehearing denied August 17, 1896.

PENNSYLVANIA SUPREME COURT.

Thomas ROBB

v.

PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES AND GRANTING ANNUITIES, *Appt.*

(196 Pa. 458.)

1. A depositor's procurement of a rubber stamp which will make a fac simile of his signature, of which the bank has no notice, does not, in the absence of his negligence, make him liable for the loss occasioned by payment of his deposit on forged checks made by one who had unlawfully and clandestinely obtained the stamp and used it in forging checks.
2. The question of the negligence of a depositor in keeping a rubber stamp which will make a fac simile of his signature, and which is unlawfully obtained and used in forging checks, is for the jury.

(*Williams, J., and Sterrett, Ch. J., dissent.*)

(July 21, 1896.)

APPEAL by defendant from a judgment of the Superior Court affirming a judgment of the Court of Common Pleas, No. 4,

NOTE.—As to the duty of a drawee to know the drawer's signature, see *note* to *Germania Bank v. Boutell* (Minn.) 27 L. R. A. 635.

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for Philadelphia County in favor of plaintiff in an action brought to recover a bank deposit which had been paid out on forged checks. *Affirmed.*

The facts are stated in the opinion of the Superior Court by Presiding Justice Rice, which was as follows:

"This was an action to recover the amount of a bank deposit. The defense was that the money had been paid out on checks purporting to be drawn by the plaintiff. The jury have determined by their verdict that the signatures were forged, and no question is raised as to the correctness of this finding. But there was evidence that the signatures were made by a third person, by the unauthorized and criminal use of a rubber stamp which the plaintiff owned and kept in his safe. Upon this evidence a novel and interesting question is raised. The defendant's first proposition is that if a depositor, without the knowledge of his bank, has a rubber stamp made, which is a substantial fac simile of his bank signature, he cannot hold the bank responsible for a loss which occurs by reason of the unauthorized signing by a third person of the depositor's signature to a check by means of this stamp. It will be observed that this proposition assumes that the depositor is responsible for the loss, although there is no negligence

on his part in the manner of keeping the stamp. If he keep it as securely as possible,—if, for example, he should keep it securely locked in the best modern safe, to which no other person has access, and a burglar should break into the safe, and use the stamp to affix the depositor's signature to a check, and the bank should honor the check, the loss would fall on the depositor. This is not an extreme statement of the defendant's position. But it is not unlawful for a man to have a rubber stamp by which a fac simile of his written signature may be affixed to papers. Nor is it so extraordinary a thing as to warrant a bank in presuming, without inquiry, that a depositor will not possess nor use such a stamp for any purpose. If the owner place it in the hands of a third person for the purpose of affixing his signature to certain papers, and he, without authority, use it to forge the signature of the owner to checks, it might well be argued that the bank honoring the checks should not be responsible for the loss. In such a case there might be propriety in applying the maxim that, where one of two innocent persons must suffer, he should suffer who by his own acts occasioned the confidence and the loss. In the case supposed, the loss would be traceable to the act of the owner of the stamp in the selection of the agent to use it. In the case in hand, it was traceable, proximately, to the criminal act of a third person in the use of the stamp, and more remotely to his tortious, if not criminal, act, in possessing himself of it against the will of the owner. In the former case there would be an element of negligence in the care of the stamp, while in the case in hand (looking at it from the present standpoint) there is none. These distinctions are well illustrated in *Pennsylvania R. Co.'s Appeal*, 86 Pa. 80, where it was held that if the owner of stock intrusts the certificates, with blank powers of attorney, to an agent, for safe keeping, who fraudulently transfers them to a third party, who, in turn, without the knowledge of the fraud, had them transferred to himself, the owner cannot recover from the corporation for the loss. This decision was put upon the ground that the owner had been negligent, and should not be permitted to shift from herself to the corporation the loss which resulted from the dishonesty of her own agent. Said Sharswood, J.: 'Where one of two parties, who are equally innocent of actual fraud, must lose, it is the suggestion of common sense, as well as equity, that the one whose misplaced confidence in an agent or attorney has been the cause of the loss shall not throw it onto the other.' As Judge King has well expressed this principle in *Bank of Kentucky v. Schuykill Bank*, 1 Pars. Sel. Eq. Cas. 248: 'The true doctrine on this subject is that, where one of two innocent persons is to suffer from the tortious act of a third, he who gave the aggressor the means of doing the wrong must alone bear the consequences of the act.' Neither statement of this important principle sustains the defendant's proposition now under discussion; and, in the case cited, Judge Sharswood conceded that had the certificates of stock been lost or stolen from the possession of the owner, the corporation would have been responsible

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for permitting the fraudulent transfer. See also *Biddle v. Bayard*, 13 Pa. 150.

'We are referred to the decisions relative to the alteration of negotiable instruments by filling up blanks left by the maker. But in these cases there is an element of either negligence or of agency. It is a well settled principle in the law of negotiable securities that if the maker of a bill, note, or check issues it in such a condition that it may be easily altered without detection, he is liable to a bona fide holder who takes it in the usual course of business before maturity. 'The maker ought surely not to be discharged from his obligation by reason or on account of his own negligence in executing and issuing a note that invited tampering with.' *Brown v. Reed*, 79 Pa. 370, 21 Am. Rep. 75, citing *Phelan v. Moss*, 67 Pa. 59; *Garrard v. Hadden*, 67 Pa. 82, 5 Am. Rep. 412; *Zimmerman v. Rote*, 75 Pa. 188. According to these decisions, the question is not whether the maker so drew the paper as to make it possible to alter it without detection, but whether he used ordinary care and precaution. In *Leas v. Walls*, 101 Pa. 57, 47 Am. Rep. 699, the instrument was a printed blank note, with an open space for the insertion of the amount; the word 'dollars' being printed at the end of the space. The successful alteration of the amount from 'eight' to 'eighty' was made possible by the maker's omission to close up the space so that not even a single letter could be inserted. It was held, however, that the question whether the maker was negligent was clearly a question of fact for the jury. 'In these circumstances, to hold that the defendant was so palpably guilty of negligence, in not taking sufficient precautions against forgery, as that the jury could not be permitted to determine the question, and the court must determine it as a matter of law, would be equivalent to holding that the maker of a negotiable instrument must so execute it as to prevent the possibility of alteration in any event. Such a doctrine would be monstrous, and contrary to every legal principle.' The rule that where one of two innocent persons must suffer loss, that party who did the act which was the occasion of the loss ought to bear it, is often misapplied to cases where the two persons are not equally without fault, but where one owes a duty to the other to do, or to refrain from doing, a particular thing, and has failed in the performance of that duty. But a man's responsibility, even for his negligence and that of his servants, must end somewhere. As was truly remarked in *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 298, 27 Am. Rep. 658, there is possibility of carrying an admittedly correct principle too far. It may be extended so as to reach the *reductio ad absurdum* so far as it applies to the practical business of life. The doctrine as to remote and proximate cause, as held in Pennsylvania, had been thus stated in many cases: 'In determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligence,—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act.' *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa.

293, 27 Am. Rep. 653; *South Side Pass. R. Co. v. Trich*, 117 Pa. 390; *Swanson v. Crandall*, 2 Pa. Super. Ct. 85. The same rule, and for a stronger reason, applies when it is sought to hold one liable for the consequences of a lawful and non-negligent act. To apply the maxim invoked here, without regard to the question whether the act was the remote or proximate cause of the injury, would establish a degree of responsibility 'quite beyond any legal limitations which have yet been declared.' This would be a striking illustration of the danger of carrying an admittedly correct principle too far.

"A bank is bound to know the signature of its depositor; and, if it pays out the money on a forged check, it cannot charge the depositor with the amount, but, as against him, must bear the loss. It may be conceded that the relation of the depositor to the bank implies a duty on his part to subject it to no extraordinary risks with regard to payment of his checks, which he may avoid by the exercise of ordinary care and prudence. But we cannot assent to the proposition that it is negligence *per se* for him to have in his possession a harmless and useful thing, and one lawful for him to have, but which, in the hands of a thief breaking into his house or his safe, may be used to forge his signature. If he commits the use of it to an agent, selected by himself, or leave it in such a place as to invite the use of it for illegitimate purposes, there would be plausibility in the contention that he should be deemed to contemplate such use as one of the natural and probable consequences of his act. But, where he has used due care in securing it against unlawful use by others, it cannot be said that his mere possession of the thing was the proximate cause of the mispayment of the money to one who unlawfully possessed himself of it, and used it to commit a forgery.

"The defendant's second proposition is that, even if the court did not err in leaving the question of negligence to the jury, the instructions given by the court were insufficient and erroneous and laid down a wrong standard of negligence. In order to discuss this proposition properly, it will be necessary to state some of the undisputed facts: In 1893, the plaintiff, as president of a corporation, had occasion to send out a large number of invitations to a banquet, and, in order to save himself the labor of writing his name so often, had a rubber stamp made which would make a facsimile of his signature. For a time the stamp was kept in the company's office, but after he resigned the presidency it was sent to his private office, which he rented from a gentleman who had the adjoining office. With this office, he was entitled to the services of an office boy of about sixteen years of age. For about nine months he employed this boy for errands and messages, including the sending of him to bank to draw money on checks. He never had occasion to doubt the boy's honesty. When the rubber stamp was returned to the plaintiff from the corporation office, he placed it in a compartment inside of a fire-proof safe. He locked this compartment, and put the key in a drawer in the safe, behind some papers, and covered it up. He then locked the drawer, and put the key in another unlocked drawer in

the safe. He then locked the safe, and put the key in a little box, which he put in a wooden drawer or box, and this was kept on top of another safe. The plaintiff's surmise was that the office boy had watched his moves, found where he kept the safe key, opened the safe, and rummaged around until he found the stamp, and with it signed the two checks. Assuming this theory to be correct it turned out that, notwithstanding the plaintiff's precautions to guard the stamp, it was not kept where it would be absolutely inaccessible to others. It follows that an unqualified affirmance of the defendant's second point would have been equivalent to binding instructions to find for the defendant. But, for the reasons given in our discussion of the first proposition, the defendant was not entitled to such instructions. The practical effect would be to hold the owner of a rubber stamp up to the same standard of responsibility as the owner of a vicious animal; in other words, to hold that he is bound to keep the stamp, at all hazards, where a trespasser or a thief cannot possibly get possession of it and use it. This is not the standard of his responsibility to the bank in which he is a depositor, or to the public. He is not an insurer against its unlawful use, but it may be conceded that he is responsible for the consequences of his negligence in keeping it. He is bound to exercise the care of an ordinarily prudent man. To adopt the language of the learned trial judge, was it put away in such a manner as was, in view of all the probabilities of the case, sufficient to protect the stamp from being improperly used? This was a question of fact for the jury, and was fairly submitted. There are cases in which the court can determine that omissions constitute negligence, but they are exceptional,—those in which the precise measure of duty is determinate; the same under all circumstances. What constitutes negligence when the standard shifts, not according to any certain rule, depends upon the facts and circumstances developed at the trial, and cannot be determined by the court, but must be submitted to the jury. *Delaware, L. & W. R. Co. v. Jones*, 128 Pa. 308, and cases there cited. But complaint is made that the court set up an erroneous standard of negligence. We do not think so. The illustration used by the learned judge in his answer to the second point was not intended as a standard to govern the jury. He evidently had in mind the rule that is laid down in the cases heretofore cited, relating to the alteration of a negotiable instrument in which the maker has carelessly left blanks 'so that it may be easily altered without detection.' Following the rule laid down in those cases, he told the jury that, under the facts of the supposed case, the owner of the stamp would clearly be guilty of negligence, and the bank would not be liable for the loss. But, recognizing the distinctions pointed out in *Leas v. Walls*, 101 Pa. 57, 47 Am. Rep. 699, he did not undertake to decide that, under the actual facts of the case on trial, the plaintiff had or had not exercised the precaution of a prudent man in guarding the stamp against improper use. The defendant has no just cause to complain of the submission, or of the manner of the submission, of that question to the jury. Judgment affirmed."

Messrs Frank P. Prichard and John G. Johnson, for appellant:

If a depositor without the knowledge of the bank has a rubber stamp made which is a fac simile of his bank signature, and by means of that stamp a check is executed not distinguishable by ordinary inspection from genuine checks, and is paid by the bank in the exercise of due care and without any negligence, the loss must fall on the depositor.

Where one of two innocent persons is to suffer from the tortious act of a third, he who gave the aggressor the means of doing the wrong must alone bear the consequences of the act.

Pennsylvania R. Co.'s Appeal, 86 Pa. 80; *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Sel. Eq. Cas. 248.

This principle has been repeatedly applied to the relations between a depositor and a bank.

Orr v. Union Bank, 1 Macq. H. L. Cas. 518, 29 Eng. L. & Eq. Rep. 1; *Grant, Banks & Banking*, 17; *Morse, Banks & Banking*, 2d ed. p. 831; *Van Schaack, Bank Checks*, p. 119; *Hardy v. Chesapeake Bank*, 51 Md. 568, 34 Am. Rep. 325; *Young v. Grote*, 4 Bing. 253; *Gurrard v. Haddan*, 67 Pa. 82, 5 Am. Rep. 412; *Ingham v. Primrose*, 7 C. B. N. S. 82; *United States v. National Ech. Bank*, 45 Fed. Rep. 168; *Burnett Woods Bldg. & Sav. Co. v. German Nat. Bank*, 3 Ohio N. P. 84.

Mr. Samuel Gustine Thompson, for appellee:

A paying teller having the most moderate experience should have been able at a glance to have discovered these forgeries, especially with his attention necessarily directed to the different handwriting in the bodies of the checks.

It is very clear from the testimony that these forgeries were not committed by simply stamping the checks, as indicated by appellant's argument. It indicates also that the stamp could not alone have been used to accomplish the forgeries, and this cuts up the roots of that argument by establishing that the stamp, if used, was not alone the agency in accomplishing the result. The appellee did not know, nor is it known now definitely, that the forgery was committed by using in some way a stamp.

There can be no escape from liability where a payment is made upon a forgery so skillfully executed as to almost defy detection, much less can there be any where the difference is marked and clearly made manifest.

The mere fact that a depositor has a stamp or check book which someone, by a criminal act, gets possession of and uses to commit forgery, will not make him liable for the loss consequent upon the forgery.

Morse, Banks & Banking, § 480; *Belknap v. National Bank*, 100 Mass. 376, 97 Am. Dec. 105; *Leas v. Walls*, 101 Pa. 64, 47 Am. Rep. 699; *Brown v. Reed*, 79 Pa. 372, 31 Am. Rep. 75; *Zimmerman v. Rote*, 75 Pa. 191; *Mackintosh v. Eliot Nat. Bank*, 128 Mass. 398.

McCollum, J., delivered the opinion of the court:

This suit was brought to recover the amount of a deposit made by the plaintiff with the defendant.

It may be conceded, for the purposes of this appeal, that the deposit was paid out by the latter on checks purporting to be drawn by the former, and that the checks were forgeries. In the trial of the case in the court of common pleas, and on the appeal to the superior court, the principal defense to the action was that inasmuch as the plaintiff had, without notice to the defendant, procured a rubber stamp which would make a fac simile of his signature, he must sustain the loss occasioned by an unauthorized use of the stamp by a person who had unlawfully and clandestinely obtained possession of it, and by means of it perpetrated the forgeries on which the deposit in question was paid out by the defendant. The trial court being of the opinion that it was not unlawful for the plaintiff to have such a stamp produced for his own proper use and convenience, refused to hold that his procurement of it without notice to the defendant constituted a bar to his suit for the money paid out on the forged checks. It held, however, that, if the possession of the stamp by the forger of the checks was attributable in any degree to the negligence of the plaintiff in the care of it, such negligence would relieve the defendant from responsibility for the loss, but that the question whether he failed in the performance of his duty in this respect was for the jury, and determinable on the testimony affecting it. This view of the case resulted in a verdict for the plaintiff, and from the judgment entered thereon an appeal was taken to the superior court, which, in an opinion by its learned president, affirmed it. The case is now before us on the allowance of an appeal from the judgment of the superior court, and the defense made to the plaintiff's claim is simply a reiteration of the defense made in the trial court and on the appeal, which resulted in the decision we are asked to reverse.

We cannot regard the production of the rubber stamp, on the plaintiff's request, as an unlawful act; nor can we assent to the claim that his procurement and possession of it without notice to the defendant relieved the latter from liability for the amount paid out on the forged checks. An act which is in and by itself entirely lawful, and which had no relation to the plaintiff's deposit with the defendant, did not impose upon the former the duty of notifying the latter of the performance of it; and, if such a duty was not created by the plaintiff's procurement of the stamp, the loss occasioned by the use of it in the perpetration of the forgeries did not necessarily fall upon him. If, however, the forger obtained possession of the stamp through the negligence of the plaintiff, the responsibility for the loss occasioned by the forgeries would not rest upon the defendant, if its cashier exercised due care in the inspection of the checks. It is needless to inquire on this appeal whether such care was exercised by the cashier, because the question is not raised by the assignments. The principal questions considered in the court of common pleas and in the superior court were whether the plaintiff's possession of the stamp, without negligence in the care of it, and without notice to the defendant that he had it, relieved the latter from liability for the money paid out on the forged checks, and, if it did not, whether

the evidence in the case was sufficient to authorize a finding by the jury that the plaintiff, as owner and custodian of the stamp, had taken proper precautions to prevent an unlawful appropriation or use of it. It seems to us that these questions were rightly determined by the courts referred to, and that the reasons given for the conclusions arrived at by them were sound. The clear, concise, and convincing opinion of the learned president of the superior court fairly includes and disposes of the material questions in the case, and upon it we unhesitatingly rest an affirmance of the judgment. The fourth assignment alleges error in the instructions to the jury on the question of negligence, but a careful consideration of the charge has satisfied us that there is no error in it.

Judgment affirmed.

Williams, J., dissenting:

I dissent earnestly from this judgment, and from the reasons given in support of it in the opinion just filed. It puts an additional burden upon the defendant bank, not resulting from the commercial contract between it and its depositor. When an account is opened at a bank by the deposit of money, the depositor leaves his genuine signature with the banker for his guidance and protection in the payment of checks. When checks are presented bearing this signature, they must not be refused; but if the signature is a forgery, no matter how skillfully it is done, or how difficult of detection, they must not be paid. The contract which the commercial law raises upon the deposit of money with a banker is that the deposit shall be paid out only to the depositor or his order. Payment upon a forged check is, therefore, no payment, and in no way affects the depositor. But if the depositor executes a check, and for any reason leaves it on his table, where it is found by another, who fills it up, presents it at bank, and receives payment upon it, this is a good payment by the bank, and the loss is that of the depositor, for the check was signed by him. If, instead of leaving his check upon the table, the drawer had deposited in a drawer within his safe, locked the safe, and put the key away in a box in his office, precisely as Mr. Robb did with his stamp, nevertheless if a clerk or employee had taken the key from the box, unlocked the safe, abstracted the check and used it for his own benefit, its payment by the bank would have bound the depositor. His loss would have been due, not to the failure of the banker to distinguish his genuine signature, but to the crime of his employee, who had obtained it surreptitiously. One of two innocent persons must suffer because of the payment of the check, and the law determines that the loss shall fall upon him whose act or omission made the loss possible. If the depositor had not signed his check and left it where it was possible for a

criminal to appropriate it, palpably the loss could not have happened. This principle rules the case now before us. It is conceded that Mr. Robb caused the stamp to be made with which this check was executed. He says he only intended to use it for a particular purpose, but it is perfectly apparent that he intended his signature produced by this stamp should be recognized as his by the friends and acquaintances who should receive it, as it certainly would be. The signatures made by it as they are presented to us in the paper books, when placed by the side of admittedly genuine signatures, are indistinguishable from them. Now, this stamp belonged to him, was made under his direction, and for his use. It was intended for the rapid production of his signature. It was in his possession. He was bound to take care of it as safely as of his own signature made by himself with his own hand. He was bound to do this at his peril. There is no question of reasonable or sufficient care in the case. As with the signed check, so with this stamp signature. When he put it in his safe, and left the key where it was possible for anyone to get it, and so gain admission to the safe, he exposed himself to the loss that might follow, and that loss is his. He seeks in this action to put his own proper loss upon the bank that paid the checks, by alleging that the checks were forged. But they were not forged. The signature was his. He prepared it. All that can be said is that he did not affix it to the checks. But he had prepared it so that anyone could affix it to a check or any other paper, and when so affixed it was absolutely impossible to tell that it had not been done by him. There would be some justification for his claim upon the bank if he had advised the banker that he had prepared such a signature that might by a possibility be clandestinely gotten from his possession, and given him an impression made by it, and pointed out, if he could have done so, how it might be distinguished from his signature as made by a pen; but he did nothing of the kind. If the bank is not protected by his signature made by means of his own private stamp, if it is bound at its peril to know and discriminate between his signature made with his pen and that made with his private stamp, then he has, by the use of the stamp, very greatly increased the responsibility and peril of the bank without so much as giving it notice or affording the slightest intimation of the necessity for additional vigilance in scrutinizing checks purporting to bear his signature. Upon every rule of commercial law, and upon every consideration of equity and good conscience, the judgment entered in the court below in this case should be reversed, and judgment should be entered here in favor of the defendant.

Sterrett, Ch. J.: I fully concur in the foregoing dissenting opinion.

TENNESSEE SUPREME COURT.

HERMAN BROTHERS, LINDAUER &
COMPANY *et al.*

v.

KATZ BROTHERS *et al.*,
and
SPRINGFIELD FIRE & MARINE IN-
SURANCE COMPANY *et al.*, *Appts.*

(.....Tenn.....)

1. The word "occupants" in the provision of a policy making it void for change of interest, title, or possession, "except change of occupants without increase of hazard," is not limited to real property, but applies to personal property also.
2. The levy of attachments and executions subject thereto on property without increasing the hazard does not avoid an insurance policy which provides that it shall be void for change of interest, title, or possession, except change of occupants without increase of hazard.
3. An increase of the risk or hazard is not shown by the mere fact of the levy of attachments and executions upon property.

(December 10, 1897.)

APPEAL by defendant insurance companies from a decree of the Chancery Court for Dyer County in favor of complainants in a proceeding brought to reach the proceeds of certain insurance policies upon property destroyed while under attachment by complainants. *Affirmed.*

The facts are stated in the opinion.

Messrs. M. M. Marshall, Stokes & Stokes, Harwood & Tyree, and Deason & Rankin, for appellants:

By the issuance and levy of the attachment writs, and the issuance and levy of the justice's execution upon the stocks of goods by the sheriff and constable, and the taking possession of said goods by said officers under said levies, and the appointment of a receiver, the policies were rendered void under their terms, provisions, and stipulations.

The word "occupant" in its legal meaning is limited and peculiar when applied to personal property, if, indeed, at the present time it applies to personal property at all.

Rapalje & Lawrence, Law Dict. p. 892; 4 Kent, Com. 12th ed. pp. 255, 256.

By legal process the possession passed into the hands of others, and these companies are entitled to the contract they made. This contract of insurance was personal to the insured.

Mutual Protection Ins. Co. v. Hamilton, 5 Speed, 273.

Title by execution is classed along with other titles, and is recognized as an independent title, and it is such a title as is provided for in the policy.

Anderson, Law Dict. p. 1084; *Brown v. Allen*, 8 Head, 439; *Bradley v. Keesee*, 5 Coldw. 226, 94 Am. Dec. 246; *Connell v. Scott*, 5 Baxt. 598.

NOTE.—On the question of the applicability of the word "occupants" to personal property, there seem to be no precedents for the above decision except those cited therein.
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The levy of an execution upon personal property in this state avoids an insurance policy inhibiting change of title without the consent of insurer.

Pennebaker v. Tomlinson, 1 Tenn. Ch. 603.

In *Germania F. Ins. Co. v. Home Ins. Co.* 144 N. Y. 195, 26 L. R. A. 592, the *Walradt Case*, 186 N. Y. 875, while not in express terms criticised, is in our judgment very greatly modified, if not in effect overruled.

Drennen v. London Assur. Corp. 20 Fed. Rep. 658.

The proof in this case shows that there was such an increase of hazard that the policies were avoided under the stipulations and conditions contained in the policy.

The proof in the record discloses the fact that there is a custom among the insurance companies not to write insurance upon property that was held by officers under attachment and execution levies.

It is competent to prove this particular custom of the companies to show the increase of hazard.

Kirby v. Phoenix Ins. Co. 18 Lea, 343.

The character of the fire forfeited the policies.

Messrs. John Ruhm & Son, for appellees:

The proviso relied on is only a condition subsequent. It should be construed strictly against the right of forfeiture.

McNutt v. Virginia F. & M. Ins. Co. (Tenn. Ch. App.) 45 S. W. 61; 1 Phillips, Ins. 78; May, Ins. § 174; 2 Beach, Ins. § 1809; 2 Biddle, Ins. §§ 1810, 1829.

The policy was prepared by insurers who are presumed to have had their own interests primarily in view; hence, when a meaning is the least doubtful it should be construed most favorably to the insured who had nothing to do with the preparation thereof.

Rickerson v. Hartford F. Ins. Co. 149 N. Y. 818; *Matthews v. American Cent. Ins. Co.* 154 N. Y. 449, 39 L. R. A. 483.

The words "occupant" and "occupancy" are, without qualification, applied and used with reference to personal property by the great law commentators and by lexicographers.

2 Bl. Com. chap. 26, §§ 400 *et seq.*; Bouvier, Law Dict. title *Occupancy and Occupant*; Broom, Legal Maxims, § 855; Kent, Com. pt. 5, Lecture 34; *Walradt v. Phoenix Ins. Co.* 186 N. Y. 875; *Driscoll v. German-American Ins. Co.* 74 Hun, 158; *Germania F. Ins. Co. v. Home Ins. Co.* 144 N. Y. 195, 26 L. R. A. 591; *Wood v. American F. Ins. Co.* 149 N. Y. 888; *Rickerson v. Hartford F. Ins. Co.* 149 N. Y. 818; *Matthews v. American Cent. Ins. Co.* 154 N. Y. 449, 39 L. R. A. 483.

The levy of an attachment does not divest the debtor of the property levied upon, and the levy does not change the condition in the title.

Green v. Shaver, 8 Humph. 189; *Snell v. Allen*, 1 Swan, 208.

Nor was there a change of title by the subsequent dependent levy of the writs of *fi. fa.* by the constable.

Even in the case of an absolute levy of an execution, the general property and title re

main in the execution debtor, which he may sell. The officer has only a special or limited property.

Overtun v. Perkins, 10 Yerg. 329; *Tyler v. Duntun*, 1 Tenn. Ch. 361; *Evans v. Barnes*, 2 Swan, 292; 2 Freeman, Executions, § 268; *Herman, Executions*, §§ 172, 174; *Clark v. New England Mut. F. Ins. Co.* 6 Cush. 342, 58 Am. Dec. 44; *Hammet v. Queens Ins. Co.* 54 Wis. 72, 41 Am. Rep. 1; note to *Morrison v. Tennessee F. & M. Ins. Co. (Mo.)* 59 Am. Dec. 304; *Rice v. Tower*, 1 Gray, 426; May, Ins. § 274, note 4.

The distinction as to effect of levy under fl. fa. and attachment attempted to be drawn in some of the Tennessee cases is mere *obiter*.

Pennebaker v. Tomlinson, 1 Tenn. Ch. 594; *Green v. Shaver*, 8 Humph. 189; *Snell v. Allen*, 1 Swan, 208; *Bogges v. Gamble*, 8 Coldw. 154.

Even if the levy of the executions had been absolute, there is nothing in the Tennessee decisions which would change the common-law doctrine that the general property and title remain, after levy of fl. fa. in the debtor who may sell the same, and that the officer acquires merely a special or limited property.

Philadelphia F. & L. Ins. Co. v. Mills, 44 Pa. 241, 84 Am. Dec. 437; *Commonwealth Ins. Co. v. Berger*, 42 Pa. 285, 82 Am. Dec. 504; May, Ins. §§ 247, 249.

It cannot be that the constructive levy of an execution by another officer can change the status of the property while it is held by the sheriff under an attachment.

Tyler v. Duntun, 1 Tenn. Ch. 361; *James v. Kennedy*, 10 Heisk. 616; *Franklin F. Ins. Co. v. Findlay*, 6 Whart. 483, 37 Am. Dec. 430; *Rice v. Tower*, 1 Gray, 426.

By the levy of the attachments complainants had acquired rights which the consent of Katz could not defeat.

Carpenter v. Mechanics' Sav. Bank, 1 Lea, 202.

The mere levy of an execution, without more, would not result in such an increase of the hazard as to take the case out of the exception.

Franklin F. Ins. Co. v. Findlay, 6 Whart. 483, 37 Am. Dec. 430.

Meurs. Draper & Rice and *Nathan Cohn* also for appellees.

McAlister, J., delivered the opinion of the court:

Complainants, who are creditors of the defendants Katz Bros., filed these bills in the chancery court of Dyer county, alleging that defendants were fraudulently disposing of their property, and caused attachments to be levied upon a stock of goods in defendants' storehouse, in the town of Dyersburg, Tennessee. On the same night the attachments were levied, to wit, December 8, 1895, Katz Bros. procured judgments, aggregating about \$3,800, to be rendered against their firm before a justice of the peace of Dyer county, in favor of certain relatives and friends. Instantly executions were issued upon these judgments, which, by consent of the sheriff, who had levied the attachments, were levied upon the same stock of goods subject to the prior levy. On December 9, 1895, on motion of complainants in the attachment cases, a receiver was appointed

to take charge of the stock of merchandise; and sell the same. About 2 o'clock A. M. on December 10, 1895, and before the receiver had taken charge, the entire stock of goods was destroyed by fire. Katz Bros. were insured against loss by fire on this stock of merchandise in the aggregate amount of \$10,500. Complainants thereupon filed amended and supplemental bills in these causes against the defendant insurance companies, attaching the policies, and seeking to subject their proceeds to the satisfaction of their claims. Defendant insurance companies denied any liability on said policies, and, among other defenses, relied principally upon the following clause contained in each of the policies, to wit: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if any change, other than by the death of the assured, take place in the interest, title, or possession of the subject-matter of insurance (except change of occupants, without increase of hazard), whether by legal process or judgment, or by voluntary act of the assured, or otherwise." The contention made on behalf of the insurance companies is that the levy of the attachments and executions invalidated the policies, under the express provisions of this clause. The chancellor was of opinion that the levies of the attachments and executions did not render the policies void, and did not cause any increase of hazard, and that defendant insurance companies were liable on said policies to complainants to the extent of their respective debts, and so decreed. The chancellor further found that, when the fire occurred, the key to the storehouse in which said stock of merchandise was stored was still in the possession of the sheriff. The court further found that the stock of goods was worth more than \$10,500, the amount of the insurance. Defendant insurance companies appealed, and have assigned errors.

The second assignment is that the chancellor erred in holding that the levy of the attachments and executions by the sheriff and constable, and the possession of said officers under their levies, and the appointment of a receiver, did not render the policies void under their terms, provisions, and stipulations. It will be observed that each of the policies provides that if any change take place in the interest, title, or possession, whether by legal process or judgment or otherwise, the entire insurance shall be void, excepting, however, a change of occupants, without increase of hazard. The argument is that the levy of the attachments and executions worked such a change in the title, interest, and possession of the subject-matter of the insurance as avoided the policies. It is argued that the limitation contained in the clause "except change of occupants without increase of hazard" refers alone to cases where real estate is the subject of insurance, as the word "occupant" clearly indicates. It is said, further, that if the word "occupant" may properly be applied to personal property as the subject of insurance, it can only limit the words "possession and interest," and not the word "title." It is further insisted that, if the word "occupants" be construed to limit the entire phrase "interest, title, or possession," the proof shows an "increase of hazard," which, by virtue of

said clause, avoids the policy. It is not true, as assumed by counsel for appellants, that the word "occupant" has reference always to real estate. As shown by counsel for appellees, the words "occupant" and "occupancy" are frequently used in connection with personal property by commentators and lexicographers. Blackstone, in chapter 26, bk. 2, pp. 400 *et seq.*, under the head of *Of title of things personal by occupancy*, says: "Whatever movables are found, upon the surface of the earth, or in the sea, and are unclaimed by any owner, . . . they belong . . . to the first occupant or fortunate finder." In a subsequent part of the chapter, "accession" is used where title of realty by "occupancy" is discussed. And in the same chapter, on page 399: "A property [or title] in goods and chattels [movable] may be acquired by occupancy, which . . . was the original and only primitive method of acquiring any property at all." See also Bouvier, Law Dict. title of *Occupancy and Occupant*, and also, Broom, Legal Maxims, 355. Richardson's Dictionary defines "to occupy:" "To take or seize; to hold or keep possession of; to possess." Standard: ". . . to have in possession and use. . . ." Webster defines "occupant" thus: "One who occupies or takes possession; one who has the actual use or possession or is in possession of a thing." Worcester: "One who has the actual use or possession of a thing."

The case of *Walradt v. Phenix Ins. Co.* 186 N. Y. 375, presents a striking analogy on its facts, and the questions of law involved, to the case now in judgment. The suit was upon an insurance policy which contained a clause identical in terms with the one at bar. The court said, *viz.*: "We must first determine what the parties to the contract intended when they made use of the terms 'change in the interest, title, or possession of the subject of insurance' [whether by legal process, etc.] . . . The change of possession produced by the levy and the action of the sheriff remains to be considered. The policy is not avoided, by the terms of the condition referred to, by every change of possession that may take place in the property. A change of occupants without increasing the hazard is excepted from the operation of the condition, and does not invalidate the insurance. The learned counsel for the defendant argues that the exception in the condition does not apply when personal property is the subject of the insurance, and does not apply in this case, as there cannot be an occupant of goods in a store, consistent with the ordinary and appropriate use of language. The general term has shown that the word occupant is sometimes used with reference to personal property. When the subject of insurance is a ship, a building not attached to the soil, so as to become part of the realty, or other things of like character [as, for instance, a tent, or a chair, or a sofa], the term 'change of occupants' would [it will be admitted], be appropriate. When it is used in reference to goods in a store its fitness is not [at first glance] so [appropriately] apparent. But as the words of the policy were used to meet all cases we have no right to say that the exception in the condition was not designed to apply when goods were the subject of insurance, merely because

the term 'change of occupants' does not seem to be the most natural and appropriate. A large part of the contracts of insurance now entered into relate to personal property, and to hold that such an important exception as that now under consideration, to the broad terms of a condition, had no application to such contracts, would make the rights of the parties turn upon the literal meaning of a word [and to the meaning most in use.] What the parties intended was that a change in the control and dominion over the property should not avoid the policy, unless such change rendered the risk more hazardous. A change in the possession of a store of goods must, moreover, refer to the place where the goods are situated. In this case they are described as situated in a brick store. The place where the goods were kept, though not the subject of insurance, was an important element in the risk, and it was natural and proper for the parties to provide against a more hazardous change in the occupancy of that place, and hence the parties agreed that in case the possession of the goods changed that fact alone would not avoid the policy unless the occupancy of the place where they were was also changed in such a manner as to become more hazardous. In this way the words of the exception can be given their ordinary and natural meaning and the exception itself can have effect. It is only in a plain case that we are warranted in saying that the parties have used language not intended to have any application to the subject matter of the contract." See also *Germania F. Ins. Co. v. Home Ins. Co.* 144 N. Y. 195, 26 L. R. A. 591; *Wood v. American F. Ins. Co.* 149 N. Y. 882, where the *Walradt Case* is approvingly cited. We think that case presents a conclusive answer to the argument submitted by counsel for insurance companies, and no further discussion is needed on this branch of the case.

It is argued, however, by counsel for appellants, that whether the proviso applies to real or personal property, or both, in no event could it refer to or limit the preceding word "title," and that a change of title, whether the risk is increased or not, would terminate the policy under this clause. The argument is that, under the decisions of this court, the levy of an execution invests the levying officer with the title to personal property,—citing *Pennabaker v. Tomlinson*, 1 Tenn. Ch. 603; *Brown v. Allen*, 3 Head, 429; *Bradley v. Keesee*, 5 Coldw. 226, 94 Am. Dec. 246; *Connell v. Scott*, 5 Baxt. 598; *Freeman, Executions*, § 268. It is well settled in this state that the levy of an attachment does not divest the debtor of the title to the property, but simply creates a lien upon it. *Green v. Shaver*, 3 Humph. 139; *McKnight v. Hughes*, 4 Lea, 525; *Puckett v. Richardson*, 6 Lea, 58; *Montgomery v. Renlhofer*, 85 Tenn. 668; *Snell v. Allen*, 1 Swan, 208; *Connell v. Scott*, 5 Baxt. 598.

It is insisted by counsel for complainants, in an argument evincing much research and ability, that the levy of an execution on personal property vests in the officer a special or limited property, and does not divest title out of the debtor. It is argued that this is so because the debtor may sell the property subject to the right of possession in the officer; and further, that the mere payment of the debt

by the debtor operates as a discharge of the execution, and causes the possession to revert instantaneously to the debtor, without a decree or conveyance. *Overton v. Perkins*, 10 Yerg. 329; *Tyler v. Dunton*, 1 Tenn. Ch. 861; *Pennabaker v. Tomlinson*, 1 Tenn. Ch. 602. It is said in several of our cases that, by the levy of an execution, the title of personal property levied on passes to the officer, and that this is so because a seizure to the value of the debt prima facie satisfies it, and discharges the debtor. *Brown v. Allen*, 8 Head, 429; *Bradley v. Keesee*, 5 Coldw. 226, 94 Am. Dec. 246; *Conell v. Scott*, 5 Baxt. 598; *Evans v. Barnes*, 2 Swan, 298. Other cases speak of the possession of the levying officer as a limited or special property in the goods. *Malone v. Abbott*, 8 Humph. 533; *Evans v. Barnes*, 2 Swan, 298; Caruthers, History of a Lawsuit, Martin's ed. § 831. A careful review of the cases will probably show that the terms were used interchangeably, and to mean that the title thus acquired by the sheriff was not absolute, but only for the purpose of satisfying the execution debt. However this may be, the levy in this case was subordinate to the attachment levy, and contingent upon any surplus arising after the satisfaction of the attachments. The levy of the executions was merely constructive, and did not change the status of the property or its custody or control. Since, then, these levies were dependent, and made with the consent of the sheriff to reach a contingent surplus, there is no merit in the contention that the policies were thereby vitiated.

It is next insisted by appellants that there was in fact an increase of risk or hazard, and therefore the policies became void, notwithstanding the exception. It suffices to say the record fails to show there was any increase of the risk. The situation of the stock of goods after the levy was identical with that surrounding it prior to the levy. In the *Waldrat Case*, 186 N. Y. 875, the New York court, upon a

state of facts precisely like that in the case at bar, even to the removing of the insured from the store, and the locking up of the store, and the taking possession of the keys, by the sheriff, submitted to the jury the question whether, under the circumstances, the condition of the goods was more hazardous after the levy than before. The jury answered the question in the negative. And in an early case, decided by the Pennsylvania supreme court in 1841 (*Franklin F. Ins. Co. v. Findlay*, 6 Whart. 483, 37 Am. Dec. 430), that court found that the sheriff had levied the execution in his hands upon a stock of goods, had put the execution debtor out of doors, had fastened the shutters, locked the doors, and took and kept the keys. Says the court in the latter case: "From the evidence it appears . . . that the goods remained precisely in the same situation after the seizure that they were in before. . . . It is said that the sheriff . . . fastened down the windows, closed the window shutters, and locked the doors, . . . and having done this took and kept the keys. . . . The fire . . . happened in the night, long after the usual time of closing stores and ceasing to do business in them, indeed after all the citizens had gone to bed; so that the storehouses were really in the same situation at the time of the fire that they doubtless would and ought to have been had no seizure been made. . . . [The sheriff had the keys, and was away; but that] is immaterial, because it had nothing to do with producing the fire, and could not in the least degree prevent the goods from being destroyed by, or saved from, it; for the doors could have been forced open, had it been thought that it would have availed anything, in as short a time without the keys, as they could have been opened by the use of them. . . . There is not . . . ground, so far as the evidence goes, upon which any increase of risk can well be imagined."

Other questions of fact were disposed of orally, and the decrees of the chancellor affirmed.

VIRGINIA SUPREME COURT OF APPEALS.

James W. HARRISON *et al.*, by Next Friend,

v.

Robert TURNBULL, Exr., etc., of M. R. Walton, Deceased, *et al.*

(95 Va. 721.)

1. An infant is not prevented from asserting his rights by next friend against a decree settling an estate in which he is interested whenever he sees fit to do so by Code, § 3424, allowing him to show cause against such decree within six months after he becomes of age.
2. An infant can impeach a decree in a suit to which he was a party only upon a ground which would invalidate it in case of any other person, such as fraud, collusion, or error.
3. Unborn heirs of a person against

whose estate an action is brought to establish claims to which living heirs of the same class are made parties will be regarded as parties by representation, and will be bound by the decree rendered as effectually as if they had actually been parties to the action.

4. A bill to impeach a decree establishing claims against a decedent's estate and ordering the sale of real estate to pay them is fatally defective if the persons who purchased the land under the decrees are not made parties.
5. There is no error in dismissing a bill as to a defaulting party if the defense of the party who appeared went to the foundation of the right to recover upon the case stated.
6. A decree establishing the claims against a decedent's estate, and ordering sale of real estate to pay them, is a complete bar to an action against the executor for a devastavit, and against the claimant to compel a re-

NOTE.—For power of court to cut off the proprietary rights of persons not in case, see also *Kent v. Church of St. Michael* (N. Y.) 18 L. R. A. 331; *Loring* 41 L. R. A.

v. Hildreth (Mass.) 40 L. R. A. 127, and *Gavin v. Curtin* (Ill.) 40 L. R. A. 776.

turn of the property so long as it remains in force, when the action is brought by heirs of decedent who were parties to the former suit in person or by representation.

(March 31, 1896.)

APPEAL by complainants from a decree of the Circuit Court for Brunswick County in favor of defendants in an action brought to hold an executor liable for a devastavit, and to compel a return of property to the estate by one who had established a claim against it. *Affirmed.*

The facts are stated in the opinion.

Messrs. E. P. Buford and H. R. Pol-lard, for appellants:

The bill presents a case for equitable relief, and therefore the decree sustaining the demurrer is erroneous.

It clearly charges a devastavit as to the fictitious debt of \$2,282.68 established and enforced in favor of Sallie E. Harrison.

Neither at common law, nor particularly under the Virginia statute, Code 1887, § 2665, making real estate of decedent assets for the payment of debts, is a devastavit by an executor limited to waste of personality, but embraces any act or omission in violation of his duty by which personality or realty is subjected to unjust or illegal loss or charges.

3 Minor, Inst. pp. 583, 584, 635; Black, Law Dict. p. 363; 1 Story, Eq. Jur. (18) p. 548; chap. 9, § 531; 7 Am. & Eng. Enc. Law, p. 346; Adams, Eq. p. 254.

Independently of Code, § 2665, the will, by devising the property "after the payment of debts," and appointing the executor "to settle" the estate, charges the debts upon the land as well as upon the personality, and makes the land equitable assets in the hands of the executor for the payment of debts. The realty being thus "confided" to him by the will, he is liable for any devastavit thereof.

3 Minor, Inst. p. 635; 2 Matthew's Dig. 577, note 5, and cases cited.

As to personality it is not necessary that the executor had manual possession in order to charge him with a devastavit.

Nelson v. Cornwell, 11 Gratt. 747; *Chapman v. Shepherd*, 24 Gratt. 877; *Lacy v. Stamper*, 27 Gratt. 42; 8 Minor, Inst. p. 635.

Turnbull, as executor, was charged with the duty of protecting the rights of your petitioners. Therefore, in assuming the adverse position of attorney for creditors he transcended "the scope of his powers" (*Walker v. Grayson*, 86 Va. 337; *Arrington v. Arrington*, 116 N. C. 170), and is liable to your petitioners for all losses resulting therefrom.

Lingle v. Cook, 32 Gratt. 262; *Nelson v. Cornwell*, 11 Gratt. 724.

This is true, as a rule of law, without regard to whether or not the executor was guilty of fraud or other actual misconduct.

Halsey v. Monteiro, 92 Va. 581.

Turnbull should be made to account for the value of the personal estate alleged in the bill to be \$1,000, which should have been applied to the payment of the just debts outstanding against the estate of M. R. Wallton, and which would have been so applied if he had not so grossly misrepresented to the court the amount of such debts.

41 L. R. A.

Personality is primarily liable for the payment of debts.

8 Minor, Inst. pt. 1; *Elliott v. Carter*, 9 Gratt. 541; 2 Minor, Inst. 3d ed. p. 516.

And it is the executor's duty to protect the realty.

Beall v. Taylor, 2 Gratt. 532, 44 Am. Dec. 398; *Dandridge v. Minge*, 4 Rand. (Va.) 397.

Turnbull is liable also for the personal property, or the value thereof, because of his failure to take security therefor of the life tenant. *Hawthorne v. Beckwith*, 89 Va. 786.

It is questionable at least whether your petitioners have any recourse against the purchasers of the land, who may be protected as innocent purchasers.

Walker v. Page, 21 Gratt. 636; *Zirkle v. McOus*, 26 Gratt. 517; 10 Am. & Eng. Enc. Law, p. 694; *Durrett v. Davis*, 24 Gratt. 302.

Even if it be possible for your petitioners to eventually recover the land, a court of equity will not subject your petitioners, who are innocent, to the hardships and expense of such a course with its uncertain prospects.

Ruth v. Owens, 2 Rand. (Va.) 507; *Davis v. Newman*, 2 Rob. (Va.) 664, 40 Am. Dec. 764.

As to the debt of \$2,282.68 they are entitled to a decree also against Sallie E. Harrison, under their prayer for "general relief," and it was therefore error to dismiss their bill.

Beverley v. Brooke, 2 Leigh, 426; *Beall v. Silver*, 2 Rand. (Va.) 401; *Sands*, 2d ed. Suit in Equity, p. 29; *Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 358.

Turnbull should be required to refund the fees, commissions, and costs which were paid him out of the assets of the estate for services rendered creditors in fraud of the estate.

Gurnee v. Bausmer, 80 Va. 867; *Citizens' Nat. Bank v. Manoni*, 76 Va. 802.

Under the statute and by the former practice infants may show cause, not only within six months after attaining their majority, but during their minority also.

Sledge v. Boone, 57 Miss. 222; *Newland v. Gentry*, 18 B. Mon. 666; *Richmond v. Tayleur*, 1 P. Wms. 736; 10 Am. & Eng. Enc. Law, p. 696, notes; *Ralston v. Lahee*, 8 Iowa, 17, 74 Am. Dec. 291.

The bill clearly sets forth facts and circumstances which make a case of fraud, entitling the appellants to relief.

Story, Eq. Pl. § 426; *Keran v. Trice*, 75 Va. 690; *Meek v. Spracher*, 87 Va. 168.

Infants, like adults, may invoke this jurisdiction and seek such relief.

1 Dan. Ch. Pl. & Pr. p. 164; *McLemore v. Chicago, St. L. & N. O. R. Co.* 58 Miss. 514; *Ralston v. Lahee*, 8 Iowa, 17, 74 Am. Dec. 291.

It is a mistake to suppose that they are bound to wait until they have attained their majority before they can do so.

Newland v. Gentry, 18 B. Mon. 666; *Richmond v. Tayleur*, 1 P. Wms. 736; *Sledge v. Boone*, 57 Miss. 222.

The doctrine of *res judicata* is never applied to protect a fraudulent decree.

Smith v. Cuyler, 78 Ga. 654; *Cordova v. Hood*, 17 Wall. 1, 21 L. ed. 587; *Arrington v. Arrington*, 116 N. C. 170; *Walker v. Grayson*, 86 Va. 337; 2 Pom. Eq. Jur. § 910; *Weber v. Reid*, 11 How. 437, 13 L. ed. 761; *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed.

98; Wells, Res Adjudicata, § 499; *Pearce v. Olney*, 20 Conn. 544; *Wierich v. De Zoya*, 7 Ill. 885; *Kent v. Richards*, 3 Md. Ch. 392; *Smith v. Lowry*, 1 Johns. Ch. 820; *De Louis v. Meek*, 2 G. Greene, 55, 50 Am. Dec. 491; *Newland v. Gentry*, 18 B. Mon. 666; 10 Am. & Eng. Enc. Law, p. 692.

It is not necessary that there should have been any actual fraud in the transaction, but the rule which forbids it rests upon the broad principle of public policy which precludes persons occupying these fiduciary relations from representing conflicting interests that may tempt them to disregard duty and lead to injury on one side or the other.

Gooch v. Peebles, 105 N. C. 411; *Baker v. Humphrey*, 101 U. S. 502, 25 L. ed. 1008; *Arrington v. Arrington*, 116 N. C. 170; *Spinks v. Davis*, 32 Miss. 152; *Beall v. Taylor*, 2 Gratt. 582, 44 Am. Dec. 398; *Dawingerfeld v. Smith*, 88 Va. 81; *Elliott v. George*, 23 Gratt. 738; 1 Dan. Ch. Pl. & Pr. p. 169, and notes; *Dandridge v. Minge*, 4 Rand (Va.) 397.

The bill clearly sets forth conduct and circumstances which entitled the appellants to the relief prayed on the ground that the appellee, Turnbull, was guilty of a devastavit of the estate of his testatrix, Mary R. Wallton.

2 Lomax, Exrs. 898; *Hargrave v. Tindal*, 1 Bro. Ch. 136, note; *Newton v. Bennet*, 1 Bro. Ch. 185; *Batson v. Lindegreen*, 2 Bro. Ch. 94; *Pope v. Gwynn*, 8 Ves. Jr. 28, note; *Bailey v. Elkins*, 7 Ves. Jr. 819; *Shiphard v. Lutwidge*, 8 Ves. Jr. 26; 2 Rob. Pr. old ed. 83.

The administrator is bound to make as good defense as he can or ought to make, and if he fails in his duty, he will be responsible upon his bond for the consequences.

Black's Law Dict. p. 363; 3 Wms. Exrs. 360; *Reynolds v. Zink*, 27 Gratt. 29; *Dees v. Freeman*, 87 Ga. 588; *Anderson v. Northrop*, 30 Fla. 612; *Re Saunders*, 4 Misc. 23.

The facts coupled with the executor's knowledge, charged in the bill, constituted a sufficient allegation of fraud and collusion.

Keran v. Trice, 75 Va. 698.

For fraud and collusion adults and infants, and for error of law or other cause infants, may proceed by original bill.

Richmond v. Tayleur, 1 P. Wms. 736; *Anderson v. Woodford*, 8 Leigh. 828.

The allegations of the bill constituted a direct attack upon the former decree, and if in the opinion of the court it was necessary to set aside the former decrees in order to grant the relief prayed, the court should set aside the former decrees under the prayer for "general relief."

Adams, Eq. pp. 308, 309; 1 Barton, Ch. Pr. & Pl. 265, 266.

And especially since the plaintiffs were infants whose rights were peculiarly within the custody of courts of equity.

If a special prayer that the former decrees be set aside were necessary, the trial court should have allowed an amendment, and not have dismissed the bill absolutely.

1 Barton, Ch. Pr. & Pl. 265, 266.

Mr. George Mason, for appellees:

Every matter about which complaint is now made was a subject of litigation in the former suit, and was therein brought to the attention of the court, and after all of them were adjudicated and settled a final decree was entered and the suit removed from the docket. This being the case those matters are *res judicata*.

Diamond State Iron Co. v. Alex. K. Rarig & Co. 93 Va. 595.

These matters being *res judicata*, they cannot be again inquired into and made a subject of litigation in a collateral way, as is attempted in this case.

2 Barton, Ch. Pr. & Pl. 787, 788, and cases cited in note.

It will not be contended that the bill in this case is a bill of review. It conforms to none of the special requirements of such a bill.

Diamond State Iron Co. v. Alex. K. Rarig & Co. 93 Va. 595.

It is not an original bill in the nature of a bill of review.

2 Barton, Ch. Pr. & Pl. 787, 788, and cases cited in note.

It makes no difference that the appellants were infants, for an infant is as much bound by a decree as an adult, and can only get rid of its operation in the same way and for the same causes that will avail an adult.

Zirkle v. McCue, 26 Gratt. 530; *Pennybacker v. Switzer*, 75 Va. 688.

Fraud or collusion in the decree must first be inquired into before the propriety of the decree can be investigated.

Keran v. Trice, 75 Va. 698.

None of the facts charged in relation to payments are brought home to the knowledge of the appellee, R. Turnbull.

There is a conspicuous absence of the necessary direct charge of such knowledge.

1 Barton, Ch. Pr. & Pl. 427; 8 Am. & Eng. Enc. Law, p. 653, note 3; Story, Eq. Pl. § 452, note a.

In no event can the executor be held liable for the personal estate. It did not come into his hands and the will did not intend that it should.

Hawthorne v. Beckwith, 89 Va. 786.

Buchanan, J., delivered the opinion of the court:

This suit was brought by the appellants, the children of Sallie E. Harrison, against their mother and Robert Turnbull, in his own right and as executor of M. R. Wallton, deceased, for the purpose, as stated by the appellants in their petition for appeal, of charging the executor with the devastavit of the estate of his testatrix, occasioned by his misconduct in the case of Harrison and wife against Wallton's executor and others.

The suit of Harrison and wife was instituted by the father and mother of the appellants against the appellee Turnbull, as executor of Mrs. Wallton, and three of the appellants, all that were then in being, to ascertain the indebtedness of Mrs. Wallton's estate, and to make sale of so much of the real estate left by her as might be necessary to pay the debts.

A history of the proceedings in that case, and the misconduct of the executor relied on to show that he was guilty of a devastavit, are set out in the bill in this case, and with it are filed copies of portions of the record in that case, viz., the bill and its exhibits, the answer of the guardian *ad litem*, the decree of the court directing one of its commissioners to take an ac-

count of the debts of the estate and their priorities, and to report what portion of the real estate could be sold to pay off the debts, extracts from that commissioner's report, the decree confirming it, and directing the sale of the land, the report of sale made by the commissioner to sell, the decree to sell enough of the personal estate to pay the residue of the debts remaining unpaid after exhausting the proceeds of the sale of the land upon certain conditions, the report of the commissioner showing the payment of the debts of the estate and the completion of his duties as commissioner, and the final decree approving that report, and striking the case from the docket.

The appellee Turnbull, in his own right and as executor, demurred to the bill, and upon a hearing of the case upon the demurrer the court dismissed the bill without prejudice to the rights of the appellants, under § 3424 of the Code.

From that decree this appeal was taken.

If, as the appellants contend, the court sustained the demurrer to their bill because they could not bring suit to assert their rights until they became of age, it erred. Section 3424 of the Code, allowing an infant, within six months after he becomes of age, to show cause against a decree or order in certain cases, does not prevent him from asserting his rights while an infant, by a next friend, as soon as he sees fit to do so. *Richmond v. Tayleur*, 1 P. Wms. 738-737; 1 Dan. Ch. Pl. & Pr. 178; Judge Carr in *Tennent v. Patton*, 6 Leigh, at page 208.

The grounds relied on here by the appellee to sustain his demurrer are that the bill and exhibits in this case show that all matters about which complaint is now made were adjudicated and finally settled in the case of Harrison and wife against Wallton's executor, etc., and that these matters being *res judicata*, they cannot be inquired into, and made the subject of litigation in a collateral proceeding, as is attempted in this case.

The injuries complained of, and for which the appellants seek compensation, resulted from, as is alleged, the gross negligence and misconduct of the executor in allowing the claims of Mrs. Harrison to be established as a debt against the estate of her mother, when in fact there was nothing due her, and from injuries arising from the subjection of the real estate primarily to the payment of that and other debts due from the estate, instead of first subjecting the personal estate to their payment. The bill and exhibits in this case show that both the validity and amount of Mrs. Harrison's debt, and the propriety of subjecting the assets of the estate to the payment of the debts in the manner in which they were subjected, were necessarily adjudicated and settled in that case.

There can be no recovery in this case against the executor without showing that the debt asserted by and adjudged to be due to Mrs. Harrison in that case was not due her, in whole or in part, or without showing that the manner in which the real estate was decreed to be and was subjected in that case was erroneous. The proceedings in that case not only bar a second suit between the same parties or their privies upon the same claim or demand, but they also bar a suit between the same parties or their

privies upon a different cause of action if it appears that the issue presented in the latter suit was involved and determined in the former suit. *Shumate v. Fauquier County Supers*, 84 Va. 574; *Bigelow v. Winsor*, 1 Gray, 299; 1 Freeman, Judgm. §§ 253-258. See also *Miller v. Wills*, 95 Va. 387; *Miles v. Caldwell*, 2 Wall. 35, 17 L. ed. 755; *Cromwell v. Sac County*, 94 U. S. 851, 24 L. ed. 195; *Van Fleet, Collateral Attack*, § 17.

Such a judgment or decree is conclusive upon the parties to it until reversed upon appeal, or until set aside or annulled by some proceeding instituted for that purpose.

And it is well settled with us that an infant, as a general rule, is as much bound by a decree against him as a person of full age. The law recognizes no distinction between a decree against an infant and a decree against an adult. And therefore it is that an infant can impeach only upon the grounds which would invalidate it in the case of another person, such as fraud, collusion, or error. *Zirkle v. McCue*, 26 Gratt. 517, 518; *Pennybacker v. Switzer*, 75 Va. at p. 671; 1 Minor, Inst., at pp. 507, 508.

It is insisted that only those appellants who were in being and were parties to that suit are bound by the proceedings in that case.

Mrs. Wallton had devised and bequeathed all her property, both real and personal, after the payment of her debts, to her daughter, Mrs. Harrison, for life, and at her death to her children then surviving and the heirs of such of them as might be dead. The children of Mrs. Harrison in being at the time the suit of Harrison and wife against Wallton's executor, etc., was brought were made parties defendant, and answered the bill by their guardian *ad litem*.

The general rule certainly is that no person is bound by a judgment or decree except those who are parties or standing in privity with others who were parties. But there are exceptions to the rule, of equal authority with the rule itself. *Baylor v. Dejarrette*, 18 Gratt. at page 164. It would certainly be unreasonable and unjust that a party having a charge upon an estate affecting the whole fee should be delayed or embarrassed in enforcing his claim because of limitations by way of remainder to persons whom it might be impossible or improper to make parties to the cause. To obviate this difficulty, the doctrine of virtual representation has been introduced by which certain parties before the court are regarded as representing those coming after them with contingent interests. *Baylor v. Dejarrette*, 13 Gratt. 166.

It was said by Lord Redesdale in *Giffard v. Hort*, 1 Sch. & Lef. 386, 407, 403, that where all the parties are brought before the court that can be brought before it, and the court acts upon the property according to the rights that appear, without fraud, its decision must, of necessity, be final and conclusive. And this statement of the law is cited with approval by Judge Lee in *Baylor v. Dejarrette*, 18 Gratt. 164, and by Judge Moncre in *Faulkner v. Davis*, 18 Gratt. 651, 690, 98 Am. Dec. 698, where the question is fully discussed.

The appellants who were not in being when the suit of Harrison and wife against Wallton's executor, etc., was instituted, and whom

it was impossible to make parties to that suit in person, must be regarded as parties to it by representation, and are as effectually bound by the decrees rendered in that cause as if they had been in being, and made parties to it in person.

The counsel of the appellants also insist that if it be necessary to set aside and annul any of the decrees in the case of Harrison and wife against Wallton's executor, etc., in order that the executor may be held responsible for the devastavit charged, the averments of the bill in this case and the prayer for general relief are sufficient (treating it as an original bill in the nature of a bill of review) to enable the court to set aside and annul the decrees in that case which would bar a recovery in this.

In all suits instituted for the purpose of impeaching transactions on the ground of fraud, it is essential that the nature of the case should be distinctly and accurately stated. It must be shown in what the fraud consists, and in what manner it has been effected. Where it is sought to set aside or annul a regular judgment or decree upon the ground that it was obtained by fraud practised upon a party or upon the court during the trial, or in prosecuting the suit, or in obtaining the judgment or decree, it is necessary, it is said, that the bill should state a case which shows actual fraud. *Kerr, Fraud & Mistake*, p. 553; *Patch v. Ward*, L. R. 8 Ch. 208. See also *Milford & T. Pl. & Pr.* pp. 190, 191; *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; and that the suit should be brought for the express purpose of impeaching the decree, otherwise it will be regarded as a collateral attack (2 *Freeman, Judgm.* 4th ed. § 336; 13 *Am. & Eng. Enc. Law*, p. 147j; *Milford & T. Pl. & Pr.* pp. 190, 191).

It is clear that this bill was not filed for the express purpose of impeaching the decrees rendered in the former case.

Neither do the statements of the bill make a case of actual fraud. This is not contended. The claim is that it does show a case of constructive fraud, and that this is sufficient.

Whether it is essential, in order that a judgment or decree may be set aside and annulled for fraud, that the suit shall be brought expressly for that purpose, and that the bill shall state a case of actual fraud, it is unnecessary to decide or express any opinion upon in this case, as the bill is fatally defective as a bill for that purpose in another respect.

None of the purchasers of the lands sold in that case, or those who held under them, are made parties to this suit, except Mrs. Harrison. The persons whose right would or might be affected by setting aside the decrees complained of were necessary parties to any suit brought for that purpose, or in which such relief could be granted. *Story, Eq. Pl. § 420; Harwood v. Cincinnati & C. R. Co.* 17 Wall. 78, 21 L. ed. 558; 3 *Enc. Pl. & Pr.* pp. 620, etc.

We are of opinion that the court did not err in sustaining the demurrer of the executor to the bill, and dismissing the cause as to him.

Neither did it err in dismissing it as to Mrs. Harrison, although she failed to appear and make defense. The defense of the executor, her codefendant, was not personal to him. It went to the foundation of the appellants' right to recover upon the case stated.

The bill did not make a case entitling the appellants to relief. It showed that the validity of Mrs. Harrison's debt had been established in the case of Harrison and wife against Wallton's executor, etc., to which suit they were all parties. The court having jurisdiction both of the subject and the parties, the decrees in that case were a complete bar to a recovery against Mrs. Harrison as well as the executor, as long as they remained in force. See *Cartigne v. Raymond*, 4 Leigh, 579, 580; *Terry v. Fontaine*, 88 Va. 451; *Aiken v. Connelley* (Va.) 24 S. E. 909, 910.

The decree complained of must be affirmed.

Cardwell and Riely, JJ., absent.

MISSISSIPPI SUPREME COURT.

Hyman HILLER *et al.*, *Appts.*,

v.
I. N. ELLIS *et al.*

(72 Miss. 701.)

1. The device of an agreement to pay interest on a loan from the time appli-

Norm.—Effect of preferring an usurious debt in an assignment for creditors.

- I. General doctrine stated.
- II. Limitations of this note.
- III. Debt of assignment rendered void.
- IV. Preference of actual debt sustained, but usury rejected.
- V. Preference of usurious debt sustained generally.
- VI. Who may, and who may not, urge the usurious character of the debt preferred.

1. General doctrine stated.

The common law, both in England and America, permits a debtor, whether in failing circumstances or not, to make, in the application

tion is made for it, when the loan is not consummated until some time afterwards, cannot be resorted to for the purpose of preventing the reservation of interest in advance at the highest legal rate from the date to the maturity of the notes from being usurious.

2. An assignment for benefit of creditors will be annulled by the preference

of his property and effects to the payment of his debts, the preference of one creditor over the others. He may likewise create a trust for the payment of one creditor in preference to the others. The private motives of the debtor cannot annul the preference so long as nothing improper is resorted to; but any acts savoring of fraud or collusion inuring to the benefit of the debtor or to the illegal advantage of the preferred creditor, as by fictitious increase or creation of the debt preferred, will generally be held void for the reason that "the wilful, deliberate introduction of fictitious debts, or the intentional exaggeration of the amount of real debts, in which debtor and creditor participate,

therein of an usurious debt, where there is a statutory right of action to recover back the entire interest when usury has been paid.

3. **The release by creditors of personal claims against the assignor** in consideration of a preference in their favor in an assignment for benefit of creditors does not entitle the assignee to hold the assigned property as a purchaser for value for the satisfaction of such claims if he was a party to a fraudulent preference which annulled the assignment.

4. **The release by a creditor of all personal claim against an assignor for creditors** who makes a preference in favor of such creditor will not make the creditor a purchaser of the assignment if the assignor was hopelessly insolvent and the release was executed to uphold the assignment, and not to procure either it or the preference.

5. **One who refers to a statement by a commercial agency for his standing** for the purpose of procuring credit is guilty of fraud which will entitle the seller to rescind if the condition there shown is infinitely better than in truth it is, although he did not give the information to the agency.

6. **A sale made on the faith of a report furnished by a commercial agency** cannot be rescinded for fraud if it is not shown that the buyer ever made any statement of his standing to the agency, or referred the seller to such report.

(February 13, 1896.)

A PPEAL by cross petitioners from a decree of the Chancery Court for Copiah County setting aside a general assignment by Charles Hiller for the benefit of his creditors. *Reversed in part. Affirmed in part.*

The facts are stated in the opinion.

is feigning a consideration, and a fraud, which will vitiate the assignment." (This rule is quoted from *Perry Ins. & T. Co. v. Foster*, 58 Ala. 502, 518, 29 Am. Rep. 779.) The rule is sometimes applied to the entire deed of assignment, sometimes only to the preferred creditor on the holding that an assignment to creditors of unconnected debts is the same as several deeds of assignment, and may therefore be void as to one and not void as to all, and sometimes only to the fraudulent part.

The rule permitting a preference, though well established, has not been generally favored, especially when the debtor making the preference is in failing circumstances. Many statutes expressly prohibit preferences; some by making the deed of assignment void, some by making the preference void and applying it to the benefit of all the creditors, and some by providing that a preference or security made or given within a stated time before the making of a deed of assignment for the benefit of creditors shall inure to the benefit of all the creditors.

In the states not having prohibitory statutes the common-law rule still generally obtains, and in some of the states having prohibitory statutes the prohibition is only enforced when a statutory assignment is made for the benefit of creditors, and not when a common-law assignment is made in such state.

II. Limitations of this note.

The provision for the payment of an usurious debt by a deed of assignment creating a trust may be in fraud of creditors, and may be void because of an intent to cheat, hinder, and de-

Mr. J. S. Sexton, for appellants:

The assignment was fraudulent in fact. *Selleck v. Pollock*, 69 Miss. 870.

The assignment should be set aside *in toto*, because the debt preferred to the Merchants' & Planters' Bank is usurious.

H. Wetter Mfg. Co. v. Dinkins, 70 Miss. 885.

The assignment cannot be upheld as to the bank and Mrs. Klotz, on the ground that these parties released the assignor from personal liability. This was a mere attempt to circumvent the law and get the benefit of the principle announced in—

Anderson v. Lachs, 59 Miss. 111.

Mr. R. P. Willing, Jr., for appellants
Marshall Field & Co. and J. Kyle & Co.:

The goods sold by these appellants were obtained through Hiller's fraud, and they had the right to rescind the sales.

Klein v. Rector, 57 Miss. 538.

The assignee is not a purchaser for value, and the goods may be recovered from him.

Frank v. Robinson, 65 Miss. 162.

The false representations need not be made directly to the seller. It is sufficient if they are made to a mercantile agency through which they are communicated.

15 Am. & Eng. Enc. Law, pp. 297, 298, and authorities cited; *Eaton, C. & B. Co. v. Avery*, 88 N. Y. 81, 88 Am. Rep. 889.

Messrs. R. N. Miller and George S. Dodds, for appellees:

The creditors seeking rescission cannot prevail: (1) Because there was no fraud in the purchase of the goods; (2) because, admitting the fraud, the assignee is a bona fide purchaser. If Hiller's fraud were fully admitted, it could in no manner affect the rights of the assignee, because, at the time of the execution of the as-

lay, on the same principle that a fictitious debt, or a debt fictitiously increased in amount, is a fraud upon creditors; but only cases in which the increase is by usury will be considered herein.

Likewise, deeds or deeds of trust based on an usurious consideration may be void in whole or in part upon the same general principle, though they are not deeds of assignment for the benefit of creditors generally. Such cases may be relevant, but they do not come within the scope of this note.

The note will therefore not include any of those analogous cases in which conveyances other than deeds of assignment for the benefit of creditors are rendered void in whole or in part by usury, nor any of those cases in which deeds of assignment for the benefit of creditors are rendered void because of fraudulent increase of the debt by other means than usury.

Claims asserted in statutory insolvency, or bankruptcy proceedings are distinguishable from those provided for by an express and voluntary trust in an assignment for creditors, and are therefore not included.

III. Deed of assignment rendered void.

It is held in *HILLER v. ELLIS* that making a preference of an usurious debt in a deed of assignment for the benefit of creditors will cause the deed to be declared void when attacked by creditors on the ground of fraud. The reasoning upon which this decision is based is that the assignee, in paying the sum directed, pays it by virtue of the deed by the force of which he holds, which deed neither he nor the court can

signment, the bank and Mrs. Klotz each released Hiller from personal liability in consideration of being preferred. This makes them bona fide purchasers.

Craft v. Bloom, 59 Miss. 69, 43 Am. Rep. 351; *Anderson v. Lachs*, 59 Miss. 111; *Soule v. Shotwell*, 52 Miss. 236.

Cooper, Ch. J., delivered the opinion of the court:

On the 10th day of October, 1893, Charles Hiller, an insolvent merchant, made a general assignment of his property to the appellee Ellis, for the benefit of his creditors. Preferences were given to Messrs. Miller & Dodd, the attorneys by whom the instrument was prepared, for their fees, and also, in the order named, to F. Dillard for the sum of \$250 and interest, to the Merchants' & Planters' Bank of Hazlehurst for the sum of \$5,000 and interest, to Mrs. Hannah Klotz for the sum of \$5,500, to Hyman, Hiller, & Co. \$9,100, and after the payment of said sums, the assignee was directed to distribute any remaining funds to all other creditors *pro rata*. The assignee filed his petition in the chancery court of Copiah county as required by law, and gave bonds as receiver. Many creditors of Hiller, soon after the execution of the assignment, exhibited cross-petitions against the assignee, seeking to vacate the assignment as fraudulent and void on the grounds that it was made for the purpose and with the intent of defrauding creditors; that some of the preferred debts were simulated; that the debt to the Merchants' & Planters' Bank was composed in part of usury, and upon other grounds not necessary to be stated. The firm of Marshall Field & Co., Chicago, exhibited their cross-petition, charging that

add to or subtract from, and, as it is not susceptible of complete execution without depriving creditors of their legal rights, it is rendered void because of the usury. The law requires that in assignments by insolvents, and especially in preferential assignments, the utmost good faith to creditors must be observed; and further, as the insolvent debtor claims to act under the law, the law will try his action by strict rules, and confine him to travel along a narrow path, and will lend him no assisting hand if he departs therefrom.

Where, however, in the same state the deed of assignment expressly directs the assignee, though in obscure terms, to pay the amount really due, purged of usury, the fact that the amount stated to be due in the deed of assignment is usurious because of mistaken and usurious calculations will not invalidate the deed, but the preference named will stand for the sum which is legally due. *H. Wetter Mfg. Co. v. Dinkins*, 70 Miss. 835.

It is said in *Selleck v. Pollock*, 69 Miss. 870, which is a case not relevant except as stating the doctrine of the courts of the state in the construction of assignments, that, like the moral law in its entirety, "an assignment, however meritorious in the main, however free from censure in its chief provisions, however perfect except in some small particular, is condemned for that."

IV. Preference of actual debt sustained, but usury rejected.

The case of *Pratt v. Adams*, 7 Paige, 615, is often cited as authority in the general con-

among the assigned property was a lot of goods bought from them by the assignor, and for which the purchase price had not been paid; that Hiller procured the sale of said goods to be made to him on credit, by falsely and fraudulently representing himself to be solvent, and the owner of a large amount of property, and by falsely and fraudulently understating and concealing the amount of his liabilities; that the assigned goods were in the hands of the assignee, and capable of identification. They prayed that the purchase of said goods by Hiller be declared fraudulent, and the goods returned to them. A like cross petition was exhibited by the firm of Kyle & Co. to recover certain goods they had sold to Hiller. It was admitted by the assignee that the goods mentioned in the cross-petitions of Marshall Field & Co. and Kyle & Co. came to his hands, and were identified by the claimants; but the fraudulent purposes of Hiller were denied. Under agreement they were sold, and the proceeds yet remain in the hands of the assignee, subject of the order of the court. On final hearing the court found all the issues joined on the several cross-petitions in favor of the assignee, and dismissed the petitions, and from the decrees the cross-petitioners appeal.

In considering the questions presented for decision it is only necessary to state such facts as are relevant to the points on which the cause turns. The record is voluminous, and contains much evidence not necessary to be stated in the view we take of the cause. One of the preferred debts—that due to the Merchants' & Planters' Bank—is evidenced by five promissory notes, each for \$1,000, dated at different times, and which, when executed, the bank discounted at the rate of 10 per cent per

struction of usury laws, and it is directly in point in this connection. It holds that where the assignor has expressly directed the payment of a debt founded upon an usurious consideration the usurer is entitled to be paid all that is fairly due to him, although he could not have recovered the amount in a suit at law against the assignor himself; but that he will not be entitled to any more than is honestly due to him, for the reason that the court will not lend its aid, either directly or indirectly, to enable the usurer to obtain payment of an usurious premium, the receipt of which would subject him to a penalty under the laws against usury. The court holds further, however, that a general provision for the payment of debts will not include debts founded upon an usurious consideration. To entitle a usurer to claim under the deed of assignment there must be a clear indication in it that the debts founded upon an usurious consideration should be paid out of the fund, as well as those which are legally valid, and then only such amount will be paid as is honestly due.

In respect to the payment of the sum actually due as freed from the usurious interest, the above case of *Pratt v. Adams* is followed, with doubt as to its correctness, by *Green v. Morse*, 4 Barb. 332. The court says the distinction as to the excess of interest may perhaps be supported on the ground that the bill is quasi a bill for specific performance, and that the court may refuse to enforce an unconscionable agreement or trust. See further, *infra*, VI.

In the case of *Peyser v. Myers*, 135 N. Y. 599, the question whether or not an assignment for the benefit of creditors will be subject to an

annum, that is, retained the interest as prepayment thereof at the full legal rate. Mr. Ellis, the cashier of the bank, and who is the assignee in the assignment, gives this explanation of the circumstances of the negotiation of the loan by Hiller, and the execution and discount of the notes: Some time in January or February Hiller applied to the bank, "and stated that he wanted to borrow four or five thousand dollars, and wanted to know when he could get it, and what security would be needed. I told him that he could get it. He said, however, that he would not want it until later in the year, and I told him, to be sure of getting it, he would have to pay interest from that time. He stated the time he would want it, which was about the 1st of March, I think. We agreed upon the amount of security he was to give. I do not remember the amount of interest he was to pay. I do remember having told him that we could not hold the money for him all that time and not charge him interest for it, and he agreed to pay interest at whatever rate was required. I think this was in January or February, and I do not think he had any list of securities with him. The understanding was that he was to get up his collaterals, and also give Mrs. Klotz as security. There was no security furnished at that time, but the collaterals which he agreed to give were such as are usually given in such

cases. I would have been at liberty after that to decline the loan, unless satisfactory security had been furnished. . . . There was no written contract entered into between the bank and Hiller with reference to the interest he was to pay, when he first approached the bank to borrow money. I don't remember that the rate of interest that he agreed to pay from that date was mentioned, though I suppose, of course, it was; and I do not think it could have been less than 10 per cent. . . . I did not lay aside any specific money at that time in separate packages to save for Hiller, but I promised to let him have it. In making our arrangements we loan so much money, and no more, and we have to know what we are going to do with it. . . . I made the discounts on the notes with a view of charging him and covering the interest from the time I promised to let him have the money. Mrs. Klotz was in Texas, and we had to send the notes over there for her signature." These facts, stated by the officer of the bank by whom the money was negotiated for by Hiller, are in effect agreed to by Hiller, who was examined as a witness in the cause, and they fixed beyond doubt the usurious nature of the debt. As a matter of fact, interest was not charged on the amount Hiller applied to borrow from the date of application, of which date no memorial was made, and which neither of the parties can

attack for fraud on account of a preferred debt on which too great an amount of interest is calculated by mere mistake and without dishonest intentions, was not decided, but it was held that where such debt had been paid, and the excessive interest refunded, the creditor could retain the amount actually due as against judgment creditors of the assignor who brought an action against him for the money.

But such judgment creditors can maintain an action against the preferred creditor in such a case for the excessive interest, if the assignment has been set aside for fraud, notwithstanding a judgment by default had been obtained by the preferred creditor. The preference, when the assignment was made with intent to defraud other creditors, is "no more than a gift" of the excessive interest. *Peyser v. Myers*, 56 Hun, 175.

In Mississippi usury renders the entire interest uncollectible when opposed by the debtor, but it is held that the assignor, by directing the payment of the sum actually due, makes a valid preference in a valid deed of assignment. If, then, such a direction can be gathered, even from obscure terms in the deed of assignment, the amount really due on such usurious contract should be paid preferentially as directed in the deed. *H. Wetter Mfg. Co. v. Dinkins*, 70 Miss. 835.

It may be added here, although the case of receiverships is not here considered, that a similar doctrine has been laid down in a receivership case, to the effect that one creditor can suggest usury in the claim of another where a fund of an insolvent debtor is to be distributed and compel the excessive interest to be written off. *Brooks v. Todd*, 79 Ga. 692.

V. Preference of usurious debt sustained generally.

An attempt to avoid the deed of assignment on the ground that the usury in the debt preferred rendered the assignment void for usury
41 L. R. A.

was unsuccessful in *Murray v. Judson*, 9 N. Y. 78, 59 Am. Dec. 516.

In that case, the assignor, by his deed of assignment, had preferred a judgment which another creditor in a proceeding in the nature of a creditor's bill alleged was usurious, and prayed that so much thereof as would satisfy the same might be applied to the plaintiff's debt. It was proved on the trial that there was usury to the extent of \$50. The trial court dismissed the complaint on the ground that the plaintiff could not avoid the judgment confessed to the defendant because of usury. This judgment was affirmed at a general term of the supreme court, and is affirmed by the court of appeals. The reasoning of the court was that the defense of usury was personal to the defendant, and having been waived by him and the debt recognized by his deed of assignment, it could not be attacked by another creditor. Justice Gardiner called attention to the fact that the assignment was not a contract with the holder of a judgment, nor a mere security for that debt, but was the setting apart of the property for the payment of a specified demand—the creation of a trust with directions to the trustee how to execute it; and that the trust, when created, was irrevocable. He said: "We are not asked to determine whether a provision for a usurious debt may not, in certain cases, be evidence, more or less cogent, of a fraudulent intent on the part of the debtor, but whether the law will permit a trust for that person, to any extent under any circumstances." Justice Willard called attention to the fact that the plaintiff in the proceeding in the nature of a creditor's bill was a junior judgment creditor of the preferred judgment creditor, and did not stand in legal privity with him, so as to enable him to avoid such prior usurious judgment.

Upon the theory that although the usurer may not enforce an usurious contract, yet the debtor on such contract may make voluntary payment of the amount due thereon and thereby perform it, and that he may also create a trust for the performance of such contract,

fix, except approximately. The bank did not then lend Hiller any amount, and no contract which obligated it so to do was entered into. The bank was not bound to lend, nor Hiller to borrow, any specific sum, for in truth no specified sum was applied for; Hiller stating only that he would need four or five thousand dollars. When and as the money was borrowed no calculation of interest on the money from the date of the application to the dates of the respective notes was made, nor any amount reserved or included in the notes therefor. What was done was to reserve from the money loaned the full legal interest for the time intervening between the date and maturity of each note, and this was usury. *Commercial Bank v. Nolan*, 7 How. (Miss.) 508; *Hyde v. Finley*, 26 Miss. 468; *Folkinghorne v. Hendricks*, 61 Miss. 386. Our statutes against usury would go for nothing if so simple a device as charging interest on a promise to lend money, and carrying such interest in addition to full legal interest into the note when the money is loaned, could be successfully resorted to. Because of the usury thus reserved in the notes to the bank, all interest thereon was forfeited, and might, if paid, be recovered back by suit at law. Code, § 2348.

What effect does the fact that this usurious interest was secured to be paid and preferred by the assignor have upon the deed of assign-

ment? Is the assignment thereby annulled, or is the consequence only that the assignee shall withhold the payment of the forfeited interest? In *H. Wetter Mfg. Co. v. Dinkins*, 70 Miss. 835 and 839, the assignor preferred a debt as to which usurious interest had been reserved, and attempted to fix the amount to be paid as that of the principal and legal interest, and this we held he might lawfully do. But by error in calculation \$10 in excess of legal interest was stated as the sum due. The assignor had, however, by the terms of the assignment, provided that of the debts stated to be due in the instrument the assignee should only pay the amounts really found to be due, and this was held to preserve the assignment. There is great conflict of authority as to what effect the fact that a simulated, usurious, or excessive debt is provided for or preferred will have upon the assignment. In some of the states, by statute or decision, the assignee is treated as a purchaser for value; in others the courts separate the valid from the invalid debts, and uphold the assignment as to the valid debts it secures; in others this will be done if the invalid debt does not rest upon an unlawful, as distinguished from an insufficient, consideration. We need not go into an examination of these decisions. They are noted and discussed in *Marks v. Bradley*, 99 Miss. 1. Throughout all our decisions there runs the controlling

which trust will be valid and may be carried into effect notwithstanding the defense existing against the original contract, it was held in *Chapin v. Thompson*, 89 N. Y. 271, that where a deed of assignment for the benefit of creditors made provision for the payment of an usurious bond and mortgage, the trust thereby created was valid for the reason that "the result of establishing a trust was to convert the creditor into a *cestui que trust*, and give him rights against a trust fund, which, as a simple contract creditor, he did not possess, and which did not belong to that relation—rights not to be enforced against the debtor, but the trust property, and adhering to that property until the debt is satisfied, or the property applied upon it according to the terms of the trusts; and so long as any debt named by the creditor of the trust remains unpaid, no part of the proceeds of that property can be applied, except to its payment, without a plain violation of the trust declared by the assignment." It was therefore held that a judgment denying relief against the mortgagor should not affect the claim of the holder of the bond and mortgage under the assignment.

Re Thompson, 30 Hun, 198, follows the case of *Chapin v. Thompson*, 89 N. Y. 271, and holds that the debtor, by scheduling an usurious bond and mortgage in compliance with the law, within the time allowed after making an assignment for creditors, thereby indicates his recognition of the validity of such mortgage, and causes it to be enforceable against the property in the hands of the assignee.

The court of common pleas of the city and county of New York, in 1882, upon the authority of *Chapin v. Thompson*, 89 N. Y. 270, held it to be a settled principle that a preferred debt must be paid by the assignee, even though it be usurious. *Re Brown*, 10 Daly, 115.

In *Denn v. Dodds*, 1 Johns. Cas. 158, an assignment in trust to pay debts, some of which were usurious, was involved, and it was held to be "an absolute conveyance upon trusts," and the court said: "An act of this nature

cannot be rescinded on the ground of usury."

The fact that the deed of assignment is irrevocable will not, however, remove the taint of usury from the debt preferred, and it may be susceptible to an attack by a proper party.

VI. Who may, and who may not, urge the usurious character of the debt preferred.

As to who may interpose the defense of usury generally, see notes to *Cheney v. Dunlap* (Neb.) 5 L. R. A. 465, and *Banks v. Flint* (Ark.) 10 L. R. A. 459; also note to *Pratt v. Adams*, 7 Paige, 615, 4 L. ed. 300.

Attention is called to the distinction regarding the powers and duties of the assignee to urge the usurious character of the debt in the case of a general provision in an assignment providing for the payment of debts, and in case of an assignment particularly directing the payment of a preferred debt. In the former class of cases debts founded upon an usurious consideration are not to be paid, while in the latter class of cases the debt must be paid. This principle is sustained by *Pratt v. Adams*, 7 Paige, 615, 642, and *Green v. Morse*, 4 Barb. 332, 342.

In the case of *Pratt v. Adams*, 7 Paige, 615, and hereinbefore cited, *supra*, IV., it is further held that if the deed of assignment was in itself void because of providing for the payment of the usurious debt (and the court did not decide whether it was or was not), yet the other creditors who claim under such deed were estopped from questioning its validity, for, by claiming under it, they ratified it; and that if it were void they could not themselves enforce the payment of their own claims for which it provided. Chancellor Walworth in rendering the decision said (p. 641): "In the case of a voluntary assignment, where the assignor creates his own trusts, a creditor who comes in to claim a share of the fund under it must be content to take such share of it as the assignor intended to give him; and cannot claim that which was intended to be given to the assignees in trust for others. A creditor of the assignor,

rule that in assignments by insolvents, and especially in preferential assignments, the utmost good faith to creditors must be observed, that the insolvent, claiming to act under the law, which, notwithstanding his insolvency, recognizes his dominion over his property as owner, must keep himself within the law, which not only recognizes, but controls, his conduct; that, while the law will not obstruct the exercise of the legal right to prefer one creditor over others of equal merit, it will try his action by strict rules, confine him to travel along a narrow path, and lend him no assisting hand if he departs therefrom. The assignment as written is the law for the administration of the insolvent's estate. Neither the assignee nor the courts may add to nor subtract therefrom, and as written it must be susceptible of complete execution without depriving creditors of their legal rights, or it may not stand against their attack. *Richardson v. Stapleton*, 60 Miss. 97; *Marks v. Bradley*, 69 Miss. 1; *Selleck v. Pollock*, 69 Miss. 870. Applying the principle of these cases, it follows that the preference given by the assignor to the usurious debt due to the bank annuls the deed. The assignee is by the deed directed and required to pay to the bank the debt and the usurious interest, and this he must do. He pays it, if at all, not as debtor, nor by virtue of the obligation springing from the contract between the assignor and the bank, but by reason simply of the terms of the deed under which he holds. The deed is the law under which he acts, and "*ita lex scripta est.*" In the payment thus directed to be made the estate of the assignor is to that extent diminished, and prevented from being devoted to the demands of other creditors. But more

than this results, for the payment, when made, creates *eo instanti* a right of action in the assignor to recover from the bank, not only the usury, but the whole interest reserved. The assignee may not sue, for it is not his money that has been paid. Nor is the right thus arising a chose in action which passed by the assignment, for it did not exist when the assignment was made. The assignee, in paying the usurious debt, would be paying as the representative of the assignor (*Chapin v. Thompson*, 89 N. Y. 270); and the payment so made, though a voluntary one, would create a right of action in the assignor to recover the whole interest paid. Code 1892, § 2348. The legal effect of what the assignee was directed to do was a purchase by the assignee of a right of action for the assignor at the expense of the fund which he professed to devote to the payment of his creditors. That this cannot lawfully be done we think is clear. In some of the states the statutes against usury simply declare a forfeiture of the usury, or of all the interest; but no provision is made, as with us, that the usurious interest, if paid, may be recovered back. In some states it has sometimes been held that by providing for the payment of the debt in an assignment the forfeiture is waived. These authorities are not applicable under our statute, under which active payment is not a waiver.

At the time of the execution of the assignment the Merchants' & Planters' Bank and Mrs. Klotz, two of the preferred creditors, indorsed thereon a release to Hiller of their demands against him personally in consideration of the provision made in the deed for the payment of their debts. It is now urged that, whatever may have been the fraudulent pur

whether provided for by the assignment or not, who wishes to repudiate the trusts of the assignment on the ground that they are illegal and a fraud upon the honest creditors of the assignor, must apply to set aside the assignment as fraudulent and void against him as a creditor, instead of coming in under the assignment itself as a preferred creditor or otherwise."

It is said in *Green v. Morse*, 4 Barb. 332, that an assignee cannot refuse to pay an usurious debt, which is specifically directed to be paid. He is the mere agent of the assignor when he is not himself a creditor thereof. It is further said that a creditor at large cannot object to the payment of such usurious debt because he is not a privy to the usurious contract when he has no lien on the property by judgment or execution, or upon the choses in action by a creditor's bill. In this case the court proceeded upon the well-settled principle that the defense of usury cannot be set up by anyone except a party to the usurious contract or one who represents him as a privy in blood or estate; and that inasmuch as in this case the assignee sought to avoid payment of the usurious debt (which was by the deed of assignment directed to be paid) simply because he had been informed it was usurious, and not because he had any adverse interest therein for which he was seeking to have the assignment set aside, he was not in a position to urge such defense, since he had accepted the trust created by the deed of assignment, and upon a good consideration agreed to perform it, thereby becoming estopped; and that inasmuch as the assignor, who owed the debt, did not set up the defense, no one had a right to do it without authority

The court further held that the assignee could not, as the representative of other creditors for whom the assignment provided, urge the defense of usury, for the reason that the assignee's authority to act for such creditors is fully to execute the plain conditions of the assignment, and to pay over to them upon their debts what the assignor has directed in the deed of assignment to be paid; that in undertaking to act for other creditors the assignee not only acts without authority, but in violation of the directions of the assignor, and that in seeking in behalf of other creditors to avoid the payment of the alleged usurious debt and apply it on the shares provided for them, he establishes the fact that they have elected to enforce the assignment instead of assailing it by hostile proceedings, and that they are therefore estopped from questioning its provisions in favor of others while they claim the benefits of it for themselves. The court suggests that it might have been different if the creditor had obtained a judgment and execution against the assignor and seized the assigned property, or filed a creditor's bill to set aside the assignment as fraudulent against bona fide creditors for the reason that it provided for the payment of usurious and void debts; that in such a case the creditor would not be estopped from assailing the assignment as he is when he claims under the assignment; that without having acquired a lien on the property by judgment and execution, or upon the choses in action by a creditor's bill, the creditors at large are not privies in any sense which will entitle them to question any disposition the assignor may choose to make of his property in the payment of an usurious debt.

pose of Hiller in executing the deed, the assignee is a purchaser for value, at least to the extent of holding the assigned property to an amount sufficient to pay these claims. This position is taken on the authority of *Anderson v. Lachs*, 59 Miss. 111. We think the principle announced in that case—i. e. that when a creditor, in consideration of the assignment, releases the assignor from personal liability on the debt for the payment of which the assignment is made, the assignee is a purchaser for value, and not bound by the undiscovered fraud of the assignor—cannot apply on the facts disclosed by this record. Unquestionably the bank which, in lending the money, reserving the usury, accepting the assignment, and releasing Hiller, acted by and through its cashier, Ellis, who, as the assignee in the deed, is chargeable with full notice of the unlawfulness of the assignor. Mrs. Klotz is in no better attitude. The assignee, Mr. Ellis, had knowledge of the unlawful act, and, though Mrs. Klotz had paid value for the deed, he would not have been a bona fide purchaser, for to make one a bona fide purchaser he must take, not only for value, but without notice. The purpose of Hiller, the assignor, and the purpose of Ellis, the assignee, to devote the estate of Hiller to the payment of the usurious debt to the bank were identical. It does not matter that, as to Ellis, the assignee, and probably that as to Hiller, the assignor, this purpose involved no moral turpitude. In law many things are dealt with as fraudulent because of their results as against creditors, as to which moral delinquency may not be predicated. If the purpose of the assignor and the assignee be to do a thing not recognized by the law as valid, the instrument by which it is at-

tempted to effectuate this design cannot be upheld. But we do not think it can be said that Mrs. Klotz gave up anything for the conveyance. The assignor was her son-in-law, and hopelessly insolvent. Nothing could be hoped for in the present case except to get what might be realized from the assigned estate, and the future promised nothing except by resorting to the earnings the assignor might thereafter accumulate. The evidence makes it entirely certain that Mrs. Klotz did not in fact surrender anything which she thought was of value, nor give up anything for the deed. Under the advice of the attorneys for Hiller, that by surrendering her claim against him she would probably import to the assignee the character of a purchaser for value, under the decision in *Anderson v. Lachs*, she signed the release, not in consideration, but in aid, of the conveyance. In no just sense can it be said, on the evidence in the cause, that she purchased the conveyance. The facts that it had been determined on, and that she was to be preferred without reference to a release by her to Hiller, and that the release was not at all influential in bringing about the assignment or the preference given to her claim, and that she signed the release for her own benefit, and not for his, are as distinctly and fully shown as it is possible to establish any fact of evidence.

The cross-petitioners Marshall Field & Co. should have had the relief they prayed. Whether Hiller in fact made all the statements to the representative of the reporting agency of R. G. Dun & Co. contained in the report made by the representative, Moorman, as testified to by Moorman, or made only a part of them, as testified to by Hiller, is immaterial in view of the fact, which we think is abundantly

(See also the opinion of Justice Willard in case of *Murray v. Judson*, 9 N. Y. 73, 59 Am. Dec. 516, as cited *supra*, V.)

Where an assignee had paid usurious (compounded) interest to a creditor preferred in a deed of assignment for the benefit of creditors, it was held, in *Peyser v. Myers*, 56 Hun, 175, that where the assignment had been held void an action by judgment creditors would lie against such preferred creditor to enforce the appropriation of the money thus received to the satisfaction of their demands. This was upon the principle that the payment of such interest was a fraud upon the unpreferred creditors.

In case of an assignment to certain creditors to pay debts due to them and other debts also, the court said, respecting the effect of usury, that the assignees were not bound to set up the usury, but added: "No doubt they are not bound by their obligation as trustees to pay notes which have no legal validity. This, however, is not supported by the later New York cases above considered."

It is an obiter statement in *Morse v. Crofoot*, 4 N. Y. 114, where sureties on a note of a discharged bankrupt were seeking relief against it for usury, and had received an assignment of property to pay that debt and others, that if the debt should be proved to be usurious it would be their duty to refuse payment thereof out of the property in their hands, but this was declared obiter and the rule was rejected by *Chapin v. Thompson*, 89 N. Y. 271, nor was it even considered in *Murray v. Judson*, 9 N. Y. 73, 59 Am. Dec. 516, though that case was called to the attention of the court.

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Strong v. Strickland, 32 Barb. 284, is a case in which the usurious character of a mortgage debt preferred in an assignment was set up by the mortgagor himself against the mortgage in an action to cancel it. It holds that the defense of usury, being personal, can be set up by the debtor alone, and not by his assignee for creditors, but that notwithstanding the debtor may have, in his deed of assignment, directed the payment of the usurious debt, he may himself bring an action to cancel and set aside such debt on the ground of usury.

Where it is lawful for a debtor to pay more than 6 per cent interest, his transactions involving greater interest will not be subject to objection by his creditors on an accounting by his assignee for creditors. *Selzer's Estate*, 141 Pa. 529.

In Kentucky an assignee for creditors should not pay usury. When it appears on the record the chancellor will not order it paid, even if the objection comes from one who is not a creditor. *Hill v. Cornwall*, 95 Ky. 512.

There is nothing in the report of this case to show that the usurious debt was expressly mentioned or the usury waived by the assignment.

However, in Mississippi, where payment by the debtor is not a waiver of the defense of usury, it is held in *HILLER v. ELLIS*, that the deed of assignment, to be valid, must be susceptible of complete execution without depriving creditors of their legal rights, and as a deed of assignment containing an usurious debt cannot be so enforced, it is open to attack by injured creditors on the ground of fraud, and will be declared void.

R. S.

proved, that when called on by the manager of the credit department of Marshall Field & Co. for a statement of his financial condition Mr. Hiller referred them to the report then standing on the books of Dun & Co. as a true one of his then condition. Mr. McConnell, the manager of the credits of Field & Co., testifies distinctly that Hiller, when applied to for a statement of his financial condition, stated that he was not prepared to make a statement, but that the reports standing on the books of the commercial agencies correctly represented his condition. Hiller in some manner implies that this he did not do, but that his memory is not clear appears from his statement that he does not remember to have seen or talked with McConnell at all. It is true, he says, that he made no statement of his condition, and so says McConnell, but he does not deny that he referred McConnell to the mercantile agencies as supplying the information desired. It cannot be denied that the report on the books of Dun & Co. exhibited his condition to have been infinitely better than in truth it was, and, accepting as true the testimony of McConnell,

which Hiller had an opportunity and failed to controvert, we are of opinion that the purchase so procured was a fraudulent one, and that the sellers have the right to rescind the sale and retake the goods.

The decree on the cross-petition of Kyle & Co. must be affirmed. They state that they sold to Hiller on the faith of a report made by Bradstreet & Co. that on August 1, 1893, Hiller had made a certain statement to them, and on the faith of a report by Dun & Co. that on August 9, 1893, he had made certain statements to them of his financial condition, which reports showed to Kyle & Co. the statements purporting to have been made by Hiller. But there is nothing in the record tending to show that Hiller at these times made any statements to these agencies. The only occasion on which the evidence tends to prove a statement made by him to any agency, was in February, 1893, to Dun & Co., and it is not pretended that on this statement any goods were purchased from these cross-petitioners.

The decree is reversed, except on the appeal of Kyle & Co. As to them it is affirmed.

ARKANSAS SUPREME COURT.

Grace A. MERRILL, as Next Friend of Chester Fulton *et al.*, *Appl.*,

v.

W. W. HARRIS *et al.*

(..... Ark.)

A sale of a homestead under order of a probate court for the benefit of minor children who enjoy it as a descended or transmitted homestead from the deceased homesteader is not in violation of Const. art. 9, § 6, giving them an interest in the rents and profits of the homestead during minority, and providing that on the widow's death all the homestead shall be vested in them.

(*Battle, J., dissents.*)

(June 4, 1898.)

APPEAL by plaintiff from a judgment of the Circuit Court for Pulaski County in favor of defendants in a proceeding brought to recover possession of certain real estate as the property of the minor plaintiffs which had been sold under order of the probate court. *Affirmed.*

The facts are stated in the opinion.

Messrs. Hill & Auten, for appellant:

The only case in which the probate court seems to have any jurisdiction over the homestead is under §§ 3698-3701 of Sanderls & H.'s Dig., where the value of the homestead exceeds the limit. It can't be ordered sold to pay debts, nor partitioned.

Nichols v. Shearon, 49 Ark. 75; *Kirksey v. Cole*, 47 Ark. 504; *Kessinger v. Wilson*, 53 Ark. 400; *Sansom v. Harrell*, 51 Ark. 429; *Bond v. Montgomery*, 56 Ark. 568.

NOTE.—As to the nature of homestead estates, see also *Stern v. Lee* (N. C.), 26 L. R. A. 814.
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Creditors cannot reach the homestead of minor children, and they cannot waive or abandon it.

Booth v. Goodwin, 29 Ark. 633; *Kirksey v. Cole*, 47 Ark. 510; *Alzheimer v. Davis*, 87 Ark. 316.

Neither the Constitution nor the statute law gives the probate court any jurisdiction over the homestead; for it is not part of the estates or property embraced in the grant of jurisdiction made by the Constitution or any law in force then or since.

See Const. art. 7, § 84; *Kessinger v. Wilson*, 53 Ark. 400; *Burgett v. Apperson*, 52 Ark. 219.

If a valid sale could be made of the homestead interest, it would, *ipso facto*, terminate the right, and amount to a waiver and abandonment of the same; and thus *per se* extinguish the very right or estate sought to be conveyed.

McCloy v. Arnett, 47 Ark. 452.

When the children become orphans, the effect of granting them direct homestead protection tends rather to the preservation of the family than otherwise. The purpose, and generally the effect, of conferring this benefit upon them, is to preserve the family, keep its members together, and thus promote the welfare of society and the state. Before the death of the father, this purpose was better served by giving the children no independent rights: now it is advanced by the bestowal of such rights upon them.

Waples, Homestead & Exemption, p. 643.

Messrs. Ratcliffe & Fletcher, for appellees:

The homestead descends to minors as any other property, except it is exempt from sale for the debts of the ancestor, and it becomes the duty of the guardian immediately upon his appointment to take charge of the homestead

and manage and care for it for the benefit of the minors, the same as any other property belonging to them.

Booth v. Goodwin, 29 Ark. 636; *Kirksey v. Cole*, 47 Ark. 510.

The homestead then comes within the jurisdiction of the probate court the same as any other property of the minors.

There is nothing which limits the jurisdiction of the probate court over the homestead in the possession of the guardian any more than over any other property of the minor, and if the probate court is satisfied that a sale of the homestead would be for the benefit of the minors, there is no reason why it should not order the guardian to sell it the same as any other property.

Hindman v. O'Connor, 54 Ark. 627, 13 L. R. A. 490.

The statute (§§ 3606 and 3613, Sandels & H.'s Dig.), to say nothing of the Constitution, art. 7, § 84, and § 1141 Sandels & H.'s Dig., expressly gives the probate court jurisdiction to sell the real estate of minors, "or any part thereof." The court having the power to sell, all presumptions are in favor of the rightful exercise of the jurisdiction.

Apel v. Kelsey, 53 Ark. 841; *Borden v. State*, 11 Ark. 519, 54 Am. Dec. 217; *West v. Waddill*, 33 Ark. 575; *Reinhardt v. Gartrell*, 38 Ark. 727; *Mock v. Pleasant*, 34 Ark. 63.

If the minors had no title, or a defective one, that was the misfortune of the purchaser at the guardian's sale. But as the minors claim the same title under which appellees hold in this case, they would not be heard to dispute that title or to set up claims of creditors if there were any.

Stafford v. Watson, 41 Ark. 17; *Griesler v. McKennon*, 44 Ark. 517.

Bunn, Ch. J., delivered the opinion of the court:

The only question presented by this record is: Has a probate court (in which a guardianship of minors is pending) the power to order the sale of the homestead left them by the mother (the surviving parent) for the benefit of said minors? Lucy M. Fulton died seised and possessed of lots 1 and 2 in block 17 in the city of Little Rock, and occupied the same and the improvements thereon as her homestead until the day of her death, her husband having died previously. So far as this record shows, she left no other property and no debts, and no children except her minor sons Chester and Freddie, named in the caption, who were nineteen and seventeen years, respectively, at the institution of this suit. After the mother's death, and before the institution of this suit, the duly appointed and acting guardian of these minors, presumably on proper showing, was ordered and directed by the probate court to sell in the usual manner the said homestead property as that of the estate of said minors, and for their benefit; and the sale was accordingly made, and one W. H. Halliburton became the purchaser, and he subsequently sold to appellee Harris, who took immediate possession under his deed, and was in possession at the institution of this suit, which is a suit in ejectment to eject him from the premises. The foregoing facts appear in the complaint, to 41 L. R. A.

which the defendants interposed a general demurrer, raising the question stated at the outset, which demurrer was sustained, and the plaintiff appealed to this court.

This is a new question in this court, so far as we have been able to ascertain, and without a question which, from the very nature of things, has not been very often presented in any of the courts, and for that reason precedents are not numerous. All the cases, without exception we believe, which have been called to our attention by the appellant's counsel, are cases of sales or attempted sales under the orders of probate court, at the instance of administrators, to pay debts of the deceased owners of the homestead property; and none of them are cases where the object of the sales was to appropriate the proceeds to the support and education of the minor or minors or for his or their benefit in any way. That the homestead, during the holding of the widow or the minority of any of the children, cannot be sold to pay the debts of the father's estate, goes without further controversy in this state; and the same is to be said of the sale of the homestead left by the mother, as in this case, for her debts during the minority of her children or any of them. But the question is: Can the probate court, in any case, lawfully order the sale of such homestead for the benefit of the minor children, who enjoy it as a descended or transmitted homestead from the deceased homesteader? In *Morton v. McCannless*, 68 Miss. 810, the supreme court of Mississippi said: "The whole object of the exemption law of 1865 was to preserve the property from creditors, and not to affect the power of the courts to deal with the property as that of the children and heirs of the exemptionist." Such is the view we take of it. The Mississippi law on the subject, while different from ours in some particulars, yet is so far like ours as to render the same principles applicable in all essential particulars. There are several other cases from the same court, which either directly or incidentally sustain the same doctrine. The supreme court of Georgia expresses some doubt as to the power in the probate (chancery) court to sell; but, if it exists, it exists only as in cases of sale of other property of the minor. *Sloan v. Nance*, 45 Ga. 310. See also, as to sales of interests of remainderman, *Jenkins v. Fahey*, 78 N. Y. 855; *Cooper v. Hepburn*, 15 Gratt. 551; *Bell v. Clark*, 2 Met. (Ky.) 578; *Thaw v. Ritchie*, 136 U. S. 519, 84 L. ed. 531. In discussing this identical question, with the foregoing decisions, as well as others on the subject, in mind, Woerner, in his work on the American Law of Guardianship (§ 75), after a general reference to the subject of a minor's rights in the homestead, and the sale thereof, has this to say: "Under this aspect of the question, and remembering that a homestead right descending from a deceased parent may be the only property owned by a minor, it would appear that the court having jurisdiction over the estate of such minor should be possessed of the power to order the sale of such homestead right, if it be necessary for his education, maintenance, or well being." Following the argument of the author, suppose, as in the case at bar, there were no debts, no other property, and that there was but one child, and he or

she, as the case may be, the only child, and heir; and, upon that, suppose that the rents and profits of the homestead place were nothing, or not enough to support and educate the child, and that there was no one willing or bound to occupy the premises with the minor, and thus assist in his support and education; in other words, suppose the homestead right was unavailable or utterly inadequate for the purpose. Can it be the law that the probate court, or the court of general, original, and exclusive jurisdiction of minors and their estate, cannot sell the property, and thereby give it the only real value it has so far as the minor is concerned? We cannot think such is the law. The Constitution does not in terms seek to do more than protect from the grasp of creditors. There is neither expressly nor by implication a restriction upon the powers of the probate court in respect to this class of the property of minors. The case we have supposed presents the question fairly, and in such a case we cannot see how but one answer can be given. If one case could exist wherein the probate court would possess the power, that is all that is necessary to solve the question. To carry the discussion further than that would simply be to discuss questions pertaining to the proper or improper exercise of the court's discretion in the instances as they may arise accordingly as the facts may determine.

In the present case there is no controversy as to an abuse of the discretion of the court, and we therefore affirm the judgment of the court below.

Battle, J., dissenting:

The order of the probate court in question, which directed the sale of the homestead of minors, is a nullity.

What is a homestead? In *Williams v. Dorris*, 31 Ark. 466, (Chief Justice English, in defining it, said it "is the place of a home or house—that part of a man's landed property which is about and contiguous to his dwelling house. A homestead necessarily includes the idea of a house for residence, or mansion house. The dwelling may be a splendid mansion, a cabin, or tent. If there be either, it is under the protection of the law, but there must be a home residence before it and the land on which it is situated can be claimed as a homestead." *Tillar v. Bass*, 57 Ark. 179.

The homestead law creates no new estate, but protects the occupant in the use and occupancy of the land set apart as a homestead during the time of such occupancy. *Chambers v. Sallie*, 29 Ark. 412; *Booth v. Goodwin*, 29 Ark. 637. Hence "an estate held in common with others is sufficient to support a homestead exemption, without exclusive possession by the tenant who claims the privilege." *Robson v. Hough*, 56 Ark. 621; *Thompson v. King*, 54 Ark. 9; *Sentell v. Armor*, 35 Ark. 49; *Sims v. Thompson*, 39 Ark. 801; *Ward v. Mayfield*, 41 Ark. 94; *Stull v. Graham*, 60 Ark. 461. A leasehold estate is sufficient for that purpose (*Robson v. Hough*, 56 Ark. 621), or an equitable title (*Rockafellow v. Peay*, 40 Ark. 69). In the case last cited the court said: "Indeed, it is probable that the homestead exemption withdraws from the demands of creditors whatever interest the claimant has in the property dedi-

cated to that use." All these cases prove that the homestead interest is a mere right to use and occupy land as a home or residence.

Upon the fact that the right to a homestead is a personal right to occupy the place of residence as a home, this court held in *Garibaldi v. Jones*, 48 Ark. 280, that the sale of the homestead by the widow was an abandonment of it. In that case the court said: "One of the objects of the Constitution is to secure to the widow and orphans the family roof-tree as a fixed home, during the widowhood or life of the widow and minority of the children. It would be clearly against the policy and spirit of the Constitution, in thus providing a home for her, to permit her to alienate it, and to allow others to enjoy the benefits of the homestead of a deceased husband and father, which were only intended for the widow and orphan. If she could do so, the exemption which passes, under the Constitution, to the widow and minor children upon the death of the husband and father, would not be a reservation of a homestead, but a reservation of land of a certain quantity or value, irrespective of its uses."

In nearly every case, if not all, an abandonment of a homestead with no intent to return to it as a residence produces a forfeiture. Ordinarily, a lease for life is conclusive evidence of an abandonment and forfeiture. *Gates v. Steele*, 48 Ark. 539.

In *Booth v. Goodwin*, 29 Ark. 633, a question arose as to how minors could occupy a homestead so as to maintain their right to it. The court said: "The intention of the legislature evidently was to extend to the child or children the same protection of the property from sale by the creditor which had been extended to their parents; and as it is our duty, as far as possible, to carry this intent into effect, we must necessarily give to the term 'occupied' such a liberal construction as will uphold, not defeat, the humane intent of the legislature; and must hold that an infant is incapable, either by act or declaration, of abandoning or waiving his homestead right; not to do so would be to defeat the provisions of the statute as to them. Actual occupancy of the infant upon the homestead place is not necessary; is not required of an infant. It is the duty of his guardian to take possession of the homestead place, and to rent or lease it for the benefit of his ward, as a means for his support and education; and this must have been the possession and occupancy contemplated by the legislature, because it is the only one consistent with the condition of the minor child or children."

The minor children do not create the homestead. It descends to them. During minority they are incapable of waiving or abandoning it by act or declaration. As it is a mere occupancy, how can they utilize or enjoy it? The question is answered by *Booth v. Goodwin*, 29 Ark. 633: By their guardian taking possession, and renting or leasing it for their benefit, as a means for their support and education. In this way it is held and occupied by them. The occupancy of their guardian or tenant is their occupancy. In case of a sale it would not be so held, but would be abandoned or forfeited.

The Constitution intends and directs that

the homestead of the father should be preserved for the benefit of the minor children, in a particular manner, during their minority, and that is by occupancy or renting. It does not authorize any other disposition to be made of it. It provides "that if the owner leaves children, one or more, said child or children shall share with said widow and be entitled to half the rents and profits till each of them arrives at twenty-one years of age—each child's rights to cease at twenty-one years of age—and the shares to go to the younger children, and then all go to the widow, and provided that said widow or children may reside on the homestead or not; and in case of the death of the widow all of said homestead shall be vested in the minor children of the testator or intestate." Const. art. 9, § 6. Under this section they are entitled to reside upon it, and to one half of the rents and profits if there be a widow,—that is to say, to rent it,—till each of them arrives at twenty-one years of age.

In *Kessinger v. Wilson*, 53 Ark. 400, the court said: "The land was set apart by the law to appellants [minors] when their father died, as a home and means of maintenance during their minority. Until the younger of them reached the age of twenty one years, it could not have been lawfully sold to pay the debts of their father's estate, or partitioned between them. . . . It was not subject to sale, but might have been rented to raise means for their support. Until the younger reached his majority, it remained set apart as 'a place, a sanctuary, to which he or she might return to find the shelter, comfort, and security of a home' during his or her minority."

In *Sansom v. Harrell*, 51 Ark. 429, the order in question was made by the probate court for the purpose of vesting a homestead in a widow, under a statute which provides: "When anyone shall die, leaving a widow or children, and it shall be made to appear to the probate court that the estate of the deceased does not exceed three hundred dollars, the court shall make an order that the estate vest absolutely in the widow or children, as the case may be." Mansf. Dig. § 3. The husband of the widow left minor children surviving him at the time of his death. This court held the order void, and said: "The Constitution sets it apart as a home and sanctuary for the widow and children, and, for the purpose of preventing any other person invading it under a claim of right, or interfering with them in the undisturbed enjoyment of shelter, comfort, and security of it as a home, guards and protects it against sales and transfers. The same reason which makes it unlawful to sell the land constituting it for the payment of the debts of the deceased owner, subject to the homestead rights of the children during their minority, makes it unlawful to vest it in the widow, subject to the same rights of the children during their minority. One endangers the quiet, security, and comfort of a home provided in the homestead as much as the other, and both equally violate the spirit and manifest intent of the Constitution."

The homestead right of minor children, and
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the estate in the lands, which constitute the homestead, inherited by them in addition thereto, it was held in *Kessinger v. Wilson*, 53 Ark. 400, are like two separate and distinct estates, vested in different persons, and following in immediate succession. Their right to the enjoyment and possession of the same cannot exist at one and the same time, and neither merges in the other. The probate court cannot authorize the sale of the homestead right; for that is a personal right, and a sale of it is an abandonment which forfeits it. Neither can it order the sale of the estate inherited in addition to it, subject to the same, for the same reason it cannot be sold for the payment of the debts of the deceased owner, and that is: "One endangers the quiet, security, and comfort of a home provided in the homestead as much as the other, and both equally violate the spirit and manifest intent of the Constitution."

The object of the Constitution as to homesteads is not the protection of the impecunious, and no others. It protects the family homes of all classes. It conserves only the homesteads owned and possessed by a resident of this state "who is married or the head of a family." Upon the death of the owner, it gives it to the widow for her life, and the minor children during their minority. From this it appears that the policy of the Constitution "is to foster families as the factors of society, and thus protect the general welfare." "To save them from disintegration," as said in *Waples on Homestead & Exemption*, chap. 1, § 2, "and secure their permanency," the Constitution "seeks to protect their homes from forced sales so far as it can be done without injustice to others." It "protects homes as the pillars of the state edifice," and thereby fosters the sentiments of patriotism and independence and the spirit of free citizenship. "There is," said Tarben, J., "unquestionably no greater incentive to virtue, industry, and love of country than a permanent home, around which gathers the affections of a family, and to which the members fondly turn, however widely they may become dispersed." In fostering these sentiments and affections, for the purpose of accomplishing its object, the policy of the Constitution in preserving the homestead of the father for his minor children during their minority is further advanced by giving to the children an opportunity, when all of them have arrived of age and become *sui juris*, to acquire the homestead lands, in the event it became necessary to sell the same, and thereby hold them in the family. A sale of such lands during the minority of the children tends to defeat the beneficent policy of the Constitution, and should be treated by all courts as void.

It follows that the probate court cannot sell the fee in the land without defeating the spirit and intent of the Constitution. It seems to me that no argument or authority is necessary to prove that the Constitution, from which it derives its jurisdiction, did not vest the probate court with the authority to defeat its policy or violate any of its provisions.

Rehearing denied January 27, 1893

LOUISIANA SUPREME COURT.

STATE of Louisiana
v.
Amos CALDWELL *et al.*

(.....La. Ann.....)

***Accused were indicted by a grand jury composed of twelve**, under the provisions of article 117 of new Constitution, and convicted by a petit jury of twelve, of whom less than the whole number concurred, under the provisions of article 116. The crime was burglary committed before adoption of Constitution of 1898. The defense was made that these provisions of the Constitution were *ex post facto* as applied to past offenses, and that accused could be indicted only by a grand jury composed of sixteen, and convicted only by a concurrence of all twelve of the petit jury. *Held*, the provisions referred to operate changes in the method of procedure only, relate to the remedy, and are in no sense *ex post facto* in character, and that articles 116 and 117 of the Constitution are self-operative.

(June 22, 1898.)

APPEAL by defendants from a judgment of the District Court for Red River Parish convicting them of burglary and larceny. *Affirmed.*

The facts are stated in the opinion.

Messrs. W. A. Wilkinson and J. M. Pincus for appellants.

Messrs. Milton J. Cunningham, Attorney General, and C. C. Egan, for appellee:

The number of the grand jury is a matter of criminal procedure and might have been changed at any time by the legislature until it was fixed in the Constitution of 1898, at twelve. And the change made by the constitutional convention went immediately into effect, and thereafter a grand jury of twelve is a legal grand jury, even to pass upon crimes and offenses committed before said change was adopted.

See Rev. Stat. § 976.

Article 116 of the Constitution of 1898 is self-operative and went into effect immediately upon the adoption of the Constitution.

6 Am. & Eng. Enc. Law, p. 912.

The provision in article 116 for the finding of a verdict by less than twelve jurors, in a case not capital, took effect immediately upon the adoption of the Constitution, and it applies to the trial of crimes and offenses committed prior to the adoption of said Constitution, as well as to those committed afterwards. It is merely a change in a matter of criminal procedure, and not an *ex post facto* law or a law having retroactive effect.

State v. Taylor, 134 Mo. 109; *Mathis v. State*, 81 Fla. 291; *State v. Bates*, 14 Utah, 293; *Lynn v. State*, 84 Md. 67; *State v. Gay*, 18 Mont. 51; Am. Dig. 1897, p. 962, § 53, No. 9.

*Headnote by BLANCHARD, J.

NOTE.—As to number of grand jurors necessary or proper to act, see note to *State v. Belvel* (Iowa) 27 L. R. A. 846.
41 L. R. A.

Blanchard, J., delivered the opinion of the court:

Defendants appeal from a conviction and sentence on a charge of burglary and larceny. The indictment was found by a grand jury composed of twelve under the provisions of the recently adopted Constitution of the state. It was met by a motion to quash on the ground that, at the date of the alleged commission of the crimes charged, the Constitution of 1898 had not been adopted, and hence the accused were entitled to have a grand jury impaneled, composed of sixteen of their countrymen, to pass upon the charges, and return a true bill. It was further alleged as ground to quash that article 117 of the new Constitution, authorizing a grand jury of twelve is not self-operative, and requires legislative action to carry the same into effect. The motion was denied, and a bill reserved. There was no error in this ruling. The law is well settled that changes in the tribunal or method of procedure relate to the remedy, are always within the discretion of the lawmaking power, and are in no sense *ex post facto* so long as they deprive the accused of no substantial right. Cooley, Const. Lim. pp. 272, 273, 361, 362; 7 Am. & Eng. Enc. Law, p. 531. That article 117 of the Constitution is self operative is shown by its terms, which declare that its provisions shall "go into effect on the adoption of this Constitution."

The court having charged the jury that nine of them concurring could find a verdict, defendants excepted and reserved a bill. The grounds of exception are that the crime is charged to have been committed at a time antecedent to the adoption of the present Constitution; that the provisions of the Constitution in reference to trial by jury are not self-operative; that they require legislative action; and that the enforcement of the same in the instant case would be to deprive defendants of a substantial right. It is averred in the bill that one of the jury, upon a poll following the announcement of the verdict, refused to assent to the same, and from this it is insisted that no legal conviction has ensued. In answer to this, the trial judge says: "Article 116 of the Constitution of 1898 requires only nine of a jury to find a verdict in a case not capital. This is not *ex post facto*. It is a mere change in the remedy, or mode of procedure, which does not deprive the defendants of any right. Formerly no acquittal as well as no conviction could be had without the concurrence of twelve jurors. The change facilitates acquittals as much as convictions. It merely prevents mistrials. The change in the number of jurors who could convict is a mere change of remedy. This part of the Constitution is clearly self-executory. No legislation is necessary or could add to or take from the provisions of article 116 as to the number of jurors necessary to find a verdict. The first

For number of grand jurors necessary to concur in finding an indictment, see note to *State v. Hartley* (Nev.) 28 L. R. A. 33.

sentence of the article authorizes the legislature to provide for the selection of jurors, but this provision has no relation to the remainder of the article. The third paragraph of the schedule of the Constitution of 1898 declares that the provisions of all laws inconsistent with it shall cease upon its adoption, except such as require legislation to enforce them; and the eighth paragraph declares that the new Constitution is in full force and effect from and after May 12, 1898, except as otherwise provided in it. Article 116 is therefore now in force, and was properly applied in this case.

This is the first time the question has been raised under the recently adopted Constitution and the views above, so tersely and clearly expressed by our learned brother of the district court, who was himself a distinguished member of the convention which framed the new organic law, meet our full approbation. Mr. Cooley in his work on Constitutional Limitations (pp. 272 and 273), states the law to be that, so far as modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the court, in existence when its facts arose. The legislature may abolish courts and create new ones; and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully dispense with any of those substantial protections with which the existing law surrounds the person accused of crime. So, too, on pages 861 and 362, he declares the state may give a new and additional remedy for a right already in existence, and it may abolish old remedies, and substitute new. If a statute providing a remedy is repealed while proceedings are pending, such proceedings will be determined thereby, unless the legislature shall otherwise provide. Any rule or regulation in regard to the remedy which does not take away or impair the right itself cannot be regarded as beyond the proper province of legislation. An *ex post facto* law is one which is enacted after the offense has been committed, and which, in relation to it or its consequences, alters the situation of the accused to his disadvantage. 7 Am. & Eng. Enc. Law, p. 525. The term is a technical one, and relates only to penal and criminal proceedings, which impose punishments or forfeitures and not to civil proceedings, which affect private rights retroactively. 3 Am. & Eng. Enc. Law, p. 786. It has been held that a law is not *ex post facto* because it changes the manner of summoning and making up the jury, as applied to past offenses; nor because it reduces the number of peremptory challenges allowed the accused; nor because it increases the number of such challenges allowed the prosecution; nor because it permits amendments to pending indictments; nor because it authorizes the jury to fix the punishment at the trial, which, under the law in force at the time the offense was committed, was fixed by the court; nor because it makes the court

the judge of the law, whereas at the time of the offense the jury was. 7 Am. & Eng. Enc. Law, p. 581, note. In all these cases it was held that the change affected the procedure only, and that the new law was applicable to the trial of the offense. So, too, we must hold with regard to the case at bar. The accused, having committed the offense before the new law went into operation, cannot claim the impairment of any substantial right because of indictment, trial, and conviction thereunder. The new law does but relate to the remedy or procedure which it is the province of the law-making power to enact for the ascertainment, prosecution, and conviction of crime. *State v. Bates*, 14 Utah, 298; *Lynn v. State*, 84 Md. 67; *State v. Taylor*, 184 Mo. 109; *State v. Gay*, 18 Mont. 51; Am. Dig. 1897, p. 963, § 53, g.

Another bill of exception is leveled at the ruling of the court *a qua* admitting the confession of guilt made by the accused to one Sol. Cannigan, called as a witness for the state. The objection was that the confession was not free and voluntary, but brought about by inducements held out; also that the signature of one of the accused to the letter wherein the confession was made was not proved. The trial judge states the confession was not offered or received as to Hagan Clark, one of the defendants; and that as to the other two, Amos Caldwell and William Clark, the evidence showed the note was written by Caldwell in presence of Clark, and was concurred in by the latter, who signed it; and that this note contained the same recitals the two had previously made voluntarily to Cannigan who was intrusted by them with the note for delivery to the person to whom it was intended. It seems that Cannigan was the friend of the accused, and went to the jail to see them, taking some tobacco for them. While there he said to Caldwell and William Clark: "If you will tell the truth about Mr. Carnes' money, probably he will help you." Whereupon they told him to tell one of the parties (not Carnes) whose money had been stolen to come to them, and they would tell him where his money was; that Hagan (meaning Hagan Clark, the other accused) had it. This was on Sunday. On Tuesday following, Cannigan saw the party (Mr. Terry) to whom the message was sent, and delivered it. Whereupon Terry said to Cannigan, "Tell them to tell you." Following this, Cannigan again saw the parties, and the incriminating note was written. All the parties accused and Cannigan were colored. Cannigan had nothing to do with the prosecution; was rather interested in getting the accused off as lightly as possible. He was the brother-in-law of William Clark. He was not commissioned by the prosecutors to see the accused, and procure a confession from them. He merely expressed the opinion that Mr. Carnes would probably help them if they would tell the truth about the money. He made no promise, and was authorized to make none. He was not in the service of either Carnes or Terry, and did not live on their plantations, but across the river, some miles away. We agree with the judge below that, "coming from such a source, the mere suggestion that the prosecutor probably would help them does not amount to such an inducement as ought

reasonably to attach such doubt to the confession as would exclude it." Especially so when it occurred more than two months after the crime, when the accused parties were in no confusion, and laboring under no excitement

nor special dread, and were free from improper influences.

We find no sufficient warrant for reversing the verdict and sentence appealed from, and, accordingly the same stand affirmed.

MARYLAND COURT OF APPEALS.

SUPREME LODGE OF THE ORDER OF THE GOLDEN CHAIN, *Appt.*,

v.

John C. SIMERING *et al.*

(.....Md.....)

1. The representation of the 4,000 Maryland members in the Supreme Lodge, Order of the Golden Chain, extends, under Laws 1894, chap. 295 (Code, art. 23, § 1431), to eight members, as the law gives the right to as many representatives as will equal the number of times the membership is greater than the unit of representation, which is the number of members necessary to secure one representative, and the constitution of the organization gives each state one representative for the first 500 members, although it also proceeds to declare that there shall be two representatives for 1,500 and three for 4,500.

2. A court of equity has power to enjoin the members of the supreme lodge of a fraternal beneficiary association from excluding any properly qualified state representatives from the right to vote.

3. An injunction against the performance of the duties of the offices of a fraternal beneficial association, to which defendants claim to have been elected sought on the ground that the election was invalid because persons entitled to vote were denied the right, is not the proper remedy, especially when it does not appear that this was done in bad faith.

(June 30, 1898.)

A PPEAL by defendant from a decree of the Circuit Court of Baltimore City in favor of plaintiffs in a suit brought to obtain a judicial declaration that a supreme lodge of the defendant order held at Atlanta in 1896 was illegally formed, and to enjoin the officers elected thereby from performing the duties of their office. *Affirmed in part. Reversed in part.*

The facts are stated in the opinion.

Messrs. John P. Poe and Edgar Allen Poe, for appellant.

Injunctions to restrain the corporation from carrying on its business in cases where it has failed to comply with the statute, or exceeded its powers or is conducting its business fraudulently, can be granted only when applied for by the insurance commissioner, leaving in all other respects the powers of a court of equity unimpaired.

Horton v. International Fraternal Alliance, 85 Md. 14.

The whole object of the bill in this case, and the only object, is to test the validity of the

election of the individual appellants to their various offices. A court of equity is without power to decide such a question.

Merrill v. Garrett County School Comrs. 70 Md. 272; *Washington County New Bd. of School Comrs. v. Washington County Old Bd. of School Comrs.* 77 Md. 289; 1 Thomp. Corp. § 764; *Johnston v. Jones*, 23 N. J. Eq. 216; *Moses v. Tompkins*, 84 Ala. 618; *Moxley v. Alston*, 1 Phill. Ch. 790; *Hughes v. Parker*, 20 N. H. 58; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508.

A court of equity has no authority to issue an injunction, indefinitely suspending the officers of a corporation from exercising their functions, for in this way it would be able to accomplish indirectly what it could not do directly, *viz.*, the removal of the officers.

Washington County New Bd. of School Comrs. v. Washington County Old Bd. of School Comrs. 77 Md. 290; 1 Thomp. Corp. § 826; *Griffin v. St. Louis Vine & Fruit Growers' Asso.* 4 Mo. App. 595.

The appellees have a complete and adequate remedy at law. They should have proceeded by mandamus. It is no answer for them to say that this is not a controversy between rival claimants to office.

Hawkins v. State, 81 Md. 306; High, Extr. Legal Rem. § 658; Clark, Corp. p. 244.

Act of 1896, chapter 331, after declaring who shall be entitled to vote, says: "And in computing the number of representatives to which a state or district is entitled in such supreme body, the number of members that is necessary to secure one representative shall be considered the unit of representation." The clause just quoted means nothing, and is void therefore for uncertainty.

The clause does not mention a unit of representation, or state how that unit is to be ascertained, or indicate where it is to be found.

Marwell v. State, Baldwin, 40 Md. 292; *Jones v. Smart*, 1 T. R. 52; Smith, Const. & Stat. Const. § 714; *Woodbury v. Berry*, 18 Ohio St. 462.

Messrs. Isidor Rayner and A. C. Trippe for appellees.

Boyd, J., delivered the opinion of the court:

The Supreme Lodge, Order of the Golden Chain, of Baltimore city, one of the appellants, was incorporated in this state. Constitutions and by-laws were adopted for the government of the supreme and subordinate lodges of the order. Under the constitution the Maryland members of the association were only entitled to two representatives in the supreme lodge, but in 1896, the legislature passed an act,

NOTE.—For injunction to protect membership in association, see also *Mead v. Stirling* (Conn.) 23 L. R. A. 227; *Reno Lodge No. 99, I. O. O. F. v. Grand Lodge I. O. O. F.* (Kan.) 26 L. R. A. 28. 41 L. R. A.

For injunction to protect personal rights, see note to *Chappell v. Stewart* (Md.) 37 L. R. A. 783.

known as chapter 381 of the Laws of that year, which the appellees claim entitles them to a representation of eight. The appellants contend that the act is not applicable to this association, and is void for uncertainty. The supreme lodge meets biennially, and in May, 1896, met in Atlanta, Georgia. Eight persons including the appellees, claimed to be the regularly elected representatives from this state, and demanded admission to the sessions of the supreme lodge held at Atlanta, but were refused on the ground that Maryland was only entitled to two representatives, which number the supreme lodge offered to admit, but that offer was not accepted. The meetings, at which were the officers of the supreme lodge, several past supreme commanders, and one representative from each of the states of Virginia, Pennsylvania, Georgia, and South Carolina, as well as one from New York, who was also an officer, lasted for several days, and on the last day the officers were elected by them; fifteen out of twenty-three persons present being elected to office. Six of the representatives from Maryland, shortly after their return filed this bill, and afterwards another was made a party complainant. The bill alleges that the eight representatives were denied admittance to the supreme lodge, in defiance of the laws of this state, and that the states of Georgia and Virginia were likewise denied the representation they were entitled to, and that the acts of the supreme lodge were illegal and void. The court below decreed that the proceedings at the sessions in Atlanta, in refusing the complainants' admission, and denying them the right to vote in accordance with the act of 1896, were contrary to law and void, and restrained and enjoined the defendants, claiming to act as officers under that election, from exercising any powers claimed by them by virtue of said election, and from excluding any state representatives properly qualified in accordance with the act of 1896 from the right to vote at any of the sessions of the supreme lodge. The appellants contend that a court of equity is without jurisdiction to grant the relief given, and that the act of 1896 is void, but if valid, does not apply to the defendant corporation. There was no fraud proved, except in so far as it may be inferred from the conduct of the members of the supreme lodge in excluding the representatives, and electing themselves to the offices. Among other prayers in the bill was one for the appointment of a receiver *pendente lite*, but that was abandoned.

When the question of jurisdiction is presented, we would ordinarily dispose of that before considering the other points. But inasmuch as this decree not only enjoins the individual defendants from discharging the duties of their several offices, to which they claim to have been elected at the meeting in May, 1896, but also from excluding any state representatives properly qualified under the act of 1896, from the right to vote at any of the sessions of the supreme lodge, the jurisdiction of the court must be considered with reference to the two branches of the injunction thus granted, as the one is not necessarily disposed of by deciding the other. We will therefore first determine

whether the act of 1896 is open to the objections urged by the appellants.

It is conceded that the appellant corporation is "a fraternal beneficiary association," and subject to the provisions of chapter 295 of the Laws of 1894, which added §§ 143 E to 143 R, inclusive, to article 23 of the Code. The act now before us added a section to be known as "143 E 1," to follow 143 E. Although it does not very clearly express all that it is evidently intended for, so far as the matters before us are involved its meaning is sufficiently plain. Its primary object, undoubtedly, was to give subordinate organizations of such associations larger representations in the supreme bodies. By the express terms of § 143 E, every fraternal beneficiary association is required to have a representative form of government; and by the act of 1896 any association of the description set forth in § 143 E was authorized to continue business, provided it complied with that act (and other requirements of the laws of this state) in the supreme body, composed of state, council, conclave, lodge, chapter, or district representatives, who are elected by the members of the association, "and others to the number of one fourth or more of the entire membership of the supreme body who are not so elected as representatives." From article 4 of the Constitution, we find that the supreme lodge of this association is composed of state representatives and other persons, consisting of its officers, the chairman of the advisory board, past supreme commanders, and the originators and members of the supreme lodge at the date of institution who continue in good standing in the order. Those who are not state representatives comprise more than one fourth of the entire membership of the supreme lodge, and hence it would seem that this association is within the very letter of the law. It is urged at length in the answer that it was excluded from the effects of it, by reason of certain proceedings in the legislature when the bill was pending; but as the law, as passed, uses terms sufficiently comprehensive to include the supreme lodge of the defendant, without in any way exempting it, we are not called upon to examine the terms of the bill as originally introduced, or the proceedings thereunder, but must construe the one that became a law. It is also contended that this act does not change the constitution of the defendant association. It provides that "no member is qualified to vote unless he is a state, council, conclave, lodge, chapter, or district representative, elected by the members or their duly accredited delegates, and in computing the number of representatives to which a state or district is entitled in such supreme body, the number of members that is necessary to secure one representative shall be considered the unit of representation and the number of times the membership in any state is greater than this unit of representation is a number of representatives which the state is entitled to in the supreme body." The Constitution of the defendant provides that each state is entitled to representatives in the supreme lodge as follows: "For the first 500 members, one representative; for the first 1,500 members, two representatives; for the first 4,500 members, three repre-

sentatives;" and for every 5,000 members in excess of 4,500 one additional representative. It is therefore argued that there is no fixed unit and no number that can properly be called such unit. But the language of the statute is, "the number of members that is necessary to secure one representative shall be considered the unit of representation." There can be no question as to what number was necessary, under this constitution, to secure one representative, and that number (500 in this association) is the unit of representation or basis of calculation. That unit is the divisor; the number of members in the state, the dividend; and the quotient, excluding fractions, will be the number of representatives the state is entitled to. Nor is there any difficulty in ascertaining the source from which such unit can be determined. These associations are required by law to have "a representative form of government;" and, if the charters do not prescribe the basis of representation, the Constitution or by-laws should do so. The statute leaves the several associations to fix the number necessary for one representative, but when that is done the law determines the whole number for each state or district, according to the total membership in such state or district, being, then, of opinion that the act of 1896 does apply to the defendant association, and it being shown that there are 4,000 members in Maryland, it follows that they were entitled to eight representatives in the supreme lodge, and not two, as contended by the appellants. The members of the supreme lodge, not only did not admit the eight representatives, as required by the statute, but they totally disregarded it, and elected fifteen of their number to office. This was contrary to the express provision of the law that "no member is qualified to vote unless he is a . . . representative elected by the members or their duly accredited delegates." So far as the proceedings of the sessions at Atlanta show, there was apparently not even a quorum, for this statute says "a majority of the elected representatives shall constitute a quorum." Unless the self constituted members of the supreme lodge are to have a monopoly of the offices and an unlimited control of the association, it would seem that there must and ought to be some remedy for the members. The question, then, is whether the appellees have sought such as the law will afford them.

That a court of equity has power to enjoin the individual defendants, who are members of the supreme lodge, from excluding any properly qualified state representatives from the right to vote at any sessions of the supreme lodge we have no doubt. They hold the offices of supreme commander, vice supreme commander, past supreme commander, supreme secretary, supreme treasurer, supreme medical examiner, and chairman of the advisory board, which are the principal offices of the association. All of them were present at the meeting in Atlanta, and took part in the proceedings refusing to admit the representatives from Maryland, Virginia, and Georgia in accordance with the act of 1896, and by their answer still deny that these members have the right of representation, which we have determined they have. The appellees are not seeking the aid

of a court of equity to place them in office. They have not been elected to such offices, and do not claim them. But, as members and state representatives of the association, they have the right to the aid of a court of equity to prohibit these officers, who have thus refused, and still refuse, to permit those entitled to take part in the deliberations and acts of this important body, from excluding them from the right to vote. This branch of the case is clearly within the meaning and reasoning of the decisions in *Campbell v. Poultney*, 6 Gill & J. 94, 26 Am. Dec. 559; *Busey v. Hooper*, 35 Md. 15, 6 Am. Rep. 360, and *Webb v. Ridgely*, 38 Md. 364. It was useless for the appellees to make further appeal for relief to the supreme lodge, and, although ordinarily the rights and interests of a corporation must be asserted by the corporation itself, yet stockholders (or members, when there is no stock) can proceed under such circumstances as these, against those in control of the corporation,—which the members of the supreme lodge are, in this association. Many cases could be cited to sustain a proceeding of this character under such circumstances as we have related, but it is not necessary to refer to those outside of this state, as our own cases are sufficient. See, in addition to those above cited, *Davis v. Gemmell*, 70 Md. 356; *Shaw v. Davis*, 78 Md. 314, 23 L. R. A. 294. And in *Mason v. Equitable League Supreme Court*, 77 Md. 426, it was said: "If the officers of the order should be guilty of misconduct, fraud, or mismanagement, a court of equity has full power to restrain and enjoin them." Whatever the motives of these individual defendants were, their action resulted in not only excluding those that were entitled to be in the supreme lodge, but in securing for themselves control over the association, and lucrative positions which they might not have had if the representatives elected by the members had been permitted to vote. Nor do we think that the act of 1894, chap. 295, in any wise interferes with the right of the appellees to this part of the decree. What is said of that act in the case of *Barton v. International Fraternal Alliance*, 85 Md. 14, makes it unnecessary for us to discuss it in this connection, as its meaning and scope are there so clearly stated. There may be some question whether this branch of the injunction that was decreed is embraced in the prayer for that writ, but, if there be any defect in that respect, it is cured by § 177 of article 16 of the Code, as construed in the case of *Washington County New Bd. of School Comrs. v. Washington County Old Bd. of School Comrs.* 77 Md. 291. We are therefore of the opinion that the court had jurisdiction to pass the portion of the decree we have been considering, and to that extent it must be affirmed.

But it was also decreed "that the defendants claiming to act as officers of the Supreme Lodge, Order of the Golden Chain, by virtue of such election, are hereby restrained and enjoined from exercising any powers claimed by them by virtue of said election." That presents the question in a different light from what we have been discussing. The practical effect of that part of the decree is the removal of those defendants from the offices to which they claim they were elected. While it is undoubtedly true that a court of equity

has power to enjoin, or otherwise decree against, officers of a private corporation guilty of fraud, misconduct, mismanagement, or some act that is *ultra vires*, or that would seriously affect the rights of the stockholders or members, we have, after a very diligent search, failed to find any authority that will justify it in not only passing on the validity *vel non* of an election of officers, but in removing them, without some special or statutory authority. It is true that it is held that, in proceedings over which equity has jurisdiction for some other purpose, if the right to an office or the regularity of an election must be decided in order to give the relief which equity can properly afford, the court has the power to inquire into and determine the validity of the election for the purposes of the suit. Such, for example, are *Johnston v. Jones*, 28 N. J. Eq. 216, and *Mechanics Nat. Bank v. H. C. Burnet Mfg. Co.* 32 N. J. Eq. 286; and it might be said we have practically done that in the other branch of this case. Even in that class of cases it is held that a court of equity cannot go further, and remove an officer from an office of which he is in possession, or declare the office forfeited. But in this branch of this case, as presented to us by the record, there is no other cause shown for a court of equity to interfere; but the controversy is purely and simply whether it can remove officers, declared elected in a proceeding instituted for that purpose, and not arising incidentally in a matter over which equity admittedly has control. In 1 Thomp. Corp. § 764, it is said: "A court of equity has no authority to determine the validity of an election of the officers of a private corporation, and pronounce judgment of annulment. The title of directors, who are in office under color of an election, and who are, at most, irregularly chosen, cannot be inquired into in a suit in equity instituted to restrain them from exercising the functions of their offices upon the ground of irregularity in their election." To the same effect are 17 Am. & Eng. Enc. Law, p. 52; *Johnston v. Jones*, 28 N. J. Eq. 216; *Mozley v. Aiston*, 1 Phill. Ch. 790; *Hughes v. Parker*, 20 N. H. 58. In High, Inj. 1st ed. § 774, it is said: "Nor will a court of equity, at the suit of stockholders of a corporation, restrain its officers from the exercise of their functions, since such restraint would be equivalent to removal from office and over such a subject equity has no jurisdiction." See also the third edition of the same work (§ 1235), where the subject is more fully discussed. None of the Maryland cases cited go to the extent we are asked to go in this case. It is true, they have sustained the right of stockholders to enjoin proposed illegal or fraudulent methods in the conduct of election of officers; but none of them have decided or intimated that this power can be used, after an election.—although irregular, or even illegal,—to remove those declared elected, or, what is equivalent to that, to prohibit them from exercising the powers vested in them by virtue of such election.

It is said in behalf of the appellees that this is not a contest between them and the individual appellants for the offices held by the latter, and hence mandamus, the proceeding authorized in this state for such purposes, will not

answer. But, while it is true they are not asking to be placed in office by this proceeding, they are attempting to oust the appellants, or do what in some respects might have worse results,—to prevent them from discharging the duties of the several offices. The application for a receiver was abandoned, and, if these officers be prohibited from acting, it would necessarily, for the time being, if not permanently, stop the regular business of the corporation; for, if they cannot act, there are no others that can, and unless these offices are filled the affairs of the association cannot be conducted as contemplated by its constitution and by-laws. The court has no power to appoint officers in their stead; and to prohibit these from acting would probably result in the ruin of the association, which might be disastrous to the members, especially the older and delicate ones. The supreme treasurer could neither receive nor pay out money, and the supreme commander could not even call a special meeting, as provided by the constitution, nor could he discharge any of the other important duties devolved on him; and so with the other officers. It may be said that the old officers would hold over. But most of them are the same persons. The treasurer, secretary, medical examiner, and chairman of the advisory board were re-elected to the same positions, and each of the other officers occupied some position before the election at Atlanta. It would, indeed, be difficult for any of them (especially those who have been re-elected to the same offices) to act without violating the spirit of the injunction; but, if they could, it would be of little service to the appellees if a court of equity issued process that would result in the parties who were enjoined being permitted to continue in office by virtue of former elections. There is not even any evidence of mismanagement or misconduct in office on the part of these persons, excepting in so far as their action at the Atlanta meeting reflects on that. If a court of equity assumes jurisdiction, at the instance of a few members of an association, in such cases, where will it end? Is every irregularity in the election of officers to be made the foundation for proceeding in equity? It may be true that this is a more serious one than may often occur, but where is the line to be drawn? There is no evidence in this case of any intentional violation of law, for the record shows that the appellants acted under advice of a learned and prominent member of this bar, who advised them that the law did not apply. In that opinion we do not concur with him, but there is nothing in the record to justify the inference that either he or the defendants did not act in good faith.

It is also said that the appellees and other members of the association are without remedy if a court of equity will not grant this relief. But we cannot agree to that. We have already said they could enjoin the members of the supreme lodge from refusing to let them vote, and they might have gone further, and enjoined those who were not representatives from voting at all. But they could have adopted still easier and simpler methods. The accredited representatives of the members could have organized, elected of-

ficers, and then, by application for mandamus, those so elected could have tested the right to the offices; or possibly a mandamus to compel the members of the supreme lodge to admit the representatives would have answered. Other methods suggest themselves which might have been sufficient (although we do not feel called upon to so determine in this case), such as applying for a mandamus to compel the proper officers of the supreme lodge to call another meeting, to hold an election, on the ground that no valid election had been held. So, although we are of opinion that the act of 1896 does apply

to the defendant corporation, and is valid, we must reverse that part of the decree that enjoins the individual defendants from performing the duties of the offices to which they claim to have been respectively elected. We will not assume that after the law has been construed by this court these parties will act in defiance of it, but, if they do, there is ample remedy provided for such cases.

Decree affirmed in part and reversed in part, and cause remanded; each side to pay their own costs.

NEW YORK COURT OF APPEALS.

Elwin S. PIPER, *Recept.*,
v.

NEW YORK CENTRAL & HUDSON
RIVER RAILROAD COMPANY, *Appt.*

(156 N. Y. 324.)

An experienced traveler who opens a vestibule door of a sleeping car by mistake about six o'clock in the morning, while the train is passing through a tunnel and the car is dark, and steps off upon the track, when he supposes he is entering the car closet, is guilty of such negligence as will preclude his recovery, even if the carrier is deemed negligent.

(June 7, 1896.)

APPEAL by defendant from a judgment of a General Term of the Supreme Court, Second Department, affirming a judgment of the Kings County Circuit in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Saunders, Webb, & Worcester, for appellant:

The plaintiff, on his own showing, was clearly guilty of contributory negligence.

No one is justified in incurring known danger merely to avoid an inconvenience.

Adams v. Lancashire & Y. R. Co. L. R. 4 C. P. 789; *Hickey v. Boston & L. R. Co.* 14 Allen, 429.

The pretended darkness, supposing that the defendant was in any way accountable for it, should ordinarily and properly serve to increase his caution and care on that subject.

Laffin v. Buffalo & S. W. R. Co. 106 N. Y. 186, 60 Am. Rep. 438.

A prudent man attempting to find his way in the dark is bound to take extra precaution.

Laffin v. Buffalo & S. W. R. Co. 106 N. Y. 186, 60 Am. Rep. 438; *Beach, Contrib. Neg.* § 248.

Where a darkness (which did not exist at first) suddenly supervenes, the increase of precaution must be prompt and marked. If the darkness is known to him to be transitory, and

the region ahead is one of known and considerable peril, he must stop until the darkness has passed.

Heaney v. Long Island R. Co. 112 N. Y. 125; *Purdy v. New York C. & H. R. R. Co.* 87 Hun, 97; *Oleson v. Lake Shore & M. S. R. Co.* 148 Ind. 405, 33 L. R. A. 149; *Manley v. New York C. & H. R. R. Co.* 18 App. Div. 420; *Value v. New York C. & H. R. R. Co.* 18 App. Div. 453.

If there was negligence of the company, it was discovered by plaintiff as a precedent condition, and yet he deliberately determined to take his chances.

Bradley v. Grand Trunk R. Co. 107 Mich. 243.

A prudent man has no right to rely absolutely on the absence of negligence in others.

Beach, Contrib. Neg. § 39; *Waller v. Chicago, M. & St. P. R. Co.* 120 Mo. 635.

The only danger to which plaintiff was exposed was due to the fact that darkness would prevent him from discerning, as accurately as in the light, the difference between the doors. This danger was obvious to him; he deliberately assumed it, and he cannot excuse himself by alleging defendant's negligence.

Weston v. Troy. 139 N. Y. 281; *Betta v. Yonkers.* 148 N. Y. 67; *Hilsenbeck v. Guhring.* 181 N. Y. 675; *Halpin v. Townsend.* 2 N. Y. City Ct. Rep. 417; *Reed v. Artell.* 84 Va. 231; *Adams v. Lancashire & Y. R. Co.* L. R. 4 C. P. 789.

The burden is upon the plaintiff to show himself free from contributory negligence.

Myers v. New York C. & H. R. R. Co. 82 Hun, 86; *Winirowski v. Lake Shore & M. S. R. Co.* 124 N. Y. 420; *Rodrian v. New York, N. H. & H. R. Co.* 125 N. Y. 529; *Bond v. Smith.* 113 N. Y. 385.

The slightest contributory negligence will defeat his action.

Dubois v. Kingston. 102 N. Y. 219, 55 Am. Rep. 804; *Cordell v. New York C. & H. R. R. Co.* 75 N. Y. 330.

It is the duty of the court to consult when it clearly appears that the plaintiff's negligence contributed in any degree to the accident.

Cordell v. New York C. & H. R. R. Co. 75 N. Y. 330; *Gonzales v. New York & H. R. Co.* 88 N. Y. 440; *Krauss v. Wallkill Valley R. Co.* 69 Hun, 483; *Babcock & Fitchburg R. Co.* 140 N. Y. 803.

Defendant had no reason to apprehend an ac-

NOTE.—As to the question of the negligence of a passenger in passing from one car to another, see *note to McAfee v. Huidekoper* (D. C. App.) 34 L. R. A. 720.

(1 L. R. A.

cident like that which the plaintiff claims to have happened, and as the arrangements made by it were such as experience had, up to that time, shown to be safe, suitable, and sufficient, no liability upon its part has been shown.

Cleveland v. New Jersey S. B. Co. 125 N. Y. 299; *Dougan v. Champlain Transp. Co.* 56 N. Y. 1; *Orocheron v. North Shore Staten Island Ferry Co.* 56 N. Y. 656; *Loftus v. Union Ferry Co.* 84 N. Y. 455, 38 Am. Rep. 533; *Burke v. Witherbee*, 98 N. Y. 562; *Stringham v. Hilton*, 111 N. Y. 188, 1 L. R. A. 488; *Unger v. Forty-second Street & G. S. F. R. Co.* 51 N. Y. 497; *Sutton v. New York & H. R. R. Co.* 66 N. Y. 243; *Craighead v. Brooklyn City R. Co.* 123 N. Y. 391; *Fox v. New York*, 70 Hun, 181; *Race v. Union Ferry Co.* 188 N. Y. 644.

Mr. Hamilton Harris, with Messrs. Burr & Coombs, for respondent:

The question of the negligence of the defendant was a question of fact for the jury.

Piper v. New York C. & H. R. R. Co. 76 Hun, 44; *Fiero v. New York C. & H. R. R. Co.* 71 Hun, 213, Affirmed, 143 N. Y. 674; *Ayres v. Delaware, L. & W. R. Co.* 4 App. Div. 511; *Fox v. New York*, 5 App. Div. 849; *Boyce v. Manhattan R. Co.* 118 N. Y. 814; *Carpenter v. New York, N. H. & H. R. Co.* 124 N. Y. 58, 11 L. R. A. 759; *Carpenter v. Boston & A. R. Co.* 97 N. Y. 494, 49 Am. Rep. 540.

When there is a conflict of evidence the verdict of the jury is conclusive upon this court, even though the members of the court, had they been on the jury, might have reached a different conclusion on the facts.

Finney v. Gallaudet, 80 N. Y. S. R. 194; *Green v. Fortier*, 80 N. Y. 640; *Duryea v. Vosburgh*, 121 N. Y. 57.

All of the testimony being that given by employees of the defendant, who were not disinterested witnesses, the credibility of their testimony was for the jury to pass upon.

Honegger v. Wettstein, 94 N. Y. 261; *Canajoharie Nat. Bank v. Diefendorf*, 128 N. Y. 200, 10 L. R. A. 676; *Joy v. Diefendorf*, 180 N. Y. 9; *Karanagh v. Wilson*, 70 N. Y. 179.

The question of plaintiff's contributory negligence was submitted properly to the jury, and it was for them to say whether, under all the circumstances of the case, the plaintiff acted as a reasonably prudent man would act under similar circumstances, in proceeding to search for the door of the water closet in the dark instead of returning to the body of the car and asking the porter for a light.

Piper v. New York C. & H. R. R. Co. 76 Hun, 44; *Fiero v. New York C. & H. R. R. Co.* 71 Hun, 213; *Jarvis v. Brooklyn Elev. R. Co.* 40 N. Y. S. R. 825, Affirmed without opinion, 133 N. Y. 623; *Flagg v. Manhattan R. Co.* 17 Jones & S. 251; *Dawson v. Sloan*, 17 Jones & S. 304; *McCauley v. Smith*, 47 N. Y. S. R. 500; *Palmer v. Dearing*, 98 N. Y. 10; *Tomkins v. New York Ferry Co.* 47 Hun, 563; *Morrison v. Metropolitan Teleph. & Teleg. Co.* 69 Hun, 100, Affirmed, 144 N. Y. 703.

A person has the right to act on the presumption that another will conduct himself in accordance with the rights and duties of both, and if injured by the act of the other party while so engaged, he will not be guilty of contributory negligence by reason of the place being a point of danger.

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Newton v. New York C. R. Co. 29 N. Y. 883; *Davenport v. Ruckman*, 87 N. Y. 568; *Jetter v. New York & H. R. Co.* 2 Keyes, 154; *Hart v. Erie R. Co.* 3 Alb. L. J. 312; *Pettengill v. Yonkers*, 116 N. Y. 558.

It is not sufficient for a company simply to promulgate a set of rules; they are also bound to exercise such a supervision over their servants and the prosecution of their business as to have reason to believe that it is being conducted in pursuance of such rules.

Whittaker v. Delaware & H. Canal Co. 126 N. Y. 549; *Carpenter v. New York, N. H. & H. R. Co.* 124 N. Y. 58, 11 L. R. A. 759.

Gray, J., delivered the opinion of the court:

The plaintiff has sought to recover damages of the defendant for personal injuries received by him while a passenger upon one of its trains which were attributable, as he alleges, to neglect in management. He was a passenger upon the train from Albany to New York city in the night of January 13, 1892. He had purchased a ticket entitling him to a berth in a sleeping car, and took possession of it early in the evening, several hours before the car was attached to the train. The car was of the "vestibule" pattern, that being a construction with respect to the platform, which permitted of a continuous passage from and to other similarly constructed cars without exposure to the discomforts or perils incident to a connection by open platforms. The sections for passengers were on either side of a straight aisle, which terminated, at either end, in washrooms for the use, respectively, of men and women. Beyond the washroom was the vestibule, on either side of which were doors opening upon the car steps and furnishing ingress and egress to the train. On the night in question, the men's washroom was in the forward end of the car. On the one side were the washbowls, and on the other were, first, a porter's closet, and, next to it, the water closet. The door of this latter closet was about in the center of the washroom. The plaintiff had entered the car at Albany by that end, which, like the rest of the car, received its light from a hanging lamp. He had frequently traveled on vestibule trains, and was familiar with the sleeping car arrangements upon this and other railroads. He had occasion, after retiring for the night to his section, to go to the men's closet in this washroom, and knew about its location. He was awakened in the morning by the porter, at about 6 o'clock, when the train was at or near Mott Haven, and, while partly undressed, again started for the men's closet. He observed that there was some light from a lamp in the center of the car, and that some came through the windows of the sections whose berths had already been made up. He testifies that, when he reached the threshold of the washroom, the part of the car where he stood was plunged into darkness, and that he believed they were in the Park avenue tunnel. There was no lamplight in the washroom, and none in the dome of the vestibule. He could distinguish such objects as the towels by the washbowls, but not one door from another. He proceeded on for a short distance, reached for the handle of the closet door, opened it, stepped, as he supposed, into the closet, and

immediately fell off of the car and upon the track, where, after lying awhile, he was picked up suffering from a fractured leg. He had opened the vestibule door by mistake. He charges the defendant with the responsibility for the occurrence, in that the washroom was not lighted properly, and that the vestibule door was not locked or bolted, and he alleges that more employees were needed to insure a proper observance of the rules in those respects. He recovered a verdict which the general term has sustained (89 Hun, 75); and the defendant now appeals to this court, asserting that not only its own freedom from negligence was shown, but that the plaintiff was guilty of contributory negligence, and that, therefore, it was error to refuse to dismiss the complaint upon the evidence.

I think that the plaintiff should have been nonsuited. If we might assume that the defendant's servants were guilty of some neglect of duty which would impose a liability upon their employer for this accident (a proposition about which I entertain very considerable doubt), it is clear that the plaintiff failed to use that vigilance and prudence which it was incumbent upon him to use in the situation in which he was placed at the time. He had been a frequent traveler upon railroads, and was familiar with such sleeping car accommodations as were furnished in the present instance. Upon this occasion, he was either so confident of his steps as to be indifferent as to where, or how far, they took him, or he was, from some cause or other, mentally preoccupied and oblivious of his surroundings, and acted mechanically, instead of intelligently. That will not do, and cannot be excused, upon such an issue. An intelligent being, as the plaintiff certainly appears to have been, when placed in that unwonted situation which results from being rapidly transported over the ground by the appliance of powerful mechanical forces, and the use of such vehicles as are adapted to the purpose, cannot omit to use his senses, and assume that there is no cause to be prudent and vigilant. He has the right to rely upon the performance by the railroad company of its duty to exercise the utmost degree of care and skill which human prudence and foresight can suggest in transporting him; but that does not relieve him from the duty of using his own senses of sight, hearing, and perception. However great the perfection attained in the operation of railroads, a train is not absolutely a safe place, nor a normal situation for a person. Railroad companies are not insurers of the safety of travelers. When they have done all that human skill, prudence, and foresight suggest, in the way of precautions, and of a safe roadbed, of suitable passenger cars, and of such proper mechanical appliances as are required in the operation of a train, they cannot be required to do more. Such risks as arise from heedlessness on the part of the passenger cannot be foreseen, and if the railroad company is to be liable for them, then, indeed, it becomes an insurer of the safety of its passengers. This accident was not attributable to defects in any of the appliances or machinery designed for the operation of the train. It happened simply because, put in its briefest form, the plaintiff, not regarding

the darkness of the moment, opened the wrong door of several, and walked out of the car, instead of into a closet. Was the company bound to foresee and to provide against such an extraordinary occurrence and such heedless conduct? Practically put, the question is this: Can a man, in the full possession of his senses, traveling upon a railroad train, and finding himself plunged into darkness, at a moment when groping about in the car, proceed with the same confidence as in the light and be regarded as a prudent man? The question seems to answer itself.

Of course, the plaintiff insists that whether he contributed to the result by his acts was a question upon the facts for the jury to decide. The argument, in effect, is that, if he had the right to assume that the rules would be observed, and, therefore, that the vestibule door was properly bolted, then he had the right to grope about in the dark without fear of consequences, and whether he acted in so doing as a prudent man is for the jury to say. I cannot find any authority for that in the cases, and I think that reason refuses its approval to such a proposition. If the fact was—and we must under this verdict so assume—that the light was out in the washroom, either from its sudden extinguishment or by inattention, and the sudden entering of the train into the tunnel left the plaintiff in darkness, he had two courses open to him. He could wait for the light to be renewed, or he could try to reach the closet door without any sufficient light to guide him. What he said he did was to step out, without any hesitation, to open the door that he came to, and to continue on in perfect confidence, and that, thus, he fell off of the car. There were several circumstances which should have, more or less forcibly, made a man with his wits about him notice his situation, especially one so familiar as the plaintiff was with the car arrangements. When he crossed the threshold of the washroom, from the car aisle, he had only about 2½ feet to go to be opposite the door knob of the men's closet. Dividing the floor of the car from that of the vestibule platform was a sill of some 9 inches in width, with a total difference in height of the floors of about 4 inches, and the former was carpeted, while the latter was covered with a rubber mat. The vestibule door was divided into two parts, each some 18 inches in width, and united by projecting hinges on the inside, which permitted the door, upon being opened, to fold upon itself. Finally, upon opening the door, there was all the change from the atmosphere of the car to the peculiar atmosphere of a tunnel, and of a foggy and rainy morning. The absence of mind, which deprived the plaintiff of his ability to notice all these remarkable differences in the situation, might well have permitted him to fumble with the latch or bolt of the vestibule door without any awakening of his senses.

I think that we must hold, as matter of law, that the plaintiff was guilty of contributory negligence, in utterly failing to use that prudence which was especially incumbent upon him under the circumstances of the situation. The darkness called upon him to use it, and, had he done so, the accident could not, within any reasonable probability, have hap-

pened. A person whose power of vision is temporarily obstructed by some supervening condition should take the greater care, and should, if it be possible, await its passing away. If he neglects to proceed cautiously, he must accept the consequences of his undue precipitation. The following cases among others, will suffice as more or less pertinent illustrations: *Loffin v. Buffalo & S. W. R. Co.* 106 N. Y. 142, 60 Am. Rep. 438; *Henney v. Long Island R. Co.* 112 N. Y. 125; *Hilsen-*

beck v. Guhring, 131 N. Y. 674. Therefore, without discussing at all the question of whether the defendant was shown to have been guilty of some neglect, I think, upon the plaintiff's own showing, that he was himself negligent, and that it was error to refuse to dismiss his complaint, and to submit the case to the determination of the jury.

The judgment should be reversed, and a new trial ordered with costs to abide the event.

All concur.

OHIO SUPREME COURT.

STATE of Ohio, *ex rel.* F. S. MONNETT,
Attorney General,

v.

Grace A. ADAMS.

(58 Ohio St. 612.)

The act of April 26, 1898, to amend § 110 and other sections of the Revised Statutes (98 Laws, 405), is ineffectual to render a woman eligible to the office of notary public, in view of the provisions of § 4 of article 15, and § 1 of article 5, of the Constitution; the former section requiring that an officer shall be an elector, and the latter that an elector shall be a male citizen.

(June 21, 1898.)

APPPLICATION for a writ of quo warranto to oust defendant from the position of notary public for Lake County to which she had been appointed by the governor. *Judgment of ouster.*

The case sufficiently appears in the opinion. *Messrs. F. S. Monnett*, Attorney General, and *John L. Lott*, for plaintiff:

Wherever the term "notary" is used, it is always used in connection with the term "office."

An office is defined to be a right to exercise a public function or employment, and to take the fees and emoluments belonging to it.

2 Bouvier, Law Dict. 328.

An office is a public station or employment, conferred by the appointment of government; and embraces the ideas of tenure, duration, emolument, and duties.

United States v. Hartwell, 6 Wall. 385, 18 L. ed. 830.

A notary is defined to be an officer who publicly attests deeds or other writings to make them authentic in another country. Also an officer who confirms and attests the truth of writings to render them available as evidence.

16 Am. & Eng. Enc. Law, p. 753; Proffatt, *Notaries*, § 1; *Hill v. Bacon*, 43 Ill. 477; *Notaries Public*, 9 Colo. 628; *State, Atty. Gen., v. Wilson*, 29 Ohio St. 347; *State, Atty. Gen., v. Jennings*, 57 Ohio St. 415; *Cayon v. Dwelling House Ins. Co.* 68 Wis. 519.

No person shall be elected or appointed to

*Headnote by the COURT.

NOTE.—As to the right of women to be notaries public, see also *Opinion of the Justices (Mass.)* 32 L. R. A. 360, and other cases there cited.
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any office in this state unless he possess the qualifications of an elector.

Const. art. 15, § 4.

Under the Constitution and laws of Ohio, a woman is not eligible to the office of notary public.

State, Robinson, v. McKinley, 57 Ohio St. 627; *Notaries Public*, 9 Colo. 628; *Story, Const.* §§ 789-792; *United States v. Hartwell*, 6 Wall. 385, 18 L. ed. 830; *Hill v. Bacon*, 43 Ill. 477; *Opinion of the Justices*, 150 Mass. 586, 6 L. R. A. 842.

A notary public is a county officer.

Hill v. Bacon, 43 Ill. 477; *Notaries Public*, 9 Colo. 628.

Messrs. A. G. Reynolds, John Kenney, James R. Garfield, and W. E. Fink, Jr., for defendant.

Per Curiam:

The commission was issued to Miss Adams under authority supposed to be conferred upon the governor by the act of April 26, 1898, to amend § 110 and other sections of the Revised Statutes (98 Ohio Laws, 405). Before the amendment, the pertinent provision of this section was: "The governor may appoint and commission as notaries public as many persons having the qualifications of electors," etc. In the amended section the phrase "having the qualifications of electors" is omitted. The amendment is ineffectual for the purpose contemplated, because § 4 of article 15 of the Constitution ordains that "no person shall be elected or appointed to any office in this state, unless he possess the qualifications of an elector." The qualifications of an elector are prescribed in § 1 of article 5 of the Constitution, and it is required that an elector shall be a male citizen of the United States. That a notary public is an officer seems clear from the nature of his functions, as well as from the authorities upon the subject. That a notary is an officer, and that a woman is ineligible under these constitutional provisions, are propositions distinctly held in *Notaries Public*, 9 Colo. 628. That a notary is an officer is held in *Hill v. Bacon*, 43 Ill. 477, and *Opinion of the Justices*, 150 Mass. 586, 6 L. R. A. 842. The same conclusion is implied in *Warwick v. State*, 25 Ohio St. 21, where it is held that a woman may be deputy clerk of the probate court, because the acts of such deputy are not independent, but are the acts of the principal. The contrary view is not supported by *State*,

Eastern & W. School Dist., v. *Cincinnati*, 19 Ohio, 178, and *State, Mills*, v. *Columbus Bd. of Elections*, 9 Ohio C. C. 184. It was held in those cases that the qualifications of an elector are not essential to the holding of positions of an official character under the school laws, because of the effect of the constitutional provisions relating especially to the subject of

schools. Those cases have not sufficient breadth or strength of foundation to admit of additional superstructure. The conclusion here reached is in accord with that announced in *State, Robinson*, v. *McKinley*, 57 Ohio St. 627.

Judgment of ouster.

INDIANA SUPREME COURT.

City of EVANSVILLE, *Appt.*,

v.

Amelia SENHENN.

(.....Ind.....)

1. **Departure from decisions previously made** is required by the policy of the law where adherence to them would be productive of more evil than the departure therefrom, and the establishment of a better and sounder rule.
2. **Negligence of the parent or guardian having custody and control of an infant** in exposing it to danger will not be imputed to the child so as to preclude its right of action against a third person by whose negligence it is injured.
3. **The negligence of private parties piling lumber in a street**, either for themselves or when delivering it to the city, will not render the city liable in the absence of notice, either express or implied.

On rehearing.

4. **If there is any evidence sufficient to warrant the jury in drawing the inference** that a certain fact exists pertinent to the issues the trial judge must, if requested, instruct the jury what the law arising from such fact is, even though he may be of the opinion that such fact is not established by a preponderance of the whole evidence.

(September 15, 1897.)

A PPEAL by defendant from a judgment of the Circuit Court for Warrick County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. George A. Cunningham, for appellant:

The question whether or not there was negligence on the part of the parents of the appellee should have been submitted to the jury.

Pittsburgh, Ft. W. & C. R. Co. v. Vining, 27 Ind. 513, 92 Am. Dec. 269; *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287, 92 Am. Dec. 818; *Jeffersonville, M. & I. R. Co. v. Bowen*, 40 Ind. 545; *Hathaway v. Toledo, W. & W. R. Co.* 46 Ind. 25; *Higgins v. Jeffersonville, M. & I. R. Co.* 52 Ind. 110; *Evansville & C. R. Co. v. Wolf*, 59 Ind. 89; *Mayhew v. Burns*, 103 Ind. 828; *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 179, 58 Am. Rep. 387; *Louisville, N.*

A. & C. R. Co. v. Shanks, 132 Ind. 395; *Indianapolis, D. & W. R. Co. v. Wilson*, 134 Ind. 95; *Cleveland, C. C. & St. L. R. Co. v. Keely*, 138 Ind. 600.

The doctrine of imputed negligence was recognized as the law of this state in—

Terre Haute Street R. Co. v. Tappenbeck, 9 Ind. App. 423; also *Louisville, N. A. & C. R. Co. v. Sears*, 11 Ind. App. 654.

Where the duty to keep its streets in safe condition rests upon the corporation, it is liable for injuries caused by its neglect or omission to keep the streets in repair, as well as for those caused by defects occasioned by the wrongful acts of others; but as the basis of the action is negligence, notice to the corporation of the defect which caused the injury, or of facts from which notice thereof may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to liability.

3 Dill. Mun. Corp. 4th ed. § 1024; *Warsaw v. Dunlap*, 112 Ind. 576; *Leeds v. Richmond*, 102 Ind. 372.

If the lumber was piled in a careless manner by the persons having the contract to deliver the lumber to the city, then this was not the act of the city and the city would not be liable until it had notice either express or implied.

2 Dill. Mun. Corp. 4th ed. § 1028; *Wabash, St. L. & P. R. Co. v. Farver*, 111 Ind. 195, 60 Am. Rep. 696.

Stricter vigilance is required of a private than a municipal corporation.

Turner v. Indianapolis, 96 Ind. 57.

The refusal to instruct the jury that if the lumber was placed in the street, not by the city but by someone else, to be used in the construction or repair of a building, then the city is not liable without notice, was error.

Wood v. Mears, 12 Ind. 515, 74 Am. Dec. 223; *Vincennes v. Richards*, 23 Ind. 381; 2 Dill. Mun. Corp. 4th ed. § 730.

It will not do for the court below to determine for itself whether or not it was the duty of the city under all of the circumstances to barricade or guard the lumber pile. That question should have been left for the jury to determine. Where, as in this case, the facts are not admitted, the question of negligence is one for the jury.

Franklin v. Harter, 127 Ind. 446; *Howe v. Ohmart*, 7 Ind. App. 32; *Pittsburgh, C. & St. L. R. Co. v. Wright*, 80 Ind. 236.

NOTE.—The above decision overruling earlier cases brings the law of Indiana into line with that of most other jurisdictions, as shown in note to *Chicago City R. Co. v. Wilcox* (Ill.) 21 L. R. A. 76, 41 L. R. A.

On the same question, see *Bottoms v. Seaboard & R. R. Co.* (N. C.) 25 L. R. A. 734.

The negligence complained of must be the proximate cause of the injury.

2 Dill. Mun. Corp. § 1007; *Bluffton v. Mathews*, 92 Ind. 213; 2 Thomp. Neg. p. 765.

They are only bound to exercise reasonable care.

2 Dill. Mun. Corp. § 1015; *Warsaw v. Dunlap*, 112 Ind. 576; *Turner v. Indianapolis*, 86 Ind. 51; *Buscher v. Lafayette*, 8 Ind. App. 595.

Mr. J. E. Williamson for appellee.

McCabe, Ch. J., delivered the opinion of the court:

The appellee sued the appellant in the superior court of Vanderburg county for damages arising from a personal injury caused by the falling of a pile of lumber through the alleged negligence of appellant, resulting in the loss of appellee's foot, in August, 1874, when she was about five years old. The venue was changed to the Warwick circuit court, where a trial resulted in a verdict and judgment for the defendant. On an appeal to this court that judgment was reversed for error in instructing the jury. *Senhenn v. Evansville*, 140 Ind. 675. On the return of the case to the circuit court another trial resulted in a verdict and judgment for the plaintiff over defendant's motion for a new trial. The only error assigned is upon the action of the trial court in overruling appellant's motion for a new trial. The only errors complained of and urged by appellant under that motion are the giving and refusal of certain instructions by the trial court.

One of the most important questions in the case arises upon the court's refusal to give instruction No. 13 asked by the appellant, reading as follows: "If the plaintiff's parents knew that the pile of lumber was in the street, and was dangerous, and liable to fall, then it was their duty to exercise reasonable care in keeping the plaintiff away from the same; and if they failed to exercise such reasonable care, and such failure directly contributed to the injury, the plaintiff cannot recover." The evidence was such as to make this instruction applicable if it expresses the law correctly on the facts. This instruction raises one of the most vexed questions in the law. It is well settled that an infant of tender years is deemed in law not possessed of sufficient discretion to make it guilty of negligence for its failure to exercise due care for its own safety. *Shearm. & Redf. Neg.* 8d ed. p. 48, note 1; 2 Thomp. Neg. p. 1181. On that point there is no conflict of opinion. But there is a sharp conflict of opinion between courts of last resort as to whether the negligence of the parent or guardian having the custody and control of such infant in exposing it to danger from the negligence of others, whereby it is injured, can be attributed to such infant so as to defeat its right of recovery therefor. It is contended in support of the correctness of the instruction by appellee's counsel that the overwhelming weight of judicial decisions condemns the instruction, while appellant contends that this court is committed to the doctrine expressed by the instruction in a long line of its own decisions, in proof of which we are cited to the cases of *Pittsburgh, Ft. W. & C. R. Co. v. Vining*, 27 Ind. 513, 92 Am. Dec. 269; *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287, 92 Am. Dec. 818; 41 L. R. A.

Jeffersonville, M. & I. R. Co. v. Bowen, 40 Ind. 645; *Hathaway v. Toledo, W. & W. R. Co.* 46 Ind. 25; *Evansville & O. R. Co. v. Wolf*, 59 Ind. 89; *Mayhew v. Burns*, 103 Ind. 328; *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 179, 58 Am. Rep. 887; *Louisville, N. A. & C. R. Co. v. Shanks*, 182 Ind. 395; *Indianapolis, D. & W. R. Co. v. Wilson*, 184 Ind. 95; *Cleveland, C. O. & St. L. R. Co. v. Keely*, 138 Ind. 600.

But it is contended by appellant's counsel that the question here involved, namely, whether the contributory negligence of the parents of an infant plaintiff of such tender years as incapacitates it to exercise due care is imputable to the child, was not presented, considered, or decided in any of these cases.

This claim is a little too broad. That question may not have been presented or considered in any of those cases, and we are inclined to think that is true. But in two of the cases only was it decided. It is recognized as established law everywhere that in an action by a parent on account of the death of such an infant of tender years under statutes for the death of the child caused by the negligence of the defendant and for loss of services where death did not ensue, at common law, the parent's negligence through which the child was exposed to the danger contributing to the injury defeats the parent's action, it being recognized that there is no difference in the effect of such negligence on the part of the parent in such an action and the effect of his negligence contributing to an injury to his own person or property. In either case he attempts to found an action for damages on his own negligence and wrong, which would be manifestly unjust, as well as against principle and authority. But where the child brings the action to recover damages for its own injury, where the judgment recovered must inure to its own exclusive benefit, where its improvident actions contributed to such injury, manifestly a very different question is presented. The law taking cognizance of its want of discretion, and that its tender years renders it impossible for it to know any better, exempts it from the charge of negligence.

Upon what principle, then, we are led to inquire, may its parent's, guardian's, or custodian's negligence be imputed to it so as to take away its property in its cause of action for defendant's negligence making it a cripple for life? We know of none unless this court is by its previous decisions irretrievably committed to that doctrine. The first case cited above, *viz., Pittsburgh, Ft. W. & C. R. Co. v. Vining*, 27 Ind. 513, 92 Am. Dec. 269, was a case where the father, as administrator, recovered the judgment for the death of his son through the negligence of the defendant railway company. The judgment was reversed for error in overruling a demurrer to the complaint assigning for cause insufficiency of facts; (2) that the plaintiff had no legal capacity to sue as administrator of his infant son. It was held that the right of action by the statute was in the father as such, and not in the administrator, and it was further held that the complaint was bad for failure to allege that the parents of the infant, being seven years of age, were free from contributory negligence, and it

was also held that the evidence was insufficient. This decision was clearly right, because under the statute the cause of action, if any existed, belonged to the father as such. That right of action for the negligence of the defendant could only be maintained by him by allegation and proof that his own negligence did not contribute to the injury sued for, as in any other suit by him for negligence. There was not any question made, as there could not have been made any question, in the case as to the imputability of the parent's negligence to the injured child. Yet this court, in support of its conclusion, cited the leading case, and the one which originated the doctrine of imputing the negligence of the parent or custodian to the child, namely, *Hartfield v. Roper* (decided by the supreme court of New York in 1839) 21 Wend. 615, 84 Am. Dec. 278. While that case decides that the contributory negligence of the parent may defeat an action for injury through negligence to an infant who is *non sui juris*, making it to that extent applicable, and affords support to the conclusion reached in *Vining's Case*, yet *Hartfield v. Roper*, 21 Wend. 615, 84 Am. Dec. 278, goes further, and originates the doctrine of the imputability of the parent's negligence to the child so as to defeat its right of action,—a proposition not involved in *Vining's Case*.

The next case in which any question of the sort was involved coming up before this court was *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287, 92 Am. Dec. 318, and that case did involve the precise question here involved, but it appears from the case that this court did not think any other or different question was presented than that presented and decided in *Vining's Case*. There is not a word in the case that indicates that this court intended to decide that an infant *non sui juris* injured by negligence is chargeable with the negligence of its parents contributing to its injury. The case is decided upon the theory, simply, that the parent's negligence contributing to the injury defeats the action. The only authority cited for such conclusion is *Vining's Case*, and that this court supposed it was deciding nothing but the same question that had been decided by it in that case is clearly evidenced by the language in reference thereto in the *Huffman Case*, as follows: "We are clear that the law was correctly stated [in *Vining's Case*], and its application to this case cannot be questioned." That case was correctly decided, as we have already seen, and that seems to be all this court supposed it was deciding in the *Huffman Case*, the opinion being delivered in both cases by the same judge, Ray. But the latter case necessarily decides an entirely different question than the former, namely, that the negligence of the parent may be imputed to the injured child who is *non sui juris* so as to defeat its action for its own injury caused by a defendant's negligence. The most cogent reasons ought to be shown why such an inconsiderate judgment should bind this court to a rule thus inadvertently established, and without consideration of the real question involved and decided. We are now for the first time in the history of our court asked to give the question consideration, and say whether, in our judgment, the law imputes

the parent's negligence to the child *non sui juris* in such an action. The decision in the *Huffman Case* is the principal barrier to such consideration and decision, and, while it is the policy of the law not to depart from decisions previously made by a court of last resort, yet the same law does require such departure where adherence to such decisions would be productive of more evil than the departure therefrom, and the establishment of the better and sounder rule. It is very seldom that a departure from decisions which establish a rule of property can be justified. But the decision in the *Huffman Case* does not establish a rule of property. The only other case in this court that can be construed into holding to the doctrine necessarily involved in the decision in *Huffman's Case* is *Hathaway v. Toledo, W. & W. R. Co.* 46 Ind. 25. That case did necessarily involve the same question involved and decided in *Huffman's Case*. And for the first time this court seemed to realize what had been decided without consideration in the *Huffman Case* in the following language by Downey, J., delivering the opinion of the court, namely: "It seems harsh to apply this doctrine to a case where damage occurs to a child, and yet the application is made, and this whether the fault is that of the child itself or the negligence of the person under whose immediate care it is."

This doctrine is sanctioned by several decisions of this court. *Pittsburgh, Ft. W. & C. R. Co. v. Vining*, 27 Ind. 513, 92 Am. Dec. 269; *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287, 92 Am. Dec. 318; *Jeffersonville, M. & I. R. Co. v. Bowen*, 40 Ind. 545." This language sounds more like an apology than the decision of a great principle. All the other cases decided by this court to which we have been referred named in the forepart of this opinion, including the *Bowen Case*, in 40 Ind., the last case cited in the foregoing quotation, with certain exceptions, hereinafter mentioned, are cases where the parent sues for damages to him on account of loss of services at common law or under the statute, and the rule was correctly applied that his negligence in exposing his child contributing to the injury defeated his action, which has no influence whatever on the question now before us. But the marked distinction between the two classes of cases was wholly lost sight of by this court in deciding the *Huffman Case* and the *Hathaway Case*. The observations of Chief Justice Beasley in discussing *Hartfield v. Roper*, speaking for the supreme court of New Jersey, are so pertinent that we adopt them: "The problem is, whether an infant of tender years can be vicariously negligent, so as to deprive itself of a remedy that it would otherwise be entitled to. In some of the American states this question has been answered by the courts in the affirmative, and in others in the negative. To the former of these classes belongs the decision in *Hartfield v. Roper*, reported in 21 Wend. 615, 84 Am. Dec. 278. This case appears to have been one of first impression on this subject, and it is to be regarded, not only as the precursor, but as the parent, of all the cases of the same strain that have since appeared. The inquiry with respect to the effect of the negligence of the custodian of the infant, too young to be intelligent of situations and cir-

cumstances was directly presented for decision in the primary case thus referred to. . . . It is obvious that the judicial theory was, that the infant was, through the medium of its custodian, the doer, in part, of its own misfortune, and that, consequently, by force of the well-known rule, under such conditions, he had no right to an action. This, of course, was visiting the child for the neglect of the custodian, and such infliction is justified in the case cited in this wise: 'The infant,' says the court, 'is not *ex jure*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; in respect to third persons his act must be deemed that of the infant: his neglects the infant's neglects.' It will be observed that the entire context of this quotation is the statement of a single fact, and a deduction from it, the premise being, that the child must be in the care and charge of an adult, and the inference being that, for that reason, the neglects of the adult are the neglects of the infant. But surely this is conspicuously a *non sequitur*. How does the custody of the infant justify, or lead to, the imputation of another's fault to him? The law, natural and civil, puts the infant under the care of the adult, but how can this right to care for and protect be construed into a right to waive, or forfeit, any of the legal rights of the infant? The capacity to make such waiver or forfeiture is not a necessary, or even convenient, incident of this office of the adult, but, on the contrary, is quite inconsistent with it, for the power to protect is the opposite of the power to harm, either by act or omission. In this case in *Wendell* it is evident that the rule of law enunciated by it is founded in the theory that the custodian of the infant is the agent of the infant. But this is a mere assumption without legal basis, for such custodian is the agent, not of the infant, but of the law. If such supposed agency existed, it would embrace many interests of the infant, and could not be confined to the single instance where an injury is inflicted by the co-operative tort of the guardian. And yet it seems certain that such custodian cannot surrender or impair a single right of any kind that is vested in the child, nor impose any legal burden upon it. If a mother travelling with her child in her arms should agree with a railway company, that in case of an accident to such infant by reason of the joint negligence of herself and the company the latter should not be liable to a suit by the child, such an engagement would be plainly invalid on two grounds. First the contract would be *contra bonos mores*, and, second, because the mother was not the agent of the child authorized to enter into the agreement. Nevertheless, the position has been deemed defensible that the same evil consequences to the infant will follow from the negligence of the mother in the absence of such supposed contract, as would have resulted if such contract should have been made, and should have been held valid. In fact, this doctrine of the imputability of the misfeasance of the keeper of a child to the child itself, is deemed to be a pure interpolation into the law, for, until the case under criticism it was absolutely unknown, nor is it sustained by legal

analogies. Infants have always been the particular objects of the favor and protection of the law. In the language of an ancient authority this doctrine is thus expressed: 'The common principle is, that an infant, in all things which sound in his benefit, shall have favor and preferment in law as well as another man, but shall not be prejudiced by anything in his disadvantage. 9 Vin. Abr. 374.' . . . Nothing could be more to the prejudice of an infant than to convert, by construction of law, the connection between himself and his custodian into an agency to which the harsh rule of *respondet superior* should be applicable. The answerableness of the principal for the authorized acts of his agent is not so much the dictate of natural justice as of public policy, and has arisen, with some propriety, from the circumstances that the creation of the agency is a voluntary act, and that it can be controlled at the will of its creator. But in the relationship between the infant and its keeper all these decisive characteristics are wholly wanting. The law imposes the keeper upon the child, who, of course, can neither control nor remove him, and the injustice, therefore, of making the latter responsible, in any measure whatever, for the torts of the former, would seem to be quite evident. Such subjectively, would be hostile, in every respect, to the natural rights of the infant, and consequently cannot, with any show of reason, be introduced into that provision which both necessity and law establish for his protection. Nor can it be said that its existence is necessary to give just enforcement to the rights of others. When it happens that both the infant and its custodian have been injured by the co-operative negligence of such custodian and a third party, it seems reasonable, at least in some degree, that the latter should be enabled to say to the custodian, you and I, by our common carelessness, have done this wrong, and therefore neither can look to the other for redress. But when such wrongdoer says to the infant, your guardian and I, by our joint misconduct, have brought this loss upon you, consequently you have no right of action against me, but you must look for indemnification to your guardian alone, a proposition is stated that appears to be without any basis either in good sense or law. The conversion of the infant, who is entirely free from fault, into a wrongdoer, by imputation, is a logical contrivance, uncongenial with the spirit of jurisprudence. The sensible and legal doctrine is this: An infant of tender years cannot be charged with negligence; nor can he be so charged with the commission of such fault by substitution, for he is incapable of appointing an agent, the consequence being that he can, in no case, be considered to be the blamable cause, either in whole, or in part, of his own injury. There is no injustice, nor hardship, in requiring all wrongdoers to be answerable to a person who is incapable either of self-protection or of being a participator in their misfeasance. Nor is it to be overlooked that the theory here repudiated, if it should be adopted, would go the length of making an infant in its nurse's arms answerable for all the negligences of such nurse while thus employed in its service. . . . If the neglects of the guardian are

to be regarded as the neglects of the infant, as was asserted in the New York decision, it would, from logical necessity, follow, that the infant must indemnify those who should be harmed by such neglects. That such a doctrine has never prevailed is conclusively shown by the fact that in the reports there is no indication that such a suit has ever been brought. It has already been observed that judicial opinion, touching the subject just discussed, is in a state of direct antagonism, and it would therefore serve no useful purpose to refer to any of them. It is sufficient to say that the leading text-writers have concluded that the weight of such authority is adverse to the doctrine that an infant can become, in any wise, a tortfeasor by imputation. 1 Shearm. & Redf. Neg. § 75; Whart. Neg. § 811; 2 Wood. Railway Law, p. 1284." *Newman v. Phillipsburg Horse Car R. Co.* 52 N. J. L. 446, 8 L. R. A. 842.

In the states of Alabama, Connecticut, Pennsylvania, North Carolina, Tennessee, Texas, Georgia, Vermont, Louisiana, Virginia, Maryland, Michigan, Mississippi, New Hampshire, Iowa, Illinois, Missouri, Nebraska, Ohio, New Jersey, and perhaps others, the doctrine of *Hartfield v. Roper* has been distinctly repudiated. The supreme court of North Carolina says: "The imputation of the negligence of parents and guardians to children of tender age is, says Shearman & Redfield on Negligence (vol. 1, § 74), an invention of the supreme court of New York in the . . . case of *Hartfield v. Roper*, 21 Wend. 615, 84 Am. Dec. 273, and has been followed in many of the decisions of that state, although it is said by these authors to be founded upon a *dictum* which has only been assumed to be the law by the court of last resort, but never squarely presented to that tribunal for decision. And they further remark that it may well be doubted whether the question has ever been fully argued anywhere, and that the result of their examination of the cases is to satisfy them 'that the last of the long series of so called decisions on this point is like the first, a mere *dictum* uttered without hearing argument and without consideration.'" *Bottoms v. Seaboard & R. R. Co.* 114 N. C. 699, 25 L. R. A. 784.

In reviewing the case of *Hartfield v. Roper*, 21 Wend. 615, 84 Am. Dec. 273, Mr. Beach says that the doctrine, as applied to children too young to exercise discretion, is an anomaly, and in striking contrast with the case of a donkey which is carelessly exposed in the highway, and negligently run down and injured, and also with the case of oysters carelessly placed in the bed of a river, and injured by the negligent operation of a vessel, in both of which cases actions have been maintained. And he forcibly observes that under the principle referred to, the child, were he an ass or oyster, would secure a protection which is denied him as a human being of tender years. Beach, Contrib. Neg. § 415. This author, in his examination of the doctrine, remarks: "It is not true that an infant is not *sui juris*. In the sense of being entitled to maintain an action for his own benefit, he is *sui juris*. As far as his right of action is concerned he is in no respect the chattel of his father. . . . The judgment [when suing by guardian or next friend], if any is recovered, is the property of the

minor." Beach, Contrib. Neg. 2d ed. § 128. The supreme court of Illinois was classed by text-writers and other courts as was Indiana, as holding to the doctrine of *Hartfield v. Roper*. But the supreme court of Illinois, in *Chicago City R. Co. v. Wilcox*, 188 Ill. 870, 21 L. R. A. 76, after reviewing twelve Illinois decisions, decided in 1891 against the rule in *Hartfield v. Roper*, and said: "It seems to be assumed by several of the writers on the subject that this court is committed to the doctrine that in a suit by a child to recover damages caused by the negligence of the defendant, the negligence of the plaintiff's parents or custodians may be imputed to the plaintiff in support of the defense of contributory negligence. While there is in some of the cases some foundation for this assumption, yet, in our opinion, the question has never been so considered or determined by this court as to make it the settled rule in this state. Most of the cases to which reference is made as supporting said doctrine were suits brought by a parent in his own right, or as the legal representative of the child, where the death of the child was alleged to have been caused by the negligence of the defendant." After reviewing the Illinois cases, that court goes on to say: "It is apparent that in none of the cases above mentioned was there any occasion for the court to determine whether, as a rule of law, the negligence of the plaintiff's parents or custodian would sustain the defense of contributory negligence, nor is there any attempt in any of them to consider or discuss the rule. In several of them language is used which would seem to imply a tacit recognition of the doctrine of imputed negligence, but in none of them was the adoption of that doctrine essential to the decision, nor can we suppose from the language used that the court intended to commit itself definitely to an affirmance of that doctrine." "The rule denying the doctrine of imputed negligence is now recognized and enforced by the courts of many of the states, and is supported by the reasoning and authority of text-writers whose opinions are justly entitled to a high degree of consideration. Among them may be mentioned Mr. Bishop, who in his recent treatise of Non Contract Law, § 582, says: 'This new doctrine of imputed negligence, whereby the minor loses his suit, not only where he is negligent himself, but where his father, grandmother, or mother's maid is negligent, is as flatly in conflict with the established system of the common law as anything possible to be suggested. The law never took away a child's property because his father was poor, or shiftless, or a scoundrel, or because anybody who could be made to respond to a suit for damages was a negligent custodian of it. But, by the new doctrine, after a child has suffered damages, which, confessedly, are as much his own as an estate conferred upon him by gift, and which he is entitled to obtain out of any of the several defendants who may have contributed to them, he cannot have them if his father, grandmother, or mother's maid happens to be the one making the contribution. In these and other respects, it is submitted, the established principles stated in a preceding section are conclusive of the proposition that the doctrine now in contemplation does not belong to the common law.'" To the same effect, see

Whart. Neg. §§ 814 *et seq.*; Beach, Contrib. Neg. §§ 88-48.

The supreme court of Georgia, in *Atlanta & C. Air-Line R. Co. v. Gravitt*, 93 Ga. 369, 26 L. R. A. 558, in an able opinion, condemning *Hartfield v. Roper*, and speaking of this Illinois case, says: "In many of the text-books it is stated that the opposite view prevails in Illinois, and numerous decisions of the supreme court of that state are cited in support of this statement, seemingly with good reason. Be this as it may, however, that state, by its recent decisions, has 'wheeled into line,' and joined the procession of those jurisdictions which have repudiated the doctrine of *Hartfield v. Roper*."

Iowa was also classed as one of the states holding to the doctrine of *Hartfield v. Roper*, until *Wymore v. Mahaska County*, 78 Iowa, 396, 6 L. R. A. 545, was decided in 1889. In that case the Iowa cases were reviewed, and it was held that the previous decisions of that court had assumed, without deciding, that the true doctrine was that of *Hartfield v. Roper*, but in this latter decision the court distinctly and emphatically repudiated that doctrine.

We therefore conclude that these authorities announce and declare the only correct rule of law upon the subject, and hence the cases of *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287, 92 Am. Dec. 818, and *Huthaway v. Toledo, W. & W. R. Co.* 46 Ind. 25, in so far as they conflict with the conclusion here reached, are overruled. It follows that the court did not err in refusing the thirteenth instruction.

One of the cases decided by this court and cited by appellant's counsel as sustaining the doctrine of *Hartfield v. Roper* is *Louisville, N. A. & C. R. Co. v. Shanks*, 133 Ind. 395. But that case does not so decide, but simply assumes that doctrine to be the law, both parties seeming to concede that such was the law.

Another one of the list of cases cited by appellant calling for special mention is that of *Indianapolis, D. & W. R. Co. v. Wilson*, 184 Ind. 95. The complaint was held bad in that case because it showed that the plaintiff, a boy nine years of age, was guilty of contributory negligence, notwithstanding its general averment that he was free from contributory negligence, the complaint having proceeded on the theory that he had sufficient age and discretion to be chargeable with negligence. No question about the imputability of negligence is hinted at in the case, much less decided.

The only other case in the list cited by appellant not embraced in the class where the parent sues as parent for the death of the child under the statute or at common law for loss of services is *Cleveland, C. C. & St. L. R. Co. v. Keely*, 138 Ind. 600. No question of the imputability of the negligence of the parents or custodians was involved or decided in that case. The plaintiff was a boy, who was eleven years old when the injury occurred, suing by next friend. This court, in answer to the objection that the complaint did not allege due care on part of the boy's parents, observed: "The appellee in this case is suing for his own injury. He was himself capable of going to school across the rail road, and his parents are not in the case, nor is it necessary that they should be."

The refusal of two other instructions is complained of by the appellant, reading as follows:

"Seven. If, at the time of the injuries complained of, the defendant had a contract with any person to furnish it with lumber by the year or otherwise, and to deliver the same to the city, and such person did in fact, under such contract, deliver said lumber, and pile the same in the street, then the act of such person or persons in delivering and piling the same was not the act of the city, and the city would not be liable for any negligence of such person in placing the same in the street, unless it had notice thereof, either express or implied." "Twelfth. If the lumber mentioned in the complaint was not placed in the street by the city, but was placed there by someone else, to be used in the construction or repair for a building, or for any other purpose, then the city is not liable for any accident resulting therefrom, unless it had notice, either express or implied, that the same was in the street, and that the same was in an unsafe and dangerous condition." The first paragraph of the complaint proceeded upon the theory that the city itself placed the lumber in the street and the second that it suffered it to exist after notice. There was evidence from which the jury might have inferred that the lumber was piled in the street by sawmill men with whom the city had a contract for its purchase and delivery. There was also evidence from which the jury might have inferred that the lumber belonged to private persons, to be used in the erection of a dwelling house, and with which the city had no connection whatever. The difficulty in determining the particular purpose for which and by whom the lumber was put in the street was greatly enhanced by the great length of time that had elapsed between the act and the bringing of the suit, being about twenty years. But, if the city purchased lumber from outside parties, and such parties, in delivering it, wrongfully piled it in the street, such vendor of the lumber, in delivering it to the city, was not the agent of the city, and the city was not liable for such act. The general rule is that a municipal corporation is not responsible for the negligence of an independent contractor with such corporation. *Leeds v. Richmond*, 102 Ind. 372; 2 Dill. Mun. Corp. 4th ed. § 1028. But, as was held in the former opinion in this case, a city which suffers an obstruction or cause of danger to remain for an unreasonable length of time upon its streets or sidewalks, so that the city might be presumed to have notice of the obstruction, would be liable therefor to the same extent as if the city had itself placed the obstruction or danger there in the first instance. *Glantz v. South Bend*, 106 Ind. 805; *Bullock v. New York*, 99 N. Y. 654, 2 N. E. 1, and notes. Both of the instructions 7 and 12 involve the principle of the necessity of notice to the city, express or implied, of the existence of the obstruction or danger, where the same has not been made by the city or some of its agents. As was said by this court in *Ft. Wayne v. De Witt*, 47 Ind. 391, borrowing from 2 Dill. Mun. Corp. 2d ed. §§ 789, 790: "The ground of the action is either positive misfeasance on the part of the corporation, its officers, or servants, or by others under its authority, in doing acts which cause the streets to be out of repair, in which case no other notice to the corporation of the

condition of the street is essential to its liability, or the ground of action is the neglect of the corporation to put the streets in repair, or to remove obstructions therefrom, or to remedy causes of danger occasioned by the wrongful acts of others, in which cases notice of the condition of the street, or what is equivalent to notice, is necessary, as will presently be stated, to give to the person injured a right of action against the corporation, unless, indeed, the matter be otherwise regulated by statute.

Where the duty to keep its streets in safe condition rests upon the corporation, it is liable for injuries caused by its neglect or omission to keep the streets in repair, as well as for those caused by defects occasioned by the wrongful acts of others; but as, in such case, the basis of the action is negligence, notice to the corporation of the defect which caused the injury, or facts from which notice thereof may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to liability; for in such cases the corporation, in the absence of a controlling enactment, is responsible only for a reasonable diligence to repair the defect or prevent accidents after the unsafe condition of the street is known, or ought to have been known to it, or its officers having authority to act respecting it." To the same effect is *Higert v. Greencastle*, 43 Ind. 574. According to these principles, the circuit court erred in refusing to give instructions 7 and 12 asked by the appellant.

The giving and refusing of other instructions are complained of, but what we have already said covers about all the vital questions involved in such other instructions. The circuit court erred in overruling the motion for a new trial.

The judgment is reversed, and the cause remanded, with instructions to grant a new trial.

A petition for rehearing having been filed, *McCabe, J.*, on June 29, 1898, handed down the following response:

A very earnest petition for a rehearing, supported by a very elaborate brief, is presented in this case.

The first fault found with the original opinion is that we stated therein that the venue was changed from Vanderburg to Warrick county before the first trial. We hasten to cheerfully correct the error, if error it is, by saying that the statement of appellee's counsel is probably correct, to the effect that the first trial took place in the superior court of Vanderburg county, resulting in a judgment in favor of the defendant. After the reversal of this judgment the cause was remanded to the trial court, and the venue was then changed to the Warrick circuit court. If we were "in error" in this statement, as counsel says we were, we were excusable, because the record shows that the first trial that it gives any account of took place in the Warrick circuit court. We certainly ought not to be criticised for strictly following the record, especially in the absence of any information from the learned counsel that it does not speak the truth. Nor do we mean to intimate that we could accept the

statement of counsel, in conflict with the record, if the point was material.

Appellee's learned counsel, in support of the petition for a rehearing, says that "it is not our purpose to controvert any of the rules of law laid down by this court in its decision in this case. We believe, upon the other hand, that the law is correctly stated, and we have at no time contended for a different statement." And counsel proceeds to favor us with twenty-four printed pages of a brief in support of appellee's petition for a rehearing. And, in the very next statement in his brief, counsel, as to instructions 7 and 12, for the refusal of which we reversed the judgment, says that "both instructions 7 and 12 are contrary to the law." This, at least, seems a little difficult to understand. The principal defense made of the court's refusal to give instruction 12 is that it was substantially given and sufficiently embraced in instruction No. 15 given by the court to the jury. We would be fully justified in refusing to consider this point in support of appellee's petition for a rehearing, because no such defense of the refusal of that instruction was made by appellee's counsel prior to the petition for a rehearing. It has often been decided by this court that a point made for the first time on a petition for a rehearing that might have been made before is not entitled to notice. The correct and orderly administration of justice requires such a rule. Points must be made in the briefs filed before the decision of the cause, if they are to be noticed on a petition for a rehearing. Glittering generalities will not do in the place of points. But in this case there was not a word said, prior to the petition for a rehearing, about instruction 15 given by the court embracing the substance of the proposition couched in instruction 12 refused by the court, as a justification or a defense of the court's refusal of instruction 12. The correct administration of justice does not require this court to search a voluminous record to discover some matter which might tend to establish that an erroneous refusal of an instruction was rendered harmless, when the party to be benefited by such discovery is represented in this court by able counsel, with a voluminous brief, wherein no effort is made to point out such matter, or mention the same. Under such circumstances, this court is justified in presuming that no such matter exists. However, we are inclined to think that the court's refusal of said instruction 12 was justified on the ground that the same was substantially given in the fifteenth instruction. But there is no way of justifying the refusal of the seventh instruction, except that it is not the law as applied to the evidence. Appellee's counsel has attempted to justify the refusal of that instruction, both on the ground that it does not express the law, and that it was not applicable to the evidence, and that the evidence was not sufficient to establish the fact upon which it is based. We quote the instruction again: "If, at the time of the injuries complained of, the defendant had a contract with any person to furnish it with lumber, by the year, or otherwise, and to deliver the same to the city, and such person did in fact, under such contract, deliver said lumber, and pile the same in the street, then

the act of such persons in delivering and piling the same was not the act of the city, and the city would not be liable for any negligence of such person in placing the same in the street, unless it had notice thereof, either express or implied." Great stress is put upon the word "deliver," as used in this instruction. It is contended that there could be no such thing as a delivery of the lumber, without an acceptance thereof by the city, and many definitions of the word "deliver" in cases of contracts for delivery of goods or things are cited. Many of them are to the effect that a delivery implies an acceptance, and hence an act of the will and hence knowledge on the part of the party to whom delivery is made. There are many definitions to the word "deliver." What particular meaning among its many definitions is to be assigned to the word depends on the connection in which it is used. The fourth definition given to it by Webster is: "To give forth in action or exercise; to discharge; as to deliver a broadside or a ball." That is the same meaning the word has in the sentence, "To deliver the opinion," "To deliver an address." The word used in such a connection does not imply an act of the will on the part of someone else nor an acceptance of anything. Such was the sense in which it was evidently used in instruction 7, as clearly indicated in the sentence reading: "And the city would not be liable for any negligence of such person in placing the same in the street, unless it had notice thereof, either express or implied." If the court meant by the word "deliver," in the previous part of the instruction, to imply an acceptance by the city, then there would have been no sense and no meaning in the words "unless it had notice thereof express or implied." This is so because the city could not accept the lumber in a pile on the street without notice that it was there. The word "deliver," in the instruction evidently was intended to mean the same that the word "placing," in the sentence above quoted from the instruction was intended to mean. Appellee's counsel does not question the plain meaning of these words, "and the city would not be liable for any negligence of such person in placing the same in the street, unless it had notice thereof, either express or implied," nor that they express the law by themselves correctly; but the contention is that the use of the word "deliver," in the previous part of the instruction changes the meaning of these words. But we have shown that one of the meanings of the word "deliver" is synonymous with the sense in which the word "place" was used in the instruction. But we need not descend into a technical definition of every word in the instruction. The meaning of the whole could not be misunderstood by the jury or anyone else. It told them, in substance, that if the persons from whom the city purchased the lumber in question piled it in the street without notice to the city, express or implied, that it was so piled, the act of placing the lumber in the street was not the act of the city, and it was not liable therefor. Other instructions given by the court properly directed the jury as to when the city would become liable if such lumber pile, so wrongfully placed in the street without

notice to it, was left there an unreasonable length of time. In addition to the cases cited in the original opinion holding that the instruction correctly expressed the law, we note a case cited by appellee's counsel in support of the petition for a rehearing, namely *Wabash, St. L. & P. R. Co. v. Farner*, 111 Ind. 195, 60 Am. Rep. 696. This case directly and emphatically upholds the correctness of the refused instruction 7.

It is next contended that because it turned out on the trial that the contract the city had with the sawmill men for the purchase of lumber was in writing, and oral evidence of its particular terms was excluded on objection by appellee's counsel, therefore we must treat the case as if there had been no proof upon the subject. There was enough evidence to show that the city had purchased the lumber, and that it was hauled by the sawmill men to the city. At least the evidence was sufficient to warrant the jury in so inferring. This was sufficient to show the nature of the transaction and to show that the relation of master and servant did not exist between the city and the sawmill men, and hence the city would not be liable for their negligence in piling the lumber in the street, unless it had notice, express or implied, of such negligent act, or suffered it to remain there an unreasonable length of time. *Wabash, St. L. & P. R. Co. v. Farner*, 111 Ind. 195, 60 Am. Rep. 696. If there was anything in the particular terms of the contract between the city and the sawmill men tending to establish a different relation, or tending to show the relation of master and servant between the city and the sawmill men, then the appellee's counsel ought to have introduced such evidence. The evidence that was introduced was sufficient, prima facie, to warrant the jury in drawing the inference that no such relation as master and servant existed between the sawmill men and the city, and authorized them to infer that the only relation existing between them was that of buyer and seller; making the sawmill men independent contractors with the city. The jury were the judges of the evidence, and on them devolved the duty of determining whether the evidence was sufficient to establish that relation; and the duty devolved on the court of telling them what the law was, in case they concluded that the evidence did establish that relation. The nature of the transaction, as disclosed by the evidence already alluded to makes a much stronger case than *Wabash, St. L. & P. R. Co. v. Farner*, 111 Ind. 195, 60 Am. Rep. 696, relied on by appellee, for the application of the doctrine that, in case of the relation of independent contractor, there is no liability on the part of one of the contracting parties for the negligent acts of the other in carrying out the contract, where it does not necessarily create a nuisance. The facts on which that decision was made were that the railway company was engaged in constructing a well or reservoir to supply a water station on the line of its road, near Auburn, Indiana. Running water interfered with the work, and it became necessary to cause the accumulating water to be pumped out of the way, so as to prevent it from running into the well or reservoir which was in process of construction. The construction of the well and laying pipes

thence to the water station, had been committed to the charge of a Mr. Kress, an employee of the railway, who, with a force of men under his control, was engaged in providing means to supply the station with water. Williams, who resided in or near Auburn, was the owner of a small portable steam engine, which he was accustomed to employ in sawing wood, threshing grain, pumping water, and the like as opportunity offered. He contracted with Kress, for a stipulated *per diem*, to furnish and operate his engine in pumping at such times as might be necessary in order to keep the water from interfering with the work which the latter was constructing. Williams agreed to furnish his engine, and personally superintend the running of it, and to provide and pay for such assistance as he needed in keeping the water from obstructing the progress of the work. If it became necessary that he should run the engine at night, he was to receive extra compensation. In pursuance of the agreement, the latter placed his engine in a vacant lot some 6 feet or more outside the line of a public highway, which intersected the railway company's line at or near the point where the reservoir was being constructed. So far as appears, he selected the location of the engine, and controlled its operation, as the work he engaged to do required. While he was thus engaged in carrying out his agreement, the plaintiff's horse in passing along the adjacent highway, took fright at the engine and became unmanageable. The plaintiff was thrown from the carriage and injured. Herecovered a judgment in the trial court, and, in reversing the judgment on the facts above stated, Mitchell, J., speaking for the court, said: "The question is, whether under the circumstances, the railway company is liable for the negligence of Williams, assuming that he was negligent in operating his engine so near the public highway. The rule which controls in cases of this class has become well established, and has more than once been recognized and applied by this court. *Ryan v. Curran*, 64 Ind. 845, 81 Am. Rep. 123; *Sessengut v. Posey*, 67 Ind. 408, 83 Am. Rep. 98; *Logansport v. Dick*, 70 Ind. 65, 86 Am. Rep. 166. Under this rule, where work which does not necessarily create a nuisance, but is in itself harmless and lawful, when carefully conducted, is let by an employer, who merely prescribes the end, to another who undertakes to accomplish the end prescribed by means which he is to employ at his discretion, the latter is, in respect to the means employed, the master. If, during the progress of the work, a third person sustains injury by the negligent use of the means employed and controlled by the contractor, the employer is not answerable. The inquiry in such a case is, Did the relation of master and servant subsist between the per-

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son for whom the work was done, and the person whose negligence occasioned the injury? . . . The work contracted to be done was not in itself unlawful, nor was it necessarily a nuisance to operate a portable steam engine in a careful manner in close proximity to a public highway. Injury could only result from its negligent use." And the judgment was reversed on the evidence because it failed to show that the relation of master and servant subsisted between the railway and Williams, the owner and operator of the portable steam engine, and hence the railway was not liable for his negligence. But the rule there laid down is much more applicable to the evidence here, because it clearly indicates that the only relation existing between the city and the sawmill men, was that of buyer and seller, and not that of master and servant. And, there being enough evidence to warrant and require the submission of the question of fact to the jury as to the true relation subsisting between the sawmill men and the city, the appellant had a right to demand an instruction stating what the law was in case the jury found that the relation was not that of master and servant, but was merely that of buyer and seller. If they found that to be the relation, appellant had a right to an instruction that the negligent acts of the seller were not chargeable to the buyer. That, the refused instruction 7 would have done.

Another contention why the instruction was properly refused, is that the evidence was wholly insufficient to establish that there was any contractor in the case. But such contention assumes that it is the duty of the trial judge to determine that issue, as well as all other issues, in advance of the submission of the case to the jury, and, if he thinks the evidence insufficient, after carefully weighing it pro and con, he need not submit it to the jury. But that is very far from the legal duty of the trial judge. If there is any evidence sufficient to warrant the jury in drawing the inference that a certain fact exists, pertinent to the issues, it is the duty of the trial judge, especially if requested to instruct the jury what the law arising from such fact is, even though he may be of opinion that such fact is not established by a preponderance of the whole evidence. Otherwise a trial of the facts by a jury could take place only in empty form, but not in truth and in reality. Under such a rule no question of fact could be submitted to the jury until the trial judge had decided that the preponderance of the evidence had established the fact.

We are constrained to hold that the trial court erred in refusing to give instruction 7, and therefore the petition for rehearing ought to be, and is, overruled.

INDIANA SUPREME COURT.

Elizabeth BARNARD *et al.*, *Appls.*,

v.

Sarah M. SHIRLEY.

(.....Ind.....)

The discharge of mineral water from an artesian well which has been used in a public bath house in bathing and cleansing persons afflicted with infectious, syphilitic, or other similar disorders, by causing it to flow through a tile drain or otherwise into a stream which con-

stitutes the only available drainage therefor, unless a sewer is built to a river more than a mile distant, which would cost from \$3,500 to \$4,000 exclusive of the cost of the right of way, which the owners of the land refuse to grant, cannot be prevented by injunction at the suit of an owner of land through which such stream runs, even if he is damaged thereby.

(September 22, 1897.)

A PPEAL by defendants from a judgment of the Circuit Court for Morgan County in

NORM.—Correlative rights of upper and lower proprietors as to use and flow of water in stream.

- I. General statement of the right.
- II. Right to use.
- III. Right to flow.
- IV. Use for sewer.
- V. Right to relief.

I. General statement of the right.

The general principles which govern the rights of the upper and lower proprietors on a stream are well settled. The only difficulty which arises is in the application of the rules to the facts as they appear in each case.

It is sometimes stated that no proprietor can either diminish the quantity of water which will otherwise descend to the proprietor below, nor throw the water back upon the proprietor above. *Wright v. Howard*, 1 Sim. & Stu. 190.

One cannot injure or annoy those above or below him. *Hendricks v. Johnson*, 6 Port. (Ala.) 472.

Each proprietor must so use his rights as not to injure other proprietors on the stream. *Rudd v. Williams*, 43 Ill. 385.

The riparian proprietors are entitled to the natural flow of the water of the stream without diminution or obstruction. *Clark v. Rockland Water Power Co.* 52 Me. 68. And in *Mitchell v. Parks*, 26 Ind. 354, it is said, by way of argument, that riparian owners are entitled to the natural flow of the stream without diminution or injury.

But those statements are rather broader than they should be to accurately represent the law. A better statement is one which includes the element of reasonable use by each of the proprietors, although it has been said that it is impossible to lay down a general rule in all cases. *Baltimore v. Appold*, 42 Md. 442.

The rule that the upper proprietor has no right to use the water to the prejudice of the proprietor below him, or that he cannot lawfully diminish the quantity, is too broad, for it would give the lower proprietor superior advantages over the upper, and in many cases give him in effect a monopoly of the stream. *Dumont v. Kellogg*, 20 Mich. 420, 18 Am. Rep. 102.

The common law does not deprive all persons of the right to use, but allows all to use, the water in any manner not incompatible with the rights of others. When it is said that a riparian proprietor has a right to have a stream continue through his land, it is not intended to be said that he has the right to all the water, for that would render the stream which belongs to all the proprietors of no use to any. *Vansickle v. Haines*, 7 Nev. 286.

A riparian proprietor has a right to make all the use he can of the stream, provided he

does not abstract so much as prevents other people from having equal enjoyment with himself. *Sandwich v. Great Northern R. Co.* L. R. 10 Ch. Div. 707, 27 Week. Rep. 618.

The rights of riparian owners in a running stream above and below are equal; each has a right to the reasonable use and enjoyment of the water, and each has a right to the natural flow of the stream subject to such disturbance, and consequent inconvenience and annoyance, as might result to him from a reasonable use of the waters by others. *Holden v. Winnipisogee Lake Cotton & Woollen Mfg. Co.* 53 N. H. 552.

The right of a proprietor is not an absolute and exclusive right to all the water flowing in the stream, but a right to the flow and enjoyment of the water subject to similar rights of all the proprietors to a reasonable enjoyment of the stream. *Embrey v. Owen*, 6 Exch. 353, 20 L. J. Exch. N. S. 212, 15 Jur. 638.

The right of the riparian owner to the use of water is subject to be limited by the like rights of other owners on the stream. *Red River Rolling Mills v. Wright*, 30 Minn. 249, 44 Am. Rep. 194.

The upper owner has a right to such use as he can make of the water without materially diminishing it in quantity or corrupting it in quality. *Wheatley v. Chrisman*, 24 Pa. 298, 64 Am. Dec. 657.

The rule does not require that there shall be no diminution, obstruction, or detention whatever by the riparian proprietor. *Lancey v. Clifford*, 54 Me. 487, 92 Am. Dec. 561.

One riparian owner cannot impose upon the other the whole burden of the incidental injuries and inconvenience attendant upon the use of the stream. *Hoxsle v. Hoxsle*, 38 Mich. 80.

So, no man can be said to have a mill privilege which cannot be used without injury to others. *Davis v. Fuller*, 12 Vt. 178, 36 Am. Dec. 331.

No one has a right to diminish the quantity of water which will, according to the natural current, flow to the proprietor below, or to throw it back on the proprietor above. There may be a reasonable use. The true test of the principle and extent of the use is whether it is to the injury of the other proprietors or not. There may be a diminution in quantity or a retardation or acceleration of the natural flow, indispensable for the general and valuable use of the water, perfectly consistent with the existence of the common right. The diminution, retardation, or acceleration not positively and sensibly injurious by diminishing the value of the common right is an implied easement in the right of using the stream. *Tyler v. Wilkinson*, 4 Mason, 400.

The right to use necessarily implies a right

favor of plaintiff in a suit brought to enjoin the discharge of polluted water into a stream which flowed through plaintiff's land. *Reversed.*

The facts are stated in the opinion.

Messrs. W. R. Harrison, Willis Hickam, and Oscar Matthew for appellants.

Messrs. John C. Robinson, M. H. Parks, and W. S. Shirley for appellee.

to exercise a degree of control over the water, and to some extent to diminish its volume. The proprietor may apply it to domestic purposes or purposes of irrigation, but not to such extent as to unreasonably diminish its quantity; in applying it to manufacturing purposes, he must not corrupt it or injure its quality so as to render it unfit for use by the lower proprietor. He cannot unreasonably retard its natural flow, or injuriously accelerate its motion. In case of a small stream the water may be detained long enough to accumulate a head before it is let down to the next user. *Davis v. Getchell*, 50 Me. 602, 79 Am. Dec. 636.

The right of the riparian owner is subject to the reasonable use of the proprietor above him. *Dickson v. Carnegie*, 1 Ont. Rep. 110.

No proprietor on the banks of a river has a right to use the water to the prejudice of other proprietors above or below, unless he has acquired a prior right to divert it. No one can set up an exclusive right to the flow of all the water in its natural state. *Howard v. Ingersoll*, 13 How. 426, 14 L. ed. 208.

If the owner of a lower pond refuses to open his gate upon being notified that the owner of the upper dam is about to remove it to clear the mud from the pond, so that the lower pond is filled up and throws the water back on the upper proprietor, the latter may recover for his injury, but the owner of the lower pond cannot recover for the filling up of his pond. *Hardin v. Ledbetter*, 103 N. C. 90.

The limit of the private right is imposed by the public right, and the private right exists up to the point beyond which it will be inconsistent with the public right. *Morrill v. St. Anthony Falls Water Power Co.* 26 Minn. 222, 37 Am. Rep. 399.

Unity of possession will not extinguish a watercourse so that in case of subsequent separation it may be stopped by the upper owner. *Shury v. Piggett*, 3 Bolst. 339, Popham, 160.

In the very earliest cases natural and artificial watercourses seem to be treated indiscriminately. The practice seems to have been in ancient times to divert water from a natural stream through an artificial channel to run the mill, and the artificial channel was known as a watercourse. Many of the cases dealing with the right to stop a watercourse refer to this kind of artificial channel.

But in *Brown v. Best*, 1 Wils. 174, a distinction is suggested between watercourses to mills and natural watercourses.

Reasonableness.

The right to the use has been made to depend upon its reasonableness.

If the principles of the common law are to be applied there must be allowed to all of that which is common a reasonable use. *Union Mill & Min. Co. v. Dangberg*, 81 Fed. Rep. 73.

The riparian owner may make a reasonable use of the water of the stream. *Union Mill & Min. Co. v. Ferris*, 2 Sawy. 176.

A person detaining water must act in a reasonable manner, and not let it off in unreason-

McCabe, Ch. J., delivered the opinion of the court:

The appellee sued the appellants to recover damages for, and to restrain them from, causing certain mineral water coming from defendant's well to flow through a certain spring branch adjoining plaintiff's land, by which the waters of said branch are befouled, to the plaintiff's injury. The issues made were tried

able quantities. *Oregon Iron Co. v. Trullenger*, 3 Or. 1.

Every proprietor through whose land a watercourse runs has a right to a reasonable use of the water, whether for power to turn a mill, for watering stock, or to irrigate lands, provided he does not by his use materially damage any other proprietor above or below him. *Williamson v. Lock's Creek Canal Co.* 78 N. C. 156.

Any usage which inflicts positive, repeated, and sensible injury upon a proprietor above or below is not to be considered a reasonable usage. *Ellis v. Clemens*, 21 Ont. Rep. 227, Affirmed in 22 Ont. Rep. 216.

In *Tourtellot v. Phelps*, 4 Gray, 376, it is said that in order that each may enjoy his right everyone is bound to use the stream reasonably as it passes through his own lands, so as not to injure the rights of all other proprietors. What is reasonable under all the circumstances must depend much upon the character of the stream, its relative position, the usage of the country, and the state of the arts.

The question of the reasonableness of the use of the stream is one of fact when it is not settled by custom, as in the case of irrigation, propelling machinery, and watering cattle, and when it is in its nature doubtful. *Snow v. Parsons*, 28 Vt. 450, 67 Am. Dec. 723; *Jacobs v. Alford*, 42 Vt. 303, 1 Am. Rep. 331.

Whether detention of the water in the dam during the night, for the purpose of use in the daytime, is unreasonable, depends upon the custom of the place, what rule will secure the general stream for useful purposes, and whether the detention is necessarily an injury to lower mills. *Keeney & W. Mfg. Co. v. Union Mfg. Co.* 39 Conn. 577.

What constitutes a reasonable use is a question of fact having regard to the subject-matter and the use; the occasion and manner of its application; its object, extent, and necessity; the nature and size of the stream; the kind of business to which it is subservient; the importance and necessity of the use claimed by one party; and the extent of the injury caused by it to the other. *Red River Roller Mills v. Wright*, 30 Minn. 249, 44 Am. Rep. 104.

It is not unreasonable for the proprietor of a stream to take water therefrom through a conduit to his house and barn, and allow the water to run from the receptacle a little to prevent its freezing in winter and to keep it clear in summer, although the water is not returned to the stream, but is allowed to run upon the land and be wasted. *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 301.

The upper proprietor cannot complain that his right of drainage is cut off, if such effect results from merely a reasonable use by the lower owner of his property. *Bassett v. Salisbury Mfg. Co.* 43 N. H. 578, 82 Am. Dec. 179.

A riparian proprietor cannot be limited to the use of a specified amount of water, except as the same may be found to be reasonable. *Van Bitter v. Hilton*, 84 Cal. 555.

The true test as to the reasonable use of water by a riparian proprietor is whether the use works actual, material, and substantial damage to the common right; not to an exclusive

by the court, resulting in a finding and judgment against the defendants according to the prayer of the complaint. That judgment was, on appeal to this court, reversed for error in sustaining a demurrer to the second paragraph of defendants' answer. 185 Ind. 547, 24 L. R. A. 568. On the return of the case to the circuit court the issues were again tried, resulting in a special finding of the facts, upon which the

court stated its conclusions of law, upon which it rendered judgment in favor of the plaintiff, both for damages and enjoining the defendants as prayed for in the complaint. The substance of the special finding by the court is:

That the land described in the complaint, situate adjoining the city of Martinsville, was purchased by plaintiff from Lafayette Sims on May 10, 1836, and plaintiff has ever since held

right to all the water in its natural state, but to the right which each proprietor has as limited and qualified by the precisely equal right of every other riparian proprietor. Union Mill & Mln. Co. v. Daugberg, 2 Sawy. 450.

The question is whether the use made by one of the water is reasonable and consistent with the corresponding use by the other. Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102.

It has generally been held that the question of the reasonableness of the defendant's detention or use of the water is for the jury. Hetrich v. Deachler, 6 Pa. 32; Hazeltine v. Case, 46 Wis. 391, 32 Am. Rep. 715.

So, the question is for the jury as to how much water each proprietor on a stream shall be permitted to use for manufacturing purposes. Evans v. Merriweather, 4 Ill. 492, 38 Am. Dec. 106.

And what is a reasonable use by the proprietor of a mill upon the stream is a question for the jury. Pool v. Lewis, 41 Ga. 162, 5 Am. Rep. 526.

So, what is a reasonable use of the water for irrigation purposes is a question for the jury. Heilbron v. 76 Land & Water Co. 80 Cal. 189.

Also, the question whether or not it is proper and customary to throw the sawdust from a sawmill operated by steam into a stream, the effect of which is to fill up ponds lower down the stream. Prentice v. Geiger, 74 N. Y. 341.

And whether the use of a stream to carry off a manufacturer's waste is reasonable or not. Hayes v. Waldron, 44 N. H. 583, 84 Am. Dec. 105.

Whether it is reasonable for the upper proprietor to use the water a pondful at a time, and hold it back until that amount has been collected, is for the jury. Pollitt v. Long, 3 Thomp. & C. 232.

But in one case, it was held that the question whether the diversion of water for the supply of a municipal corporation is reasonable or not is a mixed question of law and fact to be determined by the trial court. Jones v. Proprietors of Portsmouth Aqueduct, 62 N. H. 488.

II. Right to use.

A riparian owner has a right to use the water passing through his land to supply his kitchen, and for watering his cattle, also to water and enrich his land, but he must so exercise this right as not to injure the owner below him. Perkins v. Dow, 1 Root, 535.

In Crandall v. Woods, 8 Cal. 186, which was a contest between settlers on the public land, the court said the uses to which water may be appropriated are to supply natural wants, such as to quench thirst, water cattle, for household or culinary purposes, and in some countries for the purpose of irrigation. These must be first supplied before the water can be applied for artificial wants.

The riparian proprietor may artificially use the water of the stream provided he does not force it back on the proprietor above him, nor precipitate it unreasonably upon the proprietor below him, and returns it to the stream before

it leaves his lands. Stein v. Burden, 29 Ala. 127, 65 Am. Dec. 394.

Each riparian owner has the right to use the water which flows through his lands for all ordinary purposes, and for the gratification of natural wants, even though in such use he consumes the entire stream. This right extends to the use of the water *ad lavandum et potandum* both by himself and all living things in his legitimate employment. Stein v. Burden, 29 Ala. 127, 65 Am. Dec. 394.

In Tampa Waterworks Co. v. Cline, 37 Fla. 586, 33 L. R. A. 376, it is stated, by way of argument, that the riparian rights to the ordinary use of water flowing past land extend to the supplying of natural wants, including the use of the water for domestic purposes of home or farm, such as drinking, washing, cooking, or for stock of the proprietor.

But a person cannot, for the purpose of having the water pure for growing watercresses, enjoin the drainage into the stream of water from gravel pits. Weeks v. Heward, 10 Week. Rep. 557.

A riparian owner has a right to pond the water for the purpose of gathering ice, provided he acts in a reasonable manner in view of the size and capacity of the stream and the reasonable rights of the riparian owners below; and this right cannot be affected by the appropriation to public use of a parallel stream which unites with his stream to form a larger one so that lower owners on the larger stream must in the future look to his stream for their whole supply. New London Water Comrs. v. Perry, 69 Conn. 461.

But the owner of ice upon the stream cannot recover damages from the owner of a dam who permits the water to escape through his dam to such an extent that the ice is injured, if such escape was necessary to give the owners of mills lower down the stream the natural flow of the water. Stevens v. Kelley (Mc.) 5 New Eng. Rep. 871.

Stream may be consumed for domestic use.

Either riparian proprietor has a right to the use of the water for domestic purposes and for his cattle, without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. He may also use the water for any other purposes provided he does not interfere with the rights of other proprietors above or below him. Miner v. Gilmour, 12 Moore, P. C. C. 131, 7 Week. Rep. 328, 3 L. T. N. S. 98.

If necessary for the use of his stock the upper proprietor may consume all the water flowing in the stream. Spence v. McDonough, 77 Iowa, 460.

A riparian owner may use the whole of the stream if it is necessary to satisfy his natural wants. He may consume all the water for his domestic purposes including water for his stock. If he desires to use it for irrigation or manufactures, and there be a lower proprietor to whom its use is essential to supply his natural wants, or for his stock, he must use the water so as to leave enough for such lower proprietor.

and possessed the same. That said Sims owned and occupied said lands for years before. That said defendant Elizabeth Barnard has owned the lots described in the complaint, Nos. 20 and 30, in the original plat of the town of Martinsville, Morgan county, Indiana, since the year 1868, and still owns the same. That, at the time of selling and delivering to plaintiff the lands above described, said Sims also

sold and delivered to her 160 acres lying about one mile to the northeast of said first described land, and other lands adjacent to said lands first described, and lying west thereof. That said 160 acres is a hill tract, and from the foot of the hills near the southwest corner of the tract there puts forth a spring of pure water, suitable for any use, and which, flowing in a southwesterly course, unites its waters with

Where the stream is small, and does not furnish more than sufficient to answer the natural wants of the different proprietors living on it, none of the proprietors can use the water for either irrigation or manufactures. *Evans v. Merriweather*, 4 Ill. 402, 38 Am. Dec. 106.

A riparian proprietor may take the water from the stream by pipes, and consume the whole of it if necessary for domestic purposes. *Slack v. Marsh*, 11 Phila. 543.

In *Willis v. Perry*, 92 Iowa, 297, 26 L. R. A. 124, which was a case of subterranean water, the court says that in case of surface water the owner may consume all the water of the stream for his natural and ordinary wants regardless of the effect upon other owners on the stream.

But in one case it was held that the question whether the amount of water taken from a stream for use in a house is wrongful, depends upon its quantity in relation to that which remains in the stream, and is for the jury. *Norbury v. Kitchin*, 9 Jur. N. S. 182, 7 L. T. N. S. 685.

A farmer cannot be deprived of the right of letting his cows run in a lot through which a stream of water flows by the fact that a water company has been organized to take a water supply for a municipal corporation from the stream lower down its course. *Helfrich v. Catonsville Water Co.* 74 Md. 269, 13 L. R. A. 117.

On nonriparian lands.

Water cannot be diverted to nonriparian lands. *Gould v. Eaton*, 117 Cal. 539, 38 L. R. A. 181; *Williams v. Wadsworth*, 51 Conn. 304.

The riparian proprietor can confer no right on a nonriparian owner to use the stream. *Ormerod v. Todmorden Joint Stock Mill Co.* L. R. 11 Q. B. Div. 155, 52 L. J. Q. B. N. S. 445, 31 Week. Rep. 759, 47 J. P. 532.

A riparian proprietor cannot authorize the taking of water from the stream on his land to be carried to a distant point and there sold. *Helbron v. Fowler Switch Canal Co.* 75 Cal. 428.

Water cannot be taken from a stream to irrigate nonriparian lands. *Gould v. Stafford*, 77 Cal. 66.

A riparian owner cannot give the right to a nonriparian owner to take water from the stream and return it again below the land of a lower proprietor. *Shamleffer v. Council Grove Peerless Mill Co.* 18 Kan. 24.

But, if the flow of the stream is not perceptibly diminished, and no injury is done to the lower proprietor, the upper proprietor will not be liable for selling water for use off from riparian land. *Gillis v. Chase*, 67 N. H.—, 31 Atl. 18.

So, the lower proprietor cannot maintain an action against the upper proprietor and his grantee on the ground that a grant has been made without right to use the water on nonriparian lands, if it is used and returned to the stream in such a manner as not to affect the water either in quantity or quality. *Kensit v. Great Eastern R. Co.* L. R. 23 Ch. Div. 569, 52 L. J. Q. B. 608, 48 L. T. N. S. 784, 31 Week. Rep. 603, 47 J. P. 534, Affirmed L. R. 27 Ch. Div. 122, 41 L. R. A.

54 L. J. Ch. N. S. 19, 51 L. T. N. S. 862, 32 Week. Rep. 885.

A riparian owner upon a brook cannot dispose of all its water if at the place where it empties into a river there is a public landing which requires the flow of the water from the brook. *Moulton v. Newburyport Water Co.* 137 Mass. 163.

Municipal water supply.

A part of the rule as to diversion of stream to nonriparian lands is that in regard to municipal water supply.

Water cannot be diverted to furnish a water supply to a municipal corporation. *Swindon Waterworks Co. v. Proprietors of Wilts & B. Canal Nav. Co.* L. R. 7 H. L. 697, 45 L. J. Ch. N. S. 638, 33 L. T. N. S. 513, 24 Week. Rep. 284, Affirming *Wilts & B. Canal Nav. Co. v. Swindon Waterworks Co.* L. R. 9 Ch. 451; *Saunders v. Bluefield Waterworks & I. Co.* 58 Fed. Rep. 133; *Higgins v. Flemington Water Co.* 36 N. J. Eq. 538; *Hough v. Doylestown*, 4 Brewst. (Pa.) 333; *Howe v. Norman*, 18 R. I. 488; *Rigney v. Tacoma Light & W. Co.* 9 Wash. 576, 26 L. R. A. 423; *Gallagher v. Kingston Water Co.* 25 App. Div. 82; *Lord v. Meadville Water Co.* 135 Pa. 122, 8 L. R. A. 202.

Riparian owners cannot divert water in the stream for the purpose of supplying the wants of the individuals of a distant municipal corporation. *Harding v. Stamford Water Co.* 41 Conn. 87; *Ulbricht v. Eufaula Water Co.* 86 Ala. 587, 4 L. R. A. 572.

A water company cannot divert the water of a stream for supplying a municipal corporation with water without compensation to the riparian owners for the injury thereby caused to them. *Standen v. New Rochelle Water Co.* 91 Hun, 272.

A water company cannot divert the water of a stream to the injury of riparian owners, where it is to be used for the benefit of a municipal corporation which is 5 miles distant from the stream. *Stein v. Burden*, 24 Ala. 150, 60 Am. Dec. 453.

A municipal corporation will not be permitted to take water supply from a stream if the effect will be to interfere with the rights of riparian proprietors lower down the stream. *Gardner v. Newburgh*, 2 Johns. Ch. 162, 7 Am. Dec. 526.

Water cannot be taken for a public water supply to the detriment of the owner of a bleachery lower down the stream. *Acquackanonk Water Co. v. Watson*, 29 N. J. Eq. 366.

The water of a spring which flows in a definite channel cannot be diverted for supplying a public poor house with water to the injury of the owner of a mill lower down the stream. *Dudden v. Clutton Union Guardians of Poor*, 38 Eng. L. & Eq. 526, 1 Hurlst. & N. 630, 26 L. J. Exch. N. S. 146.

A water company cannot take a water supply from the stream merely by its right as riparian owner, to the injury of a lower proprietor. *Philadelphia & R. R. Co. v. Pottsville Water Co.* 182 Pa. 418.

Or materially diminish the supply of water in the stream. *Standard Plate Glass Co. v. Butler Water Co.* 5 Pa. Super. Ct. 563.

those of several others of equally pure water, and one of which is of greater volume than plaintiff's spring; and the waters of these various springs combined would, if combined at their head, fill a 4-inch pipe with pure spring water, with continuous flow. That prior to 1870 the waters of this branch flowed as they now do,—south and west of south $\frac{1}{2}$ of a mile or over; thence west to the east border of the

original plat of the town of Martinsville; thence south on the border to and across Washington street, which passes the west side of the courthouse square, in the center of the city, where, in times of heavy rains and freshets, it broke the banks of the ditches dug for it, and the levees made from time to time to confine its waters, and flowed over and inundated a large part of said city, and the southeastern

In *Bare v. Hoffman*, 79 Pa. 71, 21 Am. Rep. 42, it is assumed that damages may be recovered in case water is diverted from a stream for use in a town near by to such an extent as to prevent the floating off of tanbark and refuse from a yard lower down the stream.

But a village which has taken a water supply from a stream cannot prevent a village higher up the stream from making the same use of the water. *Barre Water Co. v. Carnes*, 65 Vt. 626, 21 L. R. A. 769.

In *Van Wycklen v. Brooklyn*, 118 N. Y. 427, it seems to be assumed that if on obtaining a water supply a city sinks wells so near to the stream that the water is drawn from the stream into the wells, the lower proprietor will have a right of action.

In *Lehigh Coal & Nav. Co. v. Scranton Gas & Water Co.* 6 Pa. Dist. R. 291, the court mooted, but refused to decide, the question whether flood water could be taken from a stream for the use of a nonriparian municipal corporation, and held that the right to do so could be acquired by eminent domain.

Statutory authority to take a water supply from a stream may provide for compensation to persons injured thereby. *Leonard v. Rutland*, 66 Vt. 105.

Cities in California which are successors of Mexican pueblos have a right to water for their necessary uses which is superior to that of other riparian owners on the stream, but they cannot take more than is necessary for their use, for the purpose of supplying persons outside the city limits. *Vernon Irrigation Co. v. Los Angeles*, 106 Cal. 237.

A water company cannot, to defend an action against it for exhausting the water supply of the stream, set up that plaintiff wishes to use the water for manufacturing purposes which are not shown to be unreasonable or wrongful. *Standard Plate Glass Co. v. Butler Water Co.* 5 Pa. Super. Ct. 563.

Use for engines.

A railroad company cannot use the water of a stream for its locomotives so as to sensibly diminish the water flowing in the stream. *Pennsylvania R. Co. v. Miller*, 112 Pa. 34.

A railroad company cannot take water for its engines to the injury of lower proprietors. *Clark v. Pennsylvania R. Co.* 145 Pa. 438; *Anderson v. Cincinnati Southern R. Co.* 86 Ky. 44.

Nor can it, if the effect will be to interfere with the navigation of the stream. *Atty. Gen. v. Great Eastern R. Co.* 18 Week. Rep. 1187, 23 L. T. N. S. 344.

So, water cannot be sold to a railroad company for use in its engines. *Philadelphia & R. R. Co. v. Pottsville Water Co.* 18 Pa. Co. Ct. 501.

A railroad company cannot divert the water of the stream for use in its engines if the result is to materially reduce or diminish the grinding power of the mill of a proprietor located lower down the stream. *Garwood v. New York C. & H. R. R. Co.* 83 N. Y. 400, 38 Am. Rep. 452.

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taking of water from a stream by a railroad company for the use of its engines, the lower owner may prove that after such taking less water flows in the stream than formerly flowed there. *Garwood v. New York C. & H. R. R. Co.* 116 N. Y. 649, Affirming 17 Hun, 356.

But in England it is held that a railroad company which owns land on the banks of a river may take a reasonable quantity of water for the supply of its engines from the river, and the quantity will not be held to be unreasonable if it does no injury in wet weather, and never shortens the working hours of mills lower down the stream more than a few minutes a day at any time. *Sandwich v. Great Northern R. Co.* L. R. 10 Ch. Div. 707, 27 Week. Rep. 616.

Use for irrigation.

Some right to divert for irrigation purposes is generally recognized.

It cannot be permitted that the owner of a tract of many thousand acres of porous soil abutting on one part of the stream can irrigate them continually by canals and drains, so as to cause a serious diminution of the quantity of the water, though there is no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for that purpose. On the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering pot into a stream in order to water his garden. *Embrey v. Owen*, 6 Exch. 353, 20 L. J. Exch. N. S. 212, 15 Jur. 633.

So, no action will lie for taking an inappreciable amount of water from a stream for the purpose of irrigation. *Embrey v. Owen*, 6 Exch. 353, 20 L. J. Exch. N. S. 212, 15 Jur. 633.

A riparian proprietor may lawfully divert the water of a stream for the purpose of irrigating his land to a reasonable extent. But in no case can he do this so as to destroy or render useless or materially affect the application of the water by other riparian proprietors. *Union Mill & Min. Co. v. Ferris*, 2 Sawy. 176.

Every riparian owner has a right to use the water flowing through his land for the purpose of irrigating his land, but his use for that purpose must be such as not essentially to interfere with the natural flow of the stream. *Farrell v. Richards*, 30 N. J. Eq. 511.

Whether water can be diverted for irrigation is an abstract question which cannot be answered either in the affirmative or negative as a rule applicable to all cases. *Elliot v. Fitchburg R. Co.* 10 Cush. 131, 57 Am. Dec. 85.

Natural wants, such as for domestic purposes and furnishing drink for man and beast, must be supplied before any water can be used for irrigation. *Smith v. Corbit*, 116 Cal. 587.

Water cannot be used for irrigation in such a way as not to leave sufficient for the watering place of a lower proprietor. *Gillett v. Johnson*, 30 Conn. 130.

Pumps may be used to raise the water from the stream for the purpose of irrigation. *Charnock v. Higuerra*, 111 Cal. 473, 32 L. R. A. 190.

All the water in the stream cannot be taken

part thereof, and formed large ponds of water, until they sunk or evaporated. That two tan-yards were operated near by, and obtained their water from said branch, up to 1870, and put their wastage into it. That in 1870 the town corporation of Martinsville changed the course and channel of said branch, from its intersection with Pike street, in said town, and turned it west to a point due west of the west

boundary of the original plat thereof, and a distance of over $\frac{1}{2}$ mile; thence south and southwest, onto the said lands first above described, then owned and occupied by said Lafayette Sims, and now owned by plaintiff. That said Sims was consulted in relation thereto by the authorities, and consented to said change of the channel of said stream, and the flowing of the waters thereof upon his said lands, that

for irrigation purposes; and the surplus not absorbed in irrigation must be returned to the stream. *Gould v. Stafford*, 77 Cal. 66.

A person owning a field on an ancient brook may lawfully use the water for irrigating his field, and if the owner of the field below is injured thereby it is *damnum absque injuria*. *Weston v. Alden*, 8 Mass. 136.

The upper proprietor cannot retain the water for the purposes of irrigation if the effect is that when it is liberated the lower owner is deprived of some portion of the benefit of it. *Sampson v. Hoddinott*, 1 C. B. N. S. 590, 3 Jur. N. S. 243, 26 L. J. C. P. N. S. 148.

In *Evans v. Merriweather*, 4 Ill. 492, 38 Am. Dec. 106, it is said that in countries with a hot and arid climate water is doubtless indispensable to the cultivation of the soil, and with them water for irrigation will be a natural want.

A riparian owner has a right to spread the water of the stream upon his land to enrich it, provided he does it prudently, and does not deprive the lower proprietor of the surplus. *Howard v. Mason*, cited in 1 Root, 537.

By the law of California riparian owners are entitled to a reasonable use of the water for irrigation. *Lux v. Haggin*, 60 Cal. 255.

A riparian owner cannot throw a dam across the stream for the purpose of using the water for irrigating his land, to the detriment of the owner of an ancient mill lower down the stream. *Colburn v. Richards*, 13 Mass. 420, 7 Am. Dec. 160.

A riparian owner cannot use all the water of a stream for irrigation purposes, although it is necessary for his use, without any regard to the necessities of the owner lower down the stream. *Learned v. Tangeman*, 65 Cal. 334.

A stream of water cannot be used for irrigation if the result is to deprive the lower proprietor of the reasonable use of the water in its natural channel. *Arnold v. Foot*, 12 Wend. 330.

In *Jones v. Adams*, 19 Nev. 78, it is said that under the principles of the common law riparian proprietors had the right to a reasonable use of the waters of a stream running through their respective lands for the purposes of irrigation.

There is a right to divert water for purposes of irrigation, the extent depending on what is a reasonable use of the stream. *Messinger's Appeal*, 100 Pa. 285.

In *Swindon Waterworks Co. v. Proprietors of Wilts & B. Canal Nav. Co.* L. R. 7 H. L. 697, 45 L. J. Ch. N. S. 638, 33 L. T. N. S. 513, 24 Week. Rep. 284, the court says, under certain circumstances, and provided no injury is done, the water may be used, and may be diverted for a time by the upper owner for the purpose of irrigation.

Water for irrigation cannot be obtained by erecting a dam and spreading the water out so that a large quantity is lost by absorption and evaporation, the surplus of the water diverted not being returned to the stream. *Anthony v. Lapham*, 5 Pick. 175.

In *Brown v. Ashley*, 16 Nev. 311, the court enforced a prior judgment enjoining the diversion of water for irrigation purposes on the 41 L. R. A.

ground that the question was *res judicata* between the parties.

If, in order to be of any use for irrigation, it is necessary to use the full flow of the stream at one time, the court may apportion the flow of the stream between the riparian owners for periods of time. *Harris v. Harrison*, 93 Cal. 676.

In *Rhodes v. Whitehead*, 27 Tex. 309, 84 Am. Dec. 631, it is said that it may be admitted that the purpose of irrigation is one of the natural uses which must absolutely be supplied; the appropriation of the water for this purpose would therefore afford no ground for complaint by lower proprietors if it were entirely consumed.

And the Texas court substituted for the common-law maxim the one, Water irrigates, and let it irrigate. *Tolle v. Correth*, 31 Tex. 362, 98 Am. Dec. 540.

But it was subsequently held that the irrigation of land will not justify the owner of a head spring in exhausting the water which flows from it to the injury of proprietors lower down on the channel of the stream. *Fleming v. Davis*, 37 Tex. 173. In that case the doctrine of the Tolle Case is repudiated and a return made to the rule that water cannot be used for irrigation purposes if the effect will be to injure a lower proprietor.

The right to exhaust the stream for irrigation purposes, however, was restored in *Mud Creek Irrig. Agri. & Mfg. Co. v. Vivian*, 74 Tex. 170.

There seems to be some qualification to the right, however, for a subsequent case states that the upper proprietor has no right to use the water for irrigation if he thereby conflicts with the rights of the lower proprietor to use it for natural purposes, such as drinking and watering stock. *Baker v. Brown*, 55 Tex. 377.

And in *Basrett v. Metcalfe*, 12 Tex. Civ. App. 247, it was held that irrigation is an ordinary use of the water of the stream, and the proprietor may exhaust all the water of the stream for that purpose to the exclusion of the proprietors below, so long as he does not deprive them of water for drinking, washing, cooking, and for stock.

The upper riparian owner is liable for every material diminution of the flow of the water by diverting from the stream water for irrigation. *Miller v. Miller*, 9 Pa. 74, 49 Am. Dec. 545. The court says the owner above cannot take all the stream, and this drives us necessarily upon the rule that he shall not materially diminish it, for from the very nature of the subject there is none other of practical operation.

Ancient use.

Ancient use is not necessary to support a present right.

In *Cox v. Matthews*, 1 Vent. 239, which was a case of ancient lights, Hale said if a man has a watercourse running through his ground, and erects a mill upon it, he may bring his action for diverting the stream and not say ancient mill, and unless the upper proprietor has a prescriptive right to turn the water he cannot justify though the mill is newly erected.

To maintain an action for diverting the flow of water from a mill, it is not necessary that

he might have the use of the same for stock water, for which it was suitable. That ever since said change was made the waters of said branch have continued to flow onto the lands so purchased by plaintiff from said Sims. That before said change was made, and before the channel of said branch was cut down on the south side of Pike street, in times of big rains and freshets the water of the branch would

break out of its channel, and flow over Pike street, and form large pools of water in various places in the central parts of said city. That said branch, since the change down said Pike street, flows the distance of about $\frac{1}{4}$ mile through said city; near three fourths of its distance being through a part of the city of population and improvement about equal to any other part of said city. Until within 18

the mill shall be an ancient one. *Rutland v. Bowler*, Palm. 290.

Conversely, the mere fact that there is an ancient use of the stream will not control its whole course.

The owner of an ancient mill cannot enjoin the construction of a dam above him if the injury to him will be trifling and unimportant. *Shreve v. Voorhees*, 3 N. J. Eq. 25.

The owner of a mill cannot control the whole stream above so that no upper riparian owner can make use of the water. *Platt v. Johnson*, 15 Johns. 213, 8 Am. Dec. 233.

A millowner has the right to use the water belonging to the mill in a reasonable, ordinary, and proper manner for the regular and usual prosecution of his business, although it may impair in some degree the efficiency of the mill privilege of another owner on the same stream. *Haskins v. Haskins*, 9 Gray, 390.

A millowner cannot, by erecting his mill, control the whole course of the stream as against the proprietors above him, but any reasonable use of the stream subsequently made by them will, if it causes injury to him, and the water is not diverted nor wantonly wasted, be not actionable. *Martin v. Bigelow*, 2 Alk. (Vt.) 184, 16 Am. Dec. 686.

The question of prescriptive rights generally, and what is necessary to acquire them, is not considered in this note.

Appropriation.

The general question of the right to appropriate water is considered in a note to *Isaacs v. Barber* (Wash.) 30 L. R. A. 685.

Generally prior use of the water is not sufficient to give an exclusive use, except where the doctrine of prior appropriation has been adopted.

It is immaterial that the lower owner has his mill in operation first. The upper owner may recover damages if the water is thrown back so as to interfere with his wheel. *Omelyan v. Jagers*, 2 Hill, L. 634, 27 Am. Dec. 417.

Nothing short of twenty years' adverse enjoyment of water diverted from a stream or raised by a weir will give a riparian proprietor a right to water as against lower owners to whom the use is injurious. *Prescott v. Phillips*, cited in 6 East, 213.

But, under the Massachusetts doctrine of appropriation, the upper proprietor cannot, after a lower proprietor has made an appropriation of the water power in his land, lower a dam or change the bed of the channel of the stream so as to interfere with the rights of the lower owners. *Gleason v. Assabét Mfg. Co.* 101 Mass. 72.

So, in England there was at one time a tendency to recognize a right of appropriation. In a case where it was held that if the owner sells the lower portion of his property, and the purchaser uses the stream of water flowing from the upper to the lower land, the vendor will not be permitted to stop the watercourse, *Bayley, B.*, says that if a man find water running through his land he may appropriate it, and thus acquire a title to the water. *Canham v. Fisk*, 2 Crompt. & J. 126, 2 Tyrw. 155.

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So, in *Lincoln v. Chadbourne*, 56 Me. 197, it is said that the dam erected first in time is first in right, but there are not enough of the facts of the controversy reported, to determine to what extent this rule would be carried.

Negligence.

The owner of a dam must use care in drawing the water from his pond not to injure mills lower down the stream. *Lapham v. Curtis*, 5 Vt. 371, 26 Am. Dec. 310.

An action will lie in case a dam is so carelessly built that it is carried away by high water, and the property of a lower proprietor injured by the flood. *New York v. Bailey*, 2 Denio, 433.

The owner of a dam which breaks by reason of an ordinary storm will be liable for the injury thereby inflicted on lower proprietors, but not in case of extraordinary storms. *Myers v. Fritz* (Pa.) 8 Cent. Rep. 499.

III. Right to flow.

The right to the flow of water is a natural right. *Stockoe v. Singers*, 8 El. & Bl. 81.

The lower proprietor has a right to have the water flow to his land undiminished, except as the upper owner may use the water for domestic purposes, stock, and reasonable irrigation. *Coffman v. Robbins*, 3 Or. 278.

The riparian proprietor has a right to have the stream continue to flow through his property whether he has any use for it or not. *Ulbricht v. Eufaula Water Co.* 86 Ala. 587, 4 L. R. A. 572.

Water flowing from springs cannot be interrupted to the injury of a lower proprietor. *Ennor v. Barwell*, 2 Giff. 410, 6 Jur. N. S. 1233.

Change of course.

The channel of the stream cannot be changed to the injury of a lower proprietor. *McLenn v. Crosson*, 33 U. C. Q. B. 448.

So, if one has ancient ponds which are replenished by channels from a river he cannot change the channels if any prejudice accrue to another by such action. *Duncombe v. Randall, Hetley*, 34.

A railroad company has no right to divert a watercourse for the protection of its track. *Union P. R. Co. v. Dyche*, 31 Kan. 120.

If in constructing its road a railroad company attempts to change the natural channel of a stream, and causes it to flow over loose gravel which is washed out and deposited on land lower down, it will be liable for the injury. *Van Orsdel v. Burlington, C. R. & N. R. Co.* 56 Iowa, 470.

The upper proprietor will be liable for throwing rocks and debris into the stream so as to cause it to change its course and cut a new channel on the land of the lower proprietor. *Newport News & M. V. Co. v. Wilson*, 16 Ky. L. Rep. 202.

The upper proprietor cannot cut a tail-race so as to turn the water into the foot instead of the head of the lower proprietor's pond, if the result will be to hasten the flow of the water

months past a large tanyard was maintained and operated on Pike street, on the south side thereof, at the point of the turn of said branch west on Pike street, and obtained its water from said branch, and emptied into said branch the refuse from its vats, in large quantities, at weekly intervals, and which was of such offensive character, and produced such an offensive odor, as that persons residing in the vicinity were compelled to close their windows to keep out the stench; and, in connection with this mass of filth, the waters of the branch, usually accumulated by a temporary dam, would be turned, and the mass distributed throughout the channel of the branch below, the effects and stain of which would remain for a considerable time. That Martinsville, either as a town or city, has never had other than open

and fill the pond with sand. *Hulme v. Shreve*, 4 N. J. Eq. 116.

Fitzherbert, N. B. 184, says that a man shall have a writ of assize in case another has levied or thrown down, or heightened or lowered a pool, or hath a watercourse to the nuisance of the complaining party.

A watercourse cannot be changed so that the water is thrown on the land of the lower proprietor in a new place. *Niles' Works v. Cincinnati*, 2 Disney (Ohio) 400.

But, if a farmer can improve his land by changing a watercourse thereon which passes from his land to and upon that of a lower proprietor without substantial injury to the latter, he may do so. *Schultz v. Bailey*, 48 N. J. Eq. 409.

If a pond is fed by a natural stream, the owner cannot cut an outlet for it which will throw the water on the land of another person at a point different from its natural course. *Vernum v. Wheeler*, 35 Hun, 53.

If a proprietor undertakes to place a structure over a watercourse he must take care that he does not prevent the accustomed flow of the water in the natural course from above. *Niles' Works v. Cincinnati*, 2 Disney (Ohio) 400.

In *Wholey v. Caldwell*, 108 Cal. 95, 30 L. R. A. 820, the court, in discussing the rights of the parties when the stream changes its course, states that the lower proprietor, as against the unwonted acts of the upper, is entitled, not only to have the water enter his land by its accustomed channel, but to have each channel carry its accustomed amount of water.

The owner of a spring is not liable for the increased flow of water from it caused by his cleaning it out and walling it up so as to keep the water in one channel, rather than to let it spread over the ground and make a wet and spongy place of the land. *Waffle v. Porter*, 61 Barb. 130.

See also *infra*, *Acceleration of flow*.

The diversion of the water from its natural channel on the land of the upper proprietor for the purpose of straightening the course of the stream will not authorize a lower proprietor to embank against the water after it has been returned to its natural channel. *Missouri P. R. Co. v. Keys*, 55 Kan. 205.

An upper proprietor will not be permitted to fill out in front of his property if the effect will be to change the current of the water and injure the banks of a lower proprietor. *Dayton v. Robert*, 8 Ohio C. C. 640.

Nor can the upper proprietor place obstructions in the channel to prevent its changing its course which cause it to destroy land of the lower proprietor. *Armendatz v. Stillman*, 67 Tex. 458.

In *Rex v. Trafford*, 1 Barn. & Ad. 874, the court applied to flood water the rule that as against the lower proprietor the upper proprietor will not be permitted to change the course of the stream so that in case the flood water of a stream had also taken a certain course to a river, the upper owner would not be permitted to erect banks to keep it in the stream.

But upon appeal a new trial was granted because sufficient facts had not been found by 41 L. R. A.

the jury; the court stating that it agreed with the principles laid down by the lower court. *Trafford v. King*, 8 Bing. 204, 1 Moore & S. 401, 2 Crompt. & J. 286, 2 Tyrw. 201.

Diversion of water.

The upper proprietor cannot divert the water. *Mason v. Hill*, 5 Barn. & Ad. 1, 2 Nev. & M. 747; *Pope v. Kinman*, 54 Cal. 8; *Shook v. Colohan*, 12 Or. 239; *Hilliker v. Coleman*, 73 Mich. 170; *Rummell v. Lamb*, 100 Mich. 424; *Pyle v. Richards*, 17 Neb. 180.

The digging of a well so near a stream that it draws water from it to the perceptible diminution of the stream will be actionable. *Dickinson v. Grand Junction Canal Co.* 7 Exch. 282, 16 Jur. 200, 21 L. J. Exch. N. S. 241.

No prescription or custom is necessary to maintain an action for diversion of a watercourse. *Sury v. Pigot*, *Popham*, 169, 3 Bulst. 339.

The water cannot be diverted from the stream so as not to return until after it has passed the mill of the lower owner. *Haymes v. Gault*, 1 McCord, L. 548.

If the lower proprietor has made use of the water of the stream it cannot be diverted to his injury. *Frankum v. Falmouth*, 6 Car. & P. 529; *Bealey v. Shaw*, 6 East, 208, 2 Smith, 321.

If the water is diverted from its channel it cannot be returned in such a manner as to fall across the natural course against the bank of the lower owner to the injury of his land. *Valley R. Co. v. Franz*, 43 Ohio St. 623.

The diversion of a watercourse from its ancient channel is a nuisance. *Shields v. Arndt*, 4 N. J. Eq. 234.

A recovery may be had for inserting a small pipe into, and taking water from, a supply pipe which carries it to the plaintiff's house. *Moore v. Browne*, 3 Dyer, 319b.

The owner of a spring which forms a watercourse cannot wholly divert its flow. *Leavenworth v. Prospect Rock Water Co.* 8 Kulp, 310.

The upper proprietor cannot divert the water and return it below the land of the lower proprietor. *Kimberly & C. Co. v. Hewitt*, 79 Wis. 334; *Parker v. Griswold*, 17 Conn. 288, 42 / a. Dec. 739.

The water cannot be diverted from a surface stream by tapping an underground vein. *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 488, 24 L. T. N. S. 402, 19 Week. Rep. 569.

The mere fact that the stream reaches the lower proprietor through a tunnel will not prevent his maintaining an action for its diversion. *Holker v. Poritt*, L. R. 8 Exch. 107, 42 L. J. Exch. 85, 21 Week. Rep. 414.

Water cannot be taken out of the stream and not returned again until it has passed the dam of a lower proprietor. *Sackrider v. Beers*, 10 Johns. 241.

The upper owner will not be permitted to sink a tank the effect of which is to absorb the whole flow of the stream and carry the water therefrom through pipes to his mill. *Shively v. Hume*, 10 Or. 76.

One riparian owner will not be permitted to turn the water from one stream into another so

ditches, no underground sewers, and the said branch on the south side of Pike street is, and has been since it was opened, in 1870, the principal drainage for all that part of the town and city lying north of it, and east of the central part of the city, and in it have been found, and from it have been taken, from time to time, dead animals, such as hogs, dogs, cats, chickens, etc., in all stages of decay. Said branch

is the only living stream passing, or that ever has passed, through said town or city. In times of heavy rains and freshets the surface washing and water from near one-third part of said city, and from pasture hills lying north of it, from across streets and alleys, flow into said branch on said Pike street, carrying into the same the washings from stables and other outbuildings. That some of the persons resid-

as to deprive the owner of land farther down the stream of its use. *Weiss v. Oregon Iron & S. Co.* 13 Or. 493.

If water is diverted from a stream the one making the diversion is bound to care for it until it is returned to the stream. *Tucker v. Salem Flouring Mills Co.* 15 Or. 581.

If the upper riparian owner, in attempting to change the channel of the stream, causes it to flow in such a way that a material portion of it is lost before it is returned to the natural channel, he will be liable for the injury. *Petibone v. Smith*, 37 Mich. 579.

The owner of one half of a milldam cannot divert the water above the dam and carry it to a point below the dam, without being liable for the injuries thereby inflicted on his co-owner. *Webb v. Portland Mfg. Co.* 3 Sumn. 189.

An action may be maintained if, in digging a conduit for a water supply, the trench is so constructed that it draws the water from the stream to the injury of complainant's supply. *Covert v. Cranford*, 141 N. Y. 521, reversing, as to the allowance of permanent damages, *Covert v. Valentine*, 50 N. Y. S. R. 516.

An upper proprietor cannot divert the water from the stream for the purpose of making repairs to his dam and mill. *Van Hoesen v. Coventry*, 10 Barb. 518. The court seems to make a distinction between diversion and retention, holding that in case of a retention it must be unreasonable in order to hold the defendant liable.

If I have a mill by prescription on my land, and another erects a new mill on his land, and thus takes the stream from my mill, or stops it, or takes more water to run to his mill so that I receive damage to my mill, so that my mill no longer grinds as much as it used to do, I may have an action on the case against him. 1 Rolle, Abr. 107, citing 22 Hen. VI. 14.

The upper owner cannot, in making an aqueduct over the stream, construct its foundation in such a way that the water is lost from the stream by percolation. *Covert v. Brooklyn*, 6 App. Div. 73.

If a man diverts all the water from my watercourse to my mill an action on the case will lie at my election. *Kirble's Case*, 1 Rolle, Abr. 104.

In 32 Ass. 2, a writ of assize of nuisance was brought because defendant had turned a watercourse, and the nuisance assigned was that defendant had made a trench across the watercourse and diverted water from the plaintiff's mill; and the court awarded that the water should be removed to its right course at the cost of the defendant, and that the plaintiff recover his damages, and that defendant be imprisoned.

No terminus *a quo* need be alleged in an action for diverting a watercourse; any want of sufficient allegation of diversion is cured by verdict. *Prickman v. Trip*, Comb. 231.

A municipal corporation is not exempt from the rule which renders the one diverting a watercourse from its natural channel liable for the resulting injury. *Ordway v. Canisteo*, 66 Hun, 568.

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The state is liable to lower owners if it takes the water of a lake for supplying a canal. *Lakeside Paper Co. v. State*, 15 App. Div. 169.

Although the court had, in *People, Loomis, v. Canal Appraisers*, 33 N. Y. 461, held that a riparian proprietor was not entitled to compensation for the diversion of the waters of the Mohawk river for use in a canal. That case, however, was limited as governed by the civil law as derived from the Dutch settlers in *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393.

The owner of a spring cannot divert its water in an unreasonable manner whereby the owner of a tannery situated below on the stream is deprived of its use. *Colrick v. Swinburne*, 105 N. Y. 503.

Water of a stream cannot be taken from its course and discharged upon the land of another person to his injury. *Porter v. Durham*, 74 N. C. 767.

One proprietor cannot divert all the water from a stream for manufacturing purposes. *Evans v. Merriweather*, 4 Ill. 492, 38 Am. Dec. 106.

A riparian owner will be liable in damages if he diverts the water from its course to the injury of a lower proprietor. *Perkins v. Dow*, 1 Root, 535.

A riparian proprietor cannot enlarge a natural channel taking water out of the main channel of the stream, if by so doing he deprives a lower proprietor of the use of the water. *Blanchard v. Baker*, 8 Me. 266, 23 Am. Dec. 504.

The water cannot be carried away in a race, and not returned to the stream until after it passes the land of a lower proprietor. *Plumleigh v. Dawson*, 6 Ill. 544, 41 Am. Dec. 199.

The erection of a dam which causes the water to spread out over a large tract of land and be lost by evaporation and percolation, is a wrongful diversion of the water. *White v. East Lake Land Co.* 96 Ga. 415.

Where the respective proprietors desire to convert the water into steam so that it cannot be returned to the stream, neither can use more than his due proportion of the amount flowing in the stream. *Bliss v. Kennedy*, 48 Ill. 67.

The question of the materiality of the diversion is for the jury. *Hogg v. Connellsville Water Co.* 168 Pa. 456.

The water may be diverted by the upper proprietor if he restores it before it leaves his land. *Canfield v. Andrew*, 54 Vt. 1, 41 Am. Rep. 828.

But the mere provision of means for the return of the diverted water is not sufficient to relieve the one making the diversion from liability if the water is not in fact returned to the stream. *Stein v. Burden*, 29 Ala. 127, 65 Am. Dec. 394.

The upper proprietor may divert the water for use on his own land, provided he restores it to the stream before the channel reaches the land of the lower proprietor. *Webster v. Fleming*, 2 Humph. 518.

There will be no right of action for diversion of water, provided it is done wholly on the upper proprietor's land and the water is returned to the channel before it leaves. *Norton v. Volentine*, 14 Vt. 239, 39 Am. Dec. 220.

ing along said branch throw their soap-suds from clothes washings, and kitchen slops, into the same, with other kitchen refuse, including the entrails of chickens. That at the present time there is one or more dead animals in said branch, and there is flowing into it, about 600 feet above where the tile drain from defendants' sanitarium flows into said branch, a tile drain from the Martinsville Sanitarium, which

has been connected with said ditch since this suit was originally filed. That there is now, and long has been, a city ordinance of said city prohibiting anyone from throwing dead animals or any refuse or befouling substance in said branch, and from in any way befouling the same. The Martinsville Sanitarium has been in operation for three years, and bathes as many patients as are bathed at defendants'

Acceleration of flow.

In England it was held that a riparian owner may remove shoals from the stream without liability to a lower owner for overflow of the stream by the hastening of the flow. *Rhodes v. Alredale Drainage Comrs.* L. R. 1 C. P. Div. 402, 45 L. J. C. P. N. S. 861, 35 L. T. N. S. 46, 24 Week. Rep. 1053.

But in Georgia the court has decided that the upper riparian proprietor cannot remove a ledge of rocks on his land if the effect will be to overflow the land of the lower proprietor with water and sand. *Grant v. Kuglar*, 81 Ga. 637, 8 L. R. A. 606.

In Quebec the upper proprietor cannot send down more water than is accustomed to flow in the stream. *Frechette v. La Compagnie Manufacturiere*, L. R. 9 App. Cas. 170, 53 L. J. C. P. N. S. 20, 50 L. T. N. S. 62.

An upper proprietor cannot cut a ditch and divert the water for the purpose of protecting his meadow from overflow if the effect will be to increase the flow of the water in the stream to such an extent as to injure the dam of a lower proprietor. *Kay v. Kirk*, 76 Md. 41.

A manufacturing company which has acquired by prescription the right to cast polluted water into the stream, which, by reason of sluggish current and numerous ponds, is largely precipitated before it reaches the lower owner, cannot clean out the channel in such a way as to hasten the flow and cast the polluted water onto the land of the lower owner. *Mississippi Mills Co. v. Smith*, 69 Miss. 290.

The owner of a mill cannot pass such unusual quantities of water through the dam as to injure the lands of lower proprietors. *Boyington v. Squires*, 71 Wis. 276.

Diminution of flow.

Water cannot be drawn from a stream so as to diminish the flow through the land of the lower proprietor, although he has no present use for it, for he may possibly thereafter find some use for it. *Bannatyne v. Cranston*, Mor. Dict. 12,769, *Property*, cited in L. R. 2 App. Cas. 855.

The upper owner cannot permit the water to escape from a dam in such small quantities in severe weather that the stream becomes a mass of ice, so that when the spring freshets come there is no channel for the water to escape in, which results in its spreading over the adjoining fields to the injury of other owners. *Ellis v. Clemens*, 21 Ont. Rep. 227, Affirmed in 22 Ont. Rep. 216.

But if the upper riparian owner in making use of the water leaves enough in the stream so that what he takes is an immaterial portion, he does not exceed his right. *New York Rubber Co. v. Rothery*, 32 N. Y. S. R. 905.

Pits for watering cattle cannot be enlarged to the injury of a lower proprietor. *Brown v. Best*, 1 Wils. 174.

The appropriation of the water of a non-navigable river by a riparian owner in such quantities as to unreasonably diminish the supply of other riparian owners is a private nuisance 41 L. R. A.

for which an injunction will lie. *Saunders v. Bluefield Waterworks & I. Co.* 58 Fed. Rep. 135.

The water cannot be obstructed and diverted to such an extent that the waste caused by frost, absorption, and evaporation causes material injury and damage. *Pettibone v. Maclem*, 45 Mich. 381.

It is not a reasonable use of water for a riparian proprietor who desires to use the water for cattle to build dams and spread the water out in such manner that it is lost by evaporation and absorption, so as to injure the proprietor below him on the stream. *Ferre v. Knipe*, 28 Cal. 341.

The upper owner cannot protect his land by means of a dam if the effect is to deprive the lower proprietor of the flow of the water. *Bilas v. Johnson*, 76 Cal. 597.

An action will lie for interrupting the flow of water. *Ingraham v. Hutchinson*, 2 Conn. 534.

If the upper proprietor maliciously holds the water back during the day and lets it down during the night when the lower proprietor cannot use it, he will be liable in damages. *Twiss v. Baldwin*, 9 Conn. 291.

Right to increase quantity.

There can be no recovery by the lower owner for injuries caused by merely enhancing the flow of the surface water into the stream. *Newport News & M. V. Co. v. Wilson*, 16 Ky. L. Rep. 202.

The owner of swamps may drain them into their natural outlets, although the effect is to cause the stream to flow more rapidly and in greater volume down the natural course through the land of the lower proprietor. *Misell v. McGowan*, 120 N. C. 134.

The upper owner cannot turn water from another stream into the watercourse, to the injury of the lower proprietor. *Tillotson v. Smith*, 32 N. H. 94, 64 Am. Dec. 353.

Nor can water be taken from one stream and made to run in another so as to increase the volume of the latter flowing over the land of the lower riparian owner. *Merritt v. Parker*, 1 N. J. L. 460.

But surface and well water may be collected and discharged into a natural stream if the result is not to cause the stream to overflow its banks. *Jackman v. Arlington Mills*, 137 Mass. 277.

A city cannot turn surface water into a stream, and provide an insufficient culvert to carry the stream under a highway, so that the water is turned upon the land of a riparian owner. *Stanchfield v. Newton*, 142 Mass. 110.

A city may use a stream for receipt of surface drainage from its streets without being liable to a lower riparian owner, although the effect is to drive the fish from the stream. *Bulnard v. Newton*, 154 Mass. 255.

However, if the upper proprietor cuts drains into the stream by which the amount of water flowing therein is increased, the lower owner will not be permitted to dam it back so as to overflow the land of the upper proprietor. *Williams v. Gale*, 3 Harr. & J. 231.

and all the water from said baths enters through said tile into said branch on Pike street, and above where the drainage from defendants' sanitarium enters the ditch, and no distinction is made at said Martinsville Sanitarium as to baths given syphilitic patients and others, but the waters from all baths enter said branch together; the distance from the bath house to said branch being about 80 feet. The waters

and soapsuds from a laundry erected since this suit was commenced, and conducted and operated about 100 feet from said branch, when of any considerable quantity, as they often are, flow into said branch through a covered ditch on Morgan street one square south of Pike street. That all the water from any source which enters the Pike street ditch flows to and beyond the west boundary of said original plat

The flow of the water into a stream may be hastened for drainage purposes, but the direction of the drainage cannot be changed for the purpose of having the water carried into the stream. *Kauffman v. Griesemer*, 26 Pa. 407, 67 Am. Dec. 437.

The flow of the surface water may be hastened by the upper owner into the stream. *Sowers v. Shift*, 15 La. Ann. 301.

But surface water cannot be collected and thrown into a stream in such quantities that the stream is caused to overflow its banks and flood the land of lower proprietors. *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540.

Surface water may be collected and discharged into a stream, although the effect is to increase the flow at certain times and diminish it at others. *Waffle v. New York C. R. Co.* 53 N. Y. 11, 13 Am. Rep. 467.

But the surface water must not be discharged into the stream beyond its natural capacity. *McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 479.

The upper proprietor may drain into the river the waters which will naturally flow into it without being liable for the injury caused thereby to the lower proprietor. *Kankakee & S. R. Co. v. Horan*, 131 Ill. 300, Affirming 30 Ill. App. 558.

A riparian owner will not be permitted to empty into the stream an additional amount of water to the extent of 10,000,000 gallons in every twenty-four hours. *Baltimore v. Appold*, 42 Md. 442.

Drainage water cannot be taken out of its natural course and thrown into a stream into which it would not naturally flow. *Williams v. Union Improv. Co.* 1 Pa. Dist. R. 288; *Gettling v. Union Improv. Co.* 7 Kulp, 493.

In *Flynn v. Shenandoah*, 19 Pa. Co. Ct. 622, the court, in discussing the right of a borough to throw down a wall which had been erected so as to interfere with the flow of a stream into which sewage was emptied, said: A borough has a right to make a sewer empty its contents into a natural stream even though the flow of water therein is somewhat increased; but that it might be liable in case of an unreasonable increase in the flow.

In *Miller v. Laubach*, 47 Pa. 154, 86 Am. Dec. 521, the court, in considering the liability for turning surface water on a lower proprietor, says: No doubt the owner of land through which a stream flows may increase the volume of water by draining into it without any liability to damages by a lower owner.

Right to water turned into stream.

A lower owner cannot complain of the action of the upper owner who has turned an extra quantity of water into the stream in taking it out again before it reaches the lower proprietor if there is no diminution of the quantity reaching him. *Society for Establishing Useful Manufactures v. Morris Canal & Bkg. Co.* 1 N. J. Eq. 157, 21 Am. Dec. 41.

But a person who has turned water into a stream will not be permitted to divert water therefrom unless he shows that he takes no 41 L. R. A.

more water out than he put in. *Wilcox v. Hausch*, 64 Cal. 461.

And the fact that the upper proprietor has added a quantity of water to the river will not entitle him to take it out again after it has passed upon the property of a lower proprietor so that it has gone beyond his control. *Druley v. Adam*, 102 Ill. 177, Affirming *Adams v. Slater*, 8 Ill. App. 72.

Right to hold back

The mere erection of a dam and the use of the water in driving wheels must necessarily derange its steady, constant, and natural flow, and substitute a different manner as to the time and mode of holding it up and letting it down. *Gould v. Boston Duck Co.* 13 Gray, 451.

The water can be detained for the purpose of the upper mill if it is not diverted from the stream. *Hartzell v. Sill*, 12 Pa. 248.

Storing the water in a pond is not actionable if it is detained no longer than is reasonably necessary. *Canfield v. Andrew*, 54 Vt. 1, 41 Am. Rep. 828.

The upper proprietor may hold back the water a reasonable time to raise a pond, although the effect is to deprive the lower owner of the use of the water to a certain extent. *Mumpower v. Bristol*, 90 Va. 153.

The upper proprietor may hold the water back and let it down in such manner as is necessary for the use of his mill, if the mill is adapted to the character of the stream and the use is reasonable, and the lower proprietor will not be heard to complain if he does not construct his dam so as to utilize the water as it is let down by the upper proprietor. *Coldwell v. Sander-son*, 69 Wis. 52.

The detention for two days and a night, for the purpose of forming an ice pond, is not an unreasonable interference with the rights of a mill owner below, if he only obtains 25 per cent of the power for his mill from the stream. *Gehlen v. Knorr*, 101 Iowa, 700, 36 L. R. A. 697.

Damages cannot be recovered for the mere exposure of the lower milldam to the sunshine by the holding back of the water. *Louisville & N. E. Co. v. Beauchamp*, 19 Ky. L. Rep. 308.

The supply to the lower proprietor must not depend upon the convenience or caprice of the upper proprietor, or upon accident or mere chance, as upon the raising of a flood gate or overflow of the dam or leakage through it, but his supply must be substantially according to the natural flow, subject only to such interruption as is necessary and unavoidable by the reasonable and proper use of the water in the stream above. *Ware v. Allen*, 140 Mass. 513.

The owner of an ice pond may, in order to clean it, drain the water off and then hold the water back until it is refilled, although the effect is to stop mills lower down the stream. *DeBaun v. Bean*, 29 Hun, 236.

So far as the mode of holding up the water and letting it down is reasonably incidental to the use of the stream for mill purposes, it is the right of the proprietor, and constitutes in part the mill privileges which the law gives. *Gould v. Boston Duck Co.* 13 Gray, 451.

of the town of Martinsville with considerable current, and from that point south across the mill lot of Moran, one square, to Morgan street, in said city; thence across Morgan street, in the same direction, some 60 feet; thence, still south, through the residence lot and cow pasture of one Hastings, to a point on a line with the north line of Washington street, extended; thence, still south, under a

culvert or small bridge on a passway of some 16 feet or more, leading to extensive bottoms to the west, and used by many persons.

That said branch from said culvert angled some to the west of south, through and across the said lands of plaintiff, and then entered the land of Harvey Satterwhite, and there flowed more westerly, and prior to the state ditch, hereinafter mentioned, caused several

Keeping back the water long enough to fill the milldam is not an unreasonable use. *Pitts v. Lancaster Mills*, 13 Met. 156.

Under ordinary circumstances the upper proprietor may shut his gates and hold back the water when necessary to the reasonable and beneficial use of his mill. *Mable v. Matteson*, 17 Wis. 1.

A city cannot claim to have the water of a stream flow in its natural manner for the purpose of supplying with water for extinguishing fires and for sewage purposes, as against a riparian owner who has a mill farther up the stream, and whose dam is appropriate to the size and capacity of the stream, and who uses the water in the ordinary and usual manner. *Springfield v. Harris*, 4 Allen, 496, 81 Am. Dec. 715.

If the owner of the upper mill lets down his gate and detains the water for an unreasonable time, or if he lets the water down in unreasonable quantities so as to prevent the lower owner from using it, he will be liable for the injury resulting therefrom. *Merritt v. Brinkerhoff*, 17 Johns. 306, 8 Am. Dec. 404.

The upper proprietor cannot detain the water and then discharge it in such quantities that it overflows its banks and injures the property of lower riparian proprietors. *McKee v. Delaware & H. Canal Co.* 125 N. Y. 353, affirming 52 Hun, 52.

If the upper proprietor detains the water no longer on his land than is necessary for its proper enjoyment consistent with the capacity of the stream, the lower proprietor will not be heard to complain. *Hoy v. Sterrett*, 2 Watts, 327, 27 Am. Dec. 313; *Whaler v. Ahl*, 29 Pa. 98.

Long-continued use of the water of a stream for mill purposes will not prevent the owner of land further up the stream from building a dam and using the water for mill purposes, although the effect is to interrupt the natural and continuous flow of water to the lower mill. *Thurber v. Martin*, 2 Gray, 394, 61 Am. Dec. 468.

The mere fact that the upper owner is compelled to occasionally shut his gates to hold back the water for a time will not give a right of action to the owner of an ancient mill lower down the stream if the upper mill is adapted to the character of the stream and the use of the water is reasonable for the mill, although no attention is paid to the necessities of mills lower down the stream. *Gould v. Boston Duck Co.* 13 Gray, 442.

The upper proprietor has a right to detain the waters for mechanical purposes in a reasonable manner. *Parker v. Hotchkiss*, 25 Conn. 821.

But a millowner whose wheel requires 50 per cent more water than the stream will supply, will not be permitted to retain the water to raise a head for the wheel, to the detriment of lower proprietors. *Timm v. Bear*, 29 Wis. 265.

So, if the owner of a dam accumulates water during the wet season and lets it off in the summer so as to cause a greater flow than usual, by means of which the banks of the lower proprietor are washed away, his land drowned, and his grass depreciated, an action will lie for 41 L. R. A.

the damage. *Gerrish v. Newmarket Mfg. Co.* 30 N. H. 484.

So, the upper owner cannot detain the water in his reservoir during the autumn and spring when his mill is supplied from another source for the purpose of providing a supply for the summer months when there is a scarcity of water. *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373.

So, if there is regularly a dry season when the water in the stream is materially reduced so that the stream is not of sufficient capacity to run an upper mill, the owner will not be permitted to pond the water and hold it back until he has acquired enough to run his mill and then turn it all on for a few hours, with the result that it flows over the smaller dams below, and is lost to the mill proprietors. *Mason v. Hoyle*, 56 Conn. 255.

The lower proprietor cannot complain of the upper dam, if enough water comes down the stream to run the lower mills; and the mere fact that the difficulty of getting logs is increased, so that it requires an extra hand for each twenty-five logs, is not sufficient to give a right of action. *Palmer v. Mulligan*, 3 Calmes, 320, 2 Am. Dec. 270.

The owner of a mill may draw sufficient water from a natural reservoir in the stream to operate his mills in the daytime if their capacity is suited to the size and character of the stream, and shut his gate at night, although the effect is to interrupt the flow of the stream while the reservoir is refilling, and the owner of a paper mill below requires the continuous flow of the stream night and day to operate his mill successfully. *Bullard v. Saratoga Victory Mfg. Co.* 77 N. Y. 525.

An action for diverting a stream of water is supported by proof of holding back of the water so that it did not reach plaintiff's mill by its natural flow. *Shears v. Wood*, 7 J. B. Moore, 345.

A millowner cannot unnecessarily and unreasonably detain water from those who have a subsequent right to use it. *Phillips v. Sherman*, 64 Me. 171.

The use of the water by the upper millowner exclusively at night, holding it back for accumulation in the daytime, may be found to be unreasonable. *Barrett v. Parsons*, 10 Cush. 367.

A booming company cannot retain the water for the purpose of obtaining a sufficient quantity to float logs down the stream, and then let it all down at once, if the effect is to deprive the lower riparian owner of the power to run his mill. *Thunder Bay River Boom Co. v. Speechly*, 31 Mich. 236, 18 Am. Rep. 184; *Woodin v. Wentworth*, 57 Mich. 278.

A log owner cannot place his logs in a stream at a time when it is not navigable, so as to obstruct the flow of the water to the injury of a millowner lower down the stream. *Wooden v. Mount Pleasant Lumber & Mfg. Co.* 106 Mich. 412.

The upper proprietor cannot unreasonably interfere with the natural flow of the stream, and send the water down in such unusual quantities that a large portion of it is wasted, and

considerable ponds on the lands of Satterwhite and plaintiff, lying west of the tract crossed by the branch, and which ponds continued and were stagnant, having no outlet, during a large part of each year, until drained off by said state ditch. That other ponds between Morgan and Washington streets, and near the line dividing the lands of plaintiff and Satterwhite, existed, of considerable size, at the time

said branch was cut and the waters turned down Pike street, but the same were filled by washings and deposits from said branch. That the said state ditch, so recently cut as aforesaid, follows the line, in the main, of the said branch from its intersection with the Pike street ditch south to the Satterwhite line. That before the state ditch was cut there was at times a considerable flowage and accumula-

none is left to maintain the stream in its usual condition. *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396, 7 L. R. A. 613.

The upper proprietor has no right to obstruct the flow of the stream to the injury of a lower proprietor, and if he does so the latter may remove the obstruction, doing no unnecessary injury to the upper proprietor. *Miner v. Gilmour*, 12 Moore, P. C. C. 131, 7 Week. Rep. 328.

Right to throw back.

There is no right to throw water back on the upper proprietor. *Jones v. Fisher*, 17 Can. S. C. 515; *Gibson v. Fischer*, 68 Iowa, 29; *Baldwin v. Calkins*, 10 Wend. 167; *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406; *Omelvany v. Jaggers*, 2 Hill, L. 634, 27 Am. Dec. 417; *Hahn v. Thornberry*, 7 Bush, 406; *Good v. Dodge*, 3 Pittsb. 557; *Brown v. Bush*, 45 Pa. 64; *Warring v. Martin*, *Wright (Ohio)* 380; *McCalmont v. Whitaker*, 3 Rawle, 84, 23 Am. Dec. 102; *Haas v. Choussard*, 17 Tex. 558; *Johns v. Stevens*, 3 Vt. 308; *Robertson v. Miller*, 40 Conn. 40; *Stout v. McAdams*, 3 Ill. 67, 33 Am. Dec. 441; *Summy v. Mulford*, 5 Blackf. 202; *Scheible v. Law*, 65 Ind. 332; *Sumner v. Tleiston*, 7 Pick. 198; *Hodges v. Hodges*, 5 Met. 205; *Luther v. Winnissimmet Co.* 9 Cush. 171; *Fox v. Fostoria*, 14 Ohio C. C. 471; *Booker v. McBride* (Tex. Civ. App.) 40 S. W. 1081.

An action will lie for stopping the natural flow of the stream. *Thompson v. Moore*, 2 Allen, 350.

A person throwing back water on the upper owner by means of a dam is a wrongdoer against whom one in possession merely may maintain an action. *Yeargalu v. Johnston*, 2 N. C. (1 Taylor & Conf. Rep.) 80, 1 Am. Dec. 581.

In *Cooper v. Barber*, 3 Taunt. 90, in discussing the acquisition of a right by prescription, it is said that there is a right to pen the water back until a neighbor is prejudiced.

2 Rolle, Abr. 140, pl. 0, says if a man stops a stream of water which runs through his land by which my land is surrounded it is a nuisance to me; citing 9 Edw. IV. 35. But the question there was as to the right to enter the land and throw down the obstruction, and the question of nuisance was only incidentally passed on.

If a man stops a watercourse by which land of which I am seised in fee is surrounded, though I may have an assize, yet, I may have an action on the case at my election. *Stye v. Mordant*, 1 Rolle, Abr. 104.

Sand, gravel, and worn marble from marble works cannot be permitted to accumulate in the stream in such a way as to cause the water to overflow the land of an upper proprietor. *Ames v. Dorset Marble Co.* 64 Vt. 10.

There can be no obstruction to the flow of the stream. *Hall v. Swift*, 4 Bing. N. C. 381, 1 Arn. 157, 6 Scott, 167.

If the accumulation of sand in a stream is caused by a dam erected lower down the stream, the owner of the dam is not relieved from responsibility, even if this accumulation results in part from hillside clearings of the upper owners. *Hines v. Jarrett*, 28 S. C. 480, 41 L. R. A.

So, if the dam of the upper owner is raised to such an extent that the pressure of the water causes percolation which renders the land of the lower owner damp and unproductive, there will be a cause of action. *Pixley v. Clark*, 35 N. Y. 525, 91 Am. Dec. 72.

Although leave is granted to build a dam so as to flow the upper proprietor's land in a certain way there will be liability in case it is flowed in another way. *Hutchinson v. Granger*, 13 Vt. 386.

Legislative authority to erect the lower mill will not authorize the throwing back of water upon the upper one. *Lee v. Pembroke Iron Co.* 57 Me. 481, 2 Am. Rep. 59.

An action will lie for penning back water as soon as it interferes with a use to which the upper proprietor attempts to put his land, although he was not making such use of the land when the dam was built. *McLaren v. Cook*, 3 U. C. Q. B. 299.

A dam which sets back the water so as to interfere with the drainage of the land of the upper owner is a violation of his rights. *Treat v. Bates*, 27 Mich. 300.

If a dam is so used as wrongfully to throw the water upon the lands or mills of another it may be called a nuisance. *Snow v. Cowles*, 22 N. H. 302.

One who builds a dam on a stream will be liable for injuries done by the holding back of ice which comes down in ordinary quantities borne by an ordinary freshet which can be expected at the time of year. *Bell v. McClintonck*, 9 Watts, 119, 34 Am. Dec. 507.

If a dam is so erected as to cause the stream to become obstructed with ice, and the water of the stream to be turned back on the land of the upper proprietor to his injury, the owner will be liable for the resulting injury. *Cowles v. Kidder*, 24 N. H. 364, 57 Am. Dec. 287.

A lower proprietor has no right to construct his dam so as to throw the water back on the upper proprietor in times of ordinary freshets. But he is not responsible for damages caused by extraordinary floods. *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236.

Throwing the water back in any degree, even at times of freshets which ought to be anticipated, or of ordinary stage of the water, is illegal. *Humphrey v. Irvin*, 18 W. N. C. 449.

The one building a dam will be liable for freshets enhanced by the dam. *Casebeer v. Mowry*, 55 Pa. 419, 93 Am. Dec. 768.

If the dam causes the stream to overflow the land above only when the stream is swollen, the upper proprietor will be entitled to the proportionate amount of damages. *Pugh v. Wheeler*, 19 N. C. (2 Dev. & B. L.) 50.

A riparian owner will be liable for all damages caused to the upper proprietor by water thrown back on his dam in times of high water which are usual, ordinary, and reasonably anticipated. *Dorman v. Ames*, 12 Minn. 451; *Ames v. Cannon River Mfg. Co.* 27 Minn. 245.

But the mere fact that water is backed up in times of freshets upon the wheels of an upper mill because of the maintenance of a dam by the lower proprietor and his storing logs in the

tion of water upon plaintiff's said land from the surface ditches on the streets of said city, and, there being no well-defined channel for said waters across plaintiff's said land, plaintiff caused a ditch of small dimensions to be cut for said branch and street flowage across said land, on or near the line of said branch, at a cost of \$20, \$10 of which plaintiff demanded said city should pay, and said city did pay the

same, because of the benefit thereof to the city. That the waters of White river during considerable freshets flow through a natural depression in the ground, the surface on either side rising gradually to a height of from 2 to 5 feet within a distance of from 500 to 600 feet of the channel of said branch before the cutting of said state ditch or other ditches from its start west on Pike street. Prior to the com-

pond will not give the upper owner a right of action. *Richards v. Peter*, 70 Mich. 286.

In *Monongahela Nav. Co. v. Coon*, 6 Pa. 383, 47 Am. Dec. 474, the court, in discussing the right of a navigation company, says that a riparian owner may use the water power to the full extent of the stream, by ponding the water back to his line, although the effect will be that in times of high water the obstruction will cause an overflow upon the land of an upper riparian owner.

But in *McCoy v. Danley*, 20 Pa. 88, 57 Am. Dec. 680, the court held that the lower proprietor will be liable for injury caused by the ordinary high water of the stream which is thrown back on his dam, and states that the rule of the *Coon Case* can only be applied to floods which are extraordinary in their character.

Although the water from a dam has been set back over the land for several years, less than the period of limitation, the upper proprietor may maintain an action, if upon attempting to make a new use of his property he finds that the use is interfered with by the water. *King v. Tiffany*, 9 Conn. 162.

The water cannot be set back one foot by the lower proprietor upon the land of the upper proprietor. *Hill v. Ward*, 7 Ill. 285.

If a lower proprietor undertakes to obstruct or change the natural stream, and thereby backs the water on the upper owner, the latter, although he cannot show any injury, is entitled to nominal damages. *Whipple v. Cumberland Mfg. Co.* 2 Story, 661.

The upper proprietor may recover damages if his right of drainage through a watercourse is cut off by obstructions placed in the stream by the lower proprietor. *Hastings v. Livermore*, 7 Gray, 194.

If one tenant in common erects a dam on his separate estate so as to flow the water back on the common property, the cotenant may recover for the injury. *Odiorne v. Lyford*, 9 N. H. 502, 32 Am. Dec. 387.

The lower owner cannot obstruct the watercourse so that it will not carry off the water which is accustomed to flow in it. *Ferris v. Wellborn*, 64 Miss. 29.

The owner of the lower dam is not liable for the flowage of a wheel above him if it is caused by the filling of the stream with sediment above the dam, which was not anticipated when the dam was constructed. *Proctor v. Jennings*, 6 Nev. 83, 3 Am. Rep. 240.

The mere facts that by reason of the dam the ice in the stream when it breaks up in the spring holds the water back so that it floods the wheels of an upper mill, and that the water is held back for a longer time than usual, do not give a right of action. *Smith v. Agawam Canal Co.* 2 Allen, 355.

If the dam of the lower owner does not throw the water back to a bridge of the upper owner the former will not be liable in case, by reason of a great storm of wind and rain, the water backs up and destroys the bridge. *China v. Southwick*, 12 Me. 238.

The fact that the upper owner uses the water out of the regular channel of the stream does not change his right to be free of the back 41 L. R. A.

water of a lower dam, if he returns the water to the stream before it leaves his land. *Webster v. Fleming*, 2 Humph. 513.

A landowner who maintains a culvert on his own land in such a manner as to safely carry the ordinary flow of water in times of ordinary freshets will not be liable for the increased flow of water on an upper owner's land by the obstruction of the channel by an owner farther down the stream. *Blerer v. Hurst*, 155 Pa. 523.

Damages must be paid in case land is flooded by the raising of a dam. *Gorman v. Trice*, 79 Ga. 731.

The upper proprietor may erect a dam across the stream on his own property for the purpose of constructing a fish pond, although the effect is to prevent the flowing back on his land of water by a milldam below. *Wood v. Edes*, 2 Allen, 578.

Restoration to ancient channel.

If a prescriptive right has been acquired to change the use of the water of the stream, it cannot be restored to its natural state to the injury of the lower proprietor. *Belknap v. Trimble*, 3 Paige, 577.

So, after a right to divert the water has been acquired by prescription the flow cannot be restored to its natural channel to the injury of lower proprietors. *Mathewson v. Hoffman*, 77 Mich. 420, 6 L. R. A. 349.

But equity will not interfere after the defendant has gone upon the plaintiff's land and restored the water to its ancient channel, on the ground that the plaintiff had acquired a right by prescription to have the water flow in the new channel. *Coalter v. Hunter*, 4 Rand. (Va.) 58, 15 Am. Dec. 728.

If by a sudden flood the stream changes its course so that it does not run into the land of the lower proprietor as it formerly did, the upper proprietor cannot, after permitting it to retain its new course for ten years, restore it to its ancient channel to the injury of the lower proprietor. *Woodbury v. Short*, 17 Vt. 388, 44 Am. Dec. 344.

If the channel of a stream is changed, and it is permitted to flow in the new channel until the upper proprietor has expended money and made improvements upon the faith of its continuing in its changed position, the owner will not be permitted to restore it to its former channel. *Ford v. Whitlock*, 27 Vt. 265.

If the channel of the stream has been gradually filled so that the natural flow has been altered, a riparian owner cannot, by removing the accretion, restore the same to its ancient course and velocity to the injury of an upper proprietor. *Withers v. Purchase*, 60 L. T. N. S. 819.

But if water is diverted from a brook for a canal, and afterwards returned to it upon the abandonment of the canal, a riparian proprietor will have no right of action for injuries done to his land by the overflow of the brook at a time of high water, which results from the fact that the bed has become partially filled up during the time of the diversion. *Mason v. Shrewsbury & H. R. Co.* L. R. 6 Q. B. 578, 40

commencement of the alleged wrongful acts of the defendants, the water flowing in said branch and through plaintiff's land, while not pure, was reasonably fit and valuable for farm and stock purposes, and the only stream of water accessible for stock kept and pastured on plaintiff's land, and was used for that purpose by the plaintiff during the part of the season that it reached her land. The land of plaintiff

south of Washington street is pasture land, and valuable for grazing purposes, and, by reason of its location, valuable for cow pasture. Prior to the acts of defendants complained of the waters of said branch deposited no offensive matter on the lands of plaintiff, except such as would naturally find its way into an open public ditch or branch running through a thickly populated district,—no offensive or

L. J. Q. B. N. S. 293, 25 L. T. N. S. 239, 20 Week. Rep. 14.

The accustomed course of a stream which riparian owners are entitled to say must not be disturbed, is not to be found in historical research, but is that which is its natural and apparently permanent course at the time when the right is called in question. *Withers v. Purchase*, 60 L. T. N. S. 819.

IV. Use for sewer.

The question how far the stream may be used for sewer purposes is one of the most difficult which the subject presents. On the one hand, the use of the stream to float off a small amount of refuse seems reasonable, and is generally upheld. On the other hand, when the quantity of refuse becomes so great that it renders the water unfit for the uses of lower proprietors, it is unreasonable, and will generally not be permitted. Between these two extremes is a broad field in which cases must be ruled by their facts.

Right to throw refuse into stream.

A riparian owner cannot cast waste from a sawmill into the stream, to the injury of a lower proprietor, in unreasonable quantities, if it is possible to operate the mill without doing so. *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763.

In *Dwinnel v. Veazie*, 50 Me. 479, it is said that if a person obstructs a stream which is by law a public highway by casting therein waste material, filth, or trash of any description, he does so at his peril; it is a public nuisance for which he will be liable to an action at law by any individual who shall be specially damaged thereby.

So, the mere fact that a sawmill as constructed cannot be operated without permitting the sawdust to fall into the stream, is not sufficient to justify such conduct, unless it is further shown that the mill was properly constructed. *Red River Roller Mills v. Wright*, 30 Minn. 249, 44 Am. Rep. 191.

Whether it is actionable to cast sawdust into a stream is a question for the jury. *Dallmar v. Wilcox*, 23 N. Y. Week. Dig. 231.

The upper proprietor cannot foul the water of the stream by refuse from a cheese factory, and filth from hog pens. *Davis v. Lambertson*, 56 Barb. 480.

A lower proprietor may enjoin the placing in the stream of blood and refuse from a slaughterhouse, the effect of which is to render the water impure and contaminate the air near where the stream flows. *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419.

The upper proprietor cannot unreasonably make use of the stream to float off the bark from his tan-yard to the injury of the lower proprietor. *Thomas v. Brackney*, 17 Barb. 654; *Honsee v. Hammond*, 39 Barb. 89.

The owner of a mine who deposits culm where it will be carried down by a stream will be liable in case it is carried down and deposited on the land of a lower proprietor. *Ellder v. Lykens Valley Coal Co.* 157 Pa. 490. 41 L. R. A.

But there is no liability in case the culm is carried into the stream by means of extraordinary floods. *Hindson v. Markle*, 171 Pa. 138.

Only the amount of sawdust can be deposited in the stream which is absolutely and indispensably necessary to the beneficial use of the water, if it injures the lower proprietor. *Caulfield v. Andrew*, 54 Vt. 1, 41 Am. Rep. 828.

The owner of a sawmill is not bound to keep the refuse from the mill wholly out of the stream for the benefit of the owner of a starch mill below. Nor can he wantonly and needlessly throw refuse into the stream to the injury of the starch mill. *Jacobs v. Allard*, 42 Vt. 303, 1 Am. Rep. 331.

The owner of a distillery with which are connected cattle stables and hog yard, cannot throw the refuse from such places into the stream to the detriment of a lower proprietor. *Greene v. Nunneisacher*, 36 Wis. 50.

Permitting the shives from a flax mill to fall into the stream is not a reasonable use of it, and the person doing so will be liable for the injury to the owner of a dam lower down the stream caused by their accumulation in and filling up of his pond. *O'Riley v. McChesney*, 3 Lans. 278.

A gas manufacturer cannot permit refuse from his works to flow into the stream to the injury of proprietors lower down. *Carhart v. Auburn Gaslight Co.* 22 Barb. 297.

The upper proprietor cannot use the stream for washing ore in such a way that the pond of the lower owner is filled with dirt and rubbish, and also his vats in which hides are tanned. *Crittenton v. Alger*, 11 Met. 281.

Tailings from a placer mine cannot be deposited in the stream to such an extent that they overflow lands of a lower proprietor. *Fitzpatrick v. Montgomery*, 20 Mont. 181.

As to the right to pollute for mining purposes generally, see note to *Drake v. Lady Enaley Coal, Iron & R. Co.* (Ala.) 24 L. R. A. 64.

Pollution generally.

The upper proprietor cannot pollute the stream so as to render it unfit for use by the lower proprietor. *Gladfeiter v. Walker*, 40 Md. 1; *McCallum v. Germantown Water Co.* 54 Pa. 40, 93 Am. Dec. 656.

Under a statute providing that running water while on land belongs to the owner of it, but that he cannot adulterate it so as to interfere with the enjoyment of it by the next owner, the owner of a mine cannot use the water for washing ore if the effect is to render the water unfit for use by a lower riparian owner. *Satterfield v. Rowan*, 83 Ga. 187.

A municipal corporation which owns land on the border of a stream from which it obtains its water supply may maintain an action against an upper proprietor who pollutes the water so as to render it unfit for the use of the municipality. *Baltimore v. Warren Mfg. Co.* 59 Md. 96.

Any use that materially fouls and adulterates the water, or the deposit or discharge therein of any filth or noxious substance that so affects the water as to impair its value for the ordi-

unhealthful odors, or anything unsightly or damaging to plaintiff's lands, except such as would naturally arise from decaying vegetation, refuse, and decaying matter thrown and finding its way into an open ditch situated as this ditch was. A large part of plaintiff's said lands are within the corporate limits of said city, and are valuable for building purposes, suitable to be platted into town lots, and, if not injured or damaged by any nuisance, they would find reasonably ready sale and demand for such purposes. The flow of waters from said springs in said ditch or branch through plaintiff's land is irregular in quantity and intermittent in continuity. They almost entirely disappear before reaching the point where the tile drain intercepts them. In midsummer

and dry seasons of the year the waters do not ordinarily reach the plaintiff's land lying below the mouth of the tile drain. During the winter and spring months, and parts of the year other than dry seasons, the waters flow into the lands south of Washington street, and part of the time through the land of plaintiff. For the larger part of the time when said waters reach the lands of plaintiff below the mouth of the tile drain, their flow does not continue during the whole day, but during portions of each day. In dry weather they sink and disappear before reaching said tile ditch. That defendants' said lots at the surface are dry, and, up to the time of digging of the artesian well hereinafter set forth, had no water thereon save surface water from rains

nary purposes of life, will be deemed a violation of the rights of the lower proprietor. *Baltimore v. Warren Mfg. Co.* 59 Md. 96.

Water from a cemetery cannot be drained into a stream the water of which is used for domestic purposes. *Barrett v. Mount Greenwood Cemetery Asso.* 159 Ill. 385, 31 L. R. A. 109.

If a prescriptive right has been acquired to pollute the water to some extent the one having the right will not be permitted to increase the pollution of the stream without being liable to an action. *McIntyre v. McGavin* [1893] A. C. 268.

Mine water cannot be turned into a stream in such a way as to pollute it, although the pollution is nothing more than to render the water which was before soft and suitable for distilling purposes, hard and unfit for such purposes. *Young v. Bankier Distillery Co.* [1893] A. C. 691. In that case it is said that a riparian proprietor is not entitled to use water for secondary purposes except upon condition that he shall return it to the stream practically undiminished in volume and with its natural qualities unimpaired.

In *Stockport Waterworks Co. v. Potter*, 7 Hurlst. & N. 160, 31 L. J. Exch. N. S. 9, 7 Jur. N. S. 880, it appeared that arsenic used in calico printing was cast into the stream from which the water supply of a municipal corporation was taken lower down, and the upper proprietor argued that he carried on his business in a proper manner; but Martin, B., asked, What answer is that to an action by persons whose water for drinking is affected by arsenic poured into it by persons carrying on such a trade?

An upper proprietor cannot throw poisonous and corrosive substances into the stream so as to corrupt the water to the extent that machinery of other proprietors on the stream is corroded and destroyed, and the use of the water for reasonable and proper purposes impaired and perverted. *Merrifield v. Lombard*, 13 Allen, 16, 90 Am. Dec. 172.

The lower proprietor may maintain a bill in equity to restrain the upper owner from polluting the stream. *Harris v. Mackintosh*, 133 Mass. 228.

The owner of a bleachery will not be permitted to turn the chemicals used in his business into the stream if, because of its small capacity, the water is so polluted that it is rendered unfit for domestic use by the lower proprietor. *Holsman v. Boiling Spring Bleaching Co.* 14 N. J. Eq. 335.

A prescriptive right to foul the water is limited to the use which has been made of it, and in case a new use is attempted which renders the stream much more foul, the lower proprietor may recover for the injury done him. *Moore v. Webb*, 1 C. B. N. S. 673.

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A dyeing establishment cannot pollute the waters of a stream by the refuse from the works to the injury of a similar institution lower down. *Richmond Mfg. Co. v. Atlantic De Laine Co.* 10 R. I. 106, 14 Am. Rep. 658; *Silver Spring Bleaching & D. Co. v. Wanskuck Co.* 13 R. I. 611.

The right of drainage into rivers, given by the English act of 1847, is subject to the condition that no nuisance shall be created. *Atty. Gen., Conservators of River Thames, v. Kingston-on-Thames*, 34 L. J. Ch. N. S. 485, 11 Jur. N. S. 596, 12 L. T. N. S. 665, 13 Week. Rep. 888.

The stream cannot be polluted for mining purposes. *Beach v. Sterling Iron & Zinc Co.* 54 N. J. Eq. 65.

Water cannot be polluted by washing iron ore to such an extent as to render it unfit for the domestic use of the lower proprietor. *Tennessee Coal, Iron & R. Co. v. Hamilton*, 100 Ala. 252.

The owner of a mine will be liable for draining into a stream water from the mine which is so impregnated with copperas as to be poisonous for domestic use, and to kill vegetation. *Hunter v. Taylor Coal Co.* 16 Ky. L. Rep. 190.

The upper proprietor will not be permitted to pollute the stream with foul water from his lead mines. *Hodgkinson v. Ennor*, 4 Best & S. 229, 32 L. J. Q. B. N. S. 231, 9 Jur. N. S. 1152, 8 L. T. N. S. 451, 11 Week. Rep. 775.

Pollution of the stream by washing coal preparatory to making coke will render the person doing so liable for the injuries thereby inflicted on lower proprietors. *Lents v. Carnegie*, 145 Pa. 612.

There is no difference in the rules governing natural and artificial watercourses. So, if the right to an artificial course has been acquired, mine water cannot be turned into it in such a way as to pollute it. *Magor v. Chadwick*, 11 Ad. & El. 571, 8 Perry & D. 367, 4 Jur. 482.

An upper proprietor cannot pollute the water so as to make it unfit for drinking purposes. *Dwight Printing Co. v. Boston*, 122 Mass. 583.

A prior brought trespass on the case for that he and his predecessors had time out of mind a ditch running to his buildings and grounds, and defendant built a lime pit for tanning purposes so near the river that he corrupted the water, and all plaintiff's tenants left his buildings; and it was ruled that the action would lie. 13 Hen. VII. 26 B.

And this was cited as law in *Aldred's Case*, 9 Coke, 58.

A slaughterhouse cannot be operated upon the banks of a stream in such a way as to pollute the waters of the stream. *Atty. Gen. v. Steward*, 20 N. J. Eq. 415.

A person establishing works on a stream may by long usage of the water acquire a right to

and melting snows, and other surface water that flowed over the same from adjacent lots and streets, and on rare occasions, such as the floods of 1847 and 1875, the waters of White river passed over and flooded the same, and that prior to the sinking of the well on defendants' land, and bringing the water to the surface, such mineral water had not, by percolation or otherwise, flowed into said branch, or upon or over plaintiff's land in question. That in the summer of 1888 a company of citizens of Martinsville bored for gas, coal, or other minerals on said lots of defendants, which constitute a single inclosure and plat of ground, with the permission of the defendants (the bore was 1,700 feet deep and over), without finding gas in paying quantities, coal, or other mineral,

but at a depth of near 700 feet struck a strong vein or flow of mineral artesian water, and which, when confined to a 6-inch pipe, rose to a height of 80 feet above the ground surface, and flowed therefrom with great force. That said bore and well were practically abandoned by said company after the failure to find gas or mineral, the water flowing therefrom in large quantities and wasting for the space of one year. That water was analyzed, and found to possess medicinal and curative properties and ingredients, and thereupon the defendants concluded to utilize the same for the general benefit, as well as the benefit of the defendants; and, to that end, defendants purchased a large part and controlling interest in the stock of said company, and proceeded at

have the water come to him in an unpolluted state. *Wood v. Sutcliffe*, 16 Jur. 75, 2 Sim. N. S. 163, 21 L. J. Ch. N. S. 253.

The upper proprietor cannot erect a tau-yard on the stream if the effect is to poison and corrupt the water to the injury of the proprietor below. *Howell v. McCoy*, 3 Rawle, 236.

If there is a prescriptive right to foul a stream, it cannot be enlarged materially without liability to damages. *Crossley v. Lightowler*, L. R. 2 Ch. 478, 36 L. J. Ch. N. S. 584, 15 Week. Rep. 801, Affirming L. R. 3 Eq. 296.

The rivers pollution prevention act of 1876 (39 & 40 Vict. chap. 75) provided an elaborate system for the prevention of water pollution, but the powers given by the act did not affect any rights existing by statute, law, or custom. *Higgins, Pollution of Watercourses*, 66.

There is a somewhat peculiar rule in Indiana. It seems that, although the use of one's own property will necessarily result in injury to the lower proprietor, there is a right to make such use if care is used to do no more than the necessary injury.

Thus, an upper proprietor may turn into the stream water which has been taken from an artesian well and used to bathe sick persons if the work is conducted in a proper manner so as to do no injury to any person which proper care would avoid. *Barnard v. Shirley*, 135 Ind. 547, 24 L. R. A. 568.

In that case the sickness was of the most infectious kind, so that its spread might, perhaps, not be prevented by the utmost care after the germs had gotten into the stream.

A second trial of that case, however, developed a state of facts which made the case much less startling than it was on the first trial. It seems that the stream was so badly polluted before receiving defendant's contribution as to be unfit for general use. *BARNARD V. SHIRLEY*. This fact will not, as a rule, defeat the action; but it would seem to furnish more reason for denying relief against a single defendant than though he alone rendered the water unfit for use.

Sewage pollution.

The general rule is that sewage cannot be cast into the stream to such an extent as to pollute it.

Sewage cannot be thrown into the stream in such a way as to render the water foul and unfit for use. *Goldamid v. Tunbridge Wells Improv. Comrs.* 12 Jur. N. S. 308, L. R. 1 Ch. 349, 35 L. J. Ch. N. S. 382, 14 L. T. N. S. 154, 14 Week. Rep. 562; *Bidder v. Croydon Local Bd. of Health*, 6 L. T. N. S. 778; *Peterson v. Santa Rosa*, 119 Cal. 587.

A city will be liable for polluting a stream with sewage in such a way as to spoil the water supply of a proprietor lower down the stream. *Good v. Altoona*, 162 Pa. 493.

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A municipal corporation cannot collect sewage and cast it into a stream of water so as to destroy its purity. *Butler v. Edgewater*, 25 N. Y. S. R. 815.

A city may be liable for injury done by the pollution of a watercourse by the emptying of its sewage therein. *Valparaiso v. Moffitt*, 12 Ind. App. 256.

There can be no prescriptive right to pollute a stream by the discharge of sewage in such manner as to be injurious to public health. *Blackburne v. Somers, Jr.* L. R. 5 Eq. 1.

If the statute does not permit the opening of new sewers into a river the town will not be permitted to do so. *Holt v. Rochdale*, L. R. 10 Eq. 354, 39 L. J. Ch. N. S. 761, 23 L. T. N. S. 43, 18 Week. Rep. 885.

Where a town seeks to turn its sewage into a stream the court will protect private rights if affected in any material degree, but will have regard to the nature and extent of the injury and to the balance of inconvenience. *Lillywhite v. Trimmer*, 38 L. J. Ch. N. S. 530, 16 L. T. N. S. 318, 15 Week. Rep. 763.

Unless authorized by the legislature a municipal corporation cannot turn sewage into a stream to such an extent as to drive the fish out of it, and to prevent cattle of the lower riparian proprietor from drinking it. *Atty. Gen. v. Birmingham*, 4 Kay & J. 528.

The English statute provides that boards of health shall not interfere with any watercourse unless the persons interested shall give consent, and without such consent the board cannot turn the sewage from a town into a private stream. *Atty. Gen. v. Luton Local Bd. of Health*, 3 Jur. N. S. 190.

In *Oldaker v. Hunt*, 19 Beav. 485, it was held that the statute did not permit sewage to be cast into the river.

And that case was affirmed in 6 De G. M. & G. 388, 1 Jur. N. S. 578.

No person is entitled on the ground of ancient custom or privilege to collect a mass of sewage matter and pour it at one point into a stream in such a quantity that the river cannot dilute it on its passage down to the lower riparian proprietors, as the effect of such an act is to create an evil which must be illegal, being such as no custom can authorize. *Atty. Gen. v. Richmond*, L. R. 2 Eq. 806, 12 Jur. N. S. 544, 35 L. J. Ch. N. S. 507, 14 Week. Rep. 686, 14 L. T. N. S. 398.

A municipal corporation cannot cast its sewage into a stream in such a manner as to pollute the pond of a lower riparian proprietor which he uses for domestic purposes, the propagation of fish, and the supply of ice. *Chapman v. Rochester*, 110 N. Y. 273, 1 L. R. A. 296.

But there will be no nuisance in turning sewage into a stream if at the place where the com-

once to erect and operate a bath house, with the necessary bath tubs, engines, boilers, and plumbing. That such was the effect of drinking the waters of said well, hot or cold, and bathing in the same, in restoring and giving relief to the afflicted, during its first year of operation, that during the ensuing season the bath house was enlarged, larger boiler and engine procured, number of tubs increased, and facilities for baths to suit all maladies added, so that 500 baths each day can be taken, and at times that number and more have been given. That these improvements, under the strictest economy consistent with the procurement of good work and material, have cost in excess of \$10,000. That the great relief and permanent cures of many hundreds of persons

and patients from all parts of Indiana, and adjoining and more distant states, of rheumatic affections, neuralgia, kidney affections, all manner of eruptions and other skin diseases, indigestion and other stomach troubles, ulcerous affections, spinal diseases, and everything resulting from impurity of blood, dropsy, malarial and syphilitic affections, attest the medicinal value of said waters when properly used. That the number of persons affected by the above-named diseases that have been and are bathed at said sanitarium average from 50 to 500 per day during the spring, summer, and fall seasons. That there is required and used about one barrel of water for each of said baths. That the net receipts of defendants from operating said sanitarium, or from rent-

plaining town takes its water supply from the stream the pollution is imperceptible. *Atty. Gen. v. Cockermouth Local Board*, L. R. 18 Eq. 172.

A city may be enjoined from emptying sewage into a stream. *Dwight v. Hayes*, 150 Ill. 273, affirming *Hayes v. Dwight*, 49 Ill. App. 530; *Robb v. La Grange*, 158 Ill. 21.

In *Spokes v. Banbury Local Bd. of Health*, L. R. 1 Eq. 42, the court, in speaking of the discharge of sewage into a river, asks, What difference can it possibly make as to the commission of an illegal act, whether a man acts on behalf of thousands or on behalf of himself alone?

A city cannot, without direct legislative authority, pollute a stream with its sewage to the injury of lower proprietors. And it cannot be done by legislative authority without making compensation to the injured riparian owners. *Nolan v. New Britain*, 69 Conn. 668.

A stream cannot be used to carry off the sewage of a public institution unless the right is acquired by condemnation under the right of eminent domain. *Atty. Gen. v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. 146, 30 L. J. Ch. N. S. 265, 17 Week. Rep. 240, 19 L. T. N. S. 708.

The court says in *Bainard v. Newton*, 154 Mass. 255, that the use of lands for streets will not exceed the rights of the upper proprietor, so that surface drainage into the stream will not be unlawful.

The Massachusetts decisions are affected by the peculiar doctrine of that state in reference to municipal corporations.

In *Morse v. Worcester*, 139 Mass. 889, the court, in discussing the liability of a city for creating a nuisance by throwing its sewage into a stream, states that it cannot be supposed that the legislature in giving the right to use the stream intended to authorize the commission of the nuisance unless it was absolutely necessary, and that it would be liable if it was negligent in the manner of constructing the works, or in failing to purify the sewage before it entered the stream. And the same general principle is found in *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592, and in *Washburn & Mfg. Co. v. Worcester*, 116 Mass. 458.

In the *Merrifield Case* it was decided that a municipal corporation is not liable for casting sewage into the stream by a properly constructed system of sewerage unless it is made so by statute. 110 Mass. 221. The court says that for loss occasioned to individuals by the quasi judicial action of the proper authorities of the city in laying out sewers; or for the construction of the work in a proper and successful manner; or for their maintenance and use in a proper man-

ner, no action of tort can be maintained against the city.

Indiana seems to have a rule of its own.

In *Richmond v. Test*, 18 Ind. App. 482, the court followed the doctrine of *Barnard v. Sherley*, 135 Ind. 547, 24 L. R. A. 568, and held that a municipal corporation was not liable for the injuries caused by casting its sewage into a stream, saying that, such action being lawful in itself, not capable of being carried on elsewhere than it was, the lower proprietor must bear the loss which results, his interest giving way to the public good, if the sewers were properly built and due care exercised to give as little annoyance as possible.

V. Right to relief.

The forms of relief are quite varied. Removal of the obstruction may in some cases be permitted.

The upper proprietor may enter upon the land of the lower proprietor and remove the nuisance. *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53.

The upper proprietor may enter upon the land of the lower proprietor and remove enough of the latter's dam to let the water run off from his property. *Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265.

If a riparian owner has been deprived of water which ought to flow in the stream, by the construction of a ditch by a highway commissioner, he may dam up the ditch and restore the water to the stream. *McCord v. High*, 24 Iowa, 342.

The lower owner has a right to remove an embankment which cuts off the flow of the water from his land. *Overton v. Sawyer*, 46 N. C. (1 Jones, L.) 308, 62 Am. Dec. 170.

The owner of an ancient mill may lawfully enter the close of another and remove a dam erected therein by which the water of the stream below the mill is made to flow back and interfere with the mill wheel. *Hodges v. Raymond*, 9 Mass. 316.

The flowage of land may be remedied by entering upon the lower land and removing the dam. *Winchell v. Clark*, 68 Mich. 64.

If a milldam is erected so as to flow the water back on the upper proprietor under circumstances which might justify the upper proprietor in abating it, he must confine his acts to the dam itself and remove only such portions as cause the injury. *Moffett v. Brewer*, 1 G. Greene, 348.

An upper proprietor will not be liable for cutting a ditch on his own land to drain a pond raised by a dam on the land of the lower proprietor if the ditch would not have interfered with the flow of the water had the stream remained

ing the same, are of the value of \$150 per month. A public fountain is kept flowing and in order for the use and benefit of the public, and this is used continuously, day and night, by all the citizens of Martinsville, or nearly so, at their pleasure, and by hundreds of passers-by on trains or in private conveyances, free of cost. That, in constructing said bath house and providing the necessary drainage therefrom, defendants laid a tile ditch of 4-inch tile from said bath house, in a southwesterly direction, across the said lots and pasture of said Hastings, to said branch, from 2 to 4 feet under the surface. That all syphilitic patients who are treated at said sanitarium who have any eruptions are now, and have been since the former trial and judgment, confined to the

use of a special room and tub, and the waters from said tub are, and have been since said date, so piped as that they cannot enter said tile, or flow to said branch, but enter the privy sink, which is cleansed as often as each three months. That said tile is of the usual clay and porous character, and is laid part of the way through sandy and gravelly soil. That said water and the ingredients of it contain well-known germicides, to which properties its curative qualities are attributable, mainly. That said waters are healthful, and in the natural state good for live stock of all kinds, and such stock will use no other after using it, if they get to it.

That said water, when exposed to the air, both before and after being used in baths, yields

in its natural state. *Bearse v. Perry*, 117 Mass. 211.

But upper riparian owners upon whose land water is backed by a dam of the lower proprietor have no right to divert the water from the stream by means of a ditch, and carry it upon the land of the lower proprietor for the purpose of removing the injury. *Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731.

The upper owner cannot tap the pond which has been thrown back upon his land by the lower owner for the purpose of securing water to assist in running his machinery. *Merritt v. Parker*, 1 N. J. L. 400.

The lower proprietor will not be permitted to construct a dam across a stream for the purpose of holding back surface water which the upper proprietor has thrown into the stream. *McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 479.

The lower owner cannot construct dams for the purpose of stopping the flow of water in a stream merely because the upper owner has cut ditches for the purpose of draining the water on his land into the stream. *Hooper v. Wilkinson*, 15 La. Ann. 497, 77 Am. Dec. 194.

The right of a riparian proprietor to enter upon the land of another to abate the nuisance of diversion exists only against the wrongdoer, and he has no right to enter upon or flow the land of an innocent person for the purpose of regaining the use of the diverted stream. *Agawam Canal Co. v. Edwards*, 36 Conn. 476.

If the statute in giving a municipal corporation power to impair a stream provides a method of assessing damages, that method is exclusive and an action at law cannot be maintained for the injury. *Boston Belting Co. v. Boston*, 149 Mass. 44.

What will give right of action.

There has been considerable disagreement as to what was necessary to give a right of action. Some of the earlier cases held that interference with an actual use was necessary, but subsequent cases have held that interference with the right was sufficient whether any use was made of it or not.

In *Williams v. Morland*, 2 Barn. & C. 910, 4 Dowl. & R. 583, the court said that the lower proprietor cannot recover damages for the diversion of water unless he has appropriated it to his use so that his use is injured by the act of the upper proprietor. But it was decided that there could be no recovery for merely changing the flow of the stream so that it was not as clear, smooth, and moderate as before.

In *Palmer v. Kebblethwaite*, 1 Show. 64, Holt said: Suppose a watercourse runs to my ground and I have no use for it and one upon another

ground diverts it before it comes to mine, will an action lie? And he intimates that it will not, although he states there will be further argument on the subject.

And in *Palms v. Heblethwait*, Skin. 65, it is stated that if the one from whom the stream was diverted owns the stream he need not show that his mills were ancient in order to be entitled to maintain the action.

An action cannot be sustained unless some injury has been inflicted. *Omelvany v. Jaggers*, 2 Hill, L. 634, 27 Am. Dec. 417.

In *Wright v. Howard*, 1 Sim. & Stu. 190, the vice chancellor says that it appeared to him that no action would lie for diverting or turning back water except by a person who sustains an actual injury.

There must be proof of special damage to enjoin the throwing back of water by a dam. *Garrett v. McKie*, 1 Rich. L. 445, 44 Am. Dec. 263.

In order to maintain an action for raising the water by a dam to some small degree between the banks on the upper riparian proprietor's land there must be actual damage. The mere invasion of his right is not sufficient. *Cooper v. Hall*, 5 Ohio, 323; *M'Elroy v. Goble*, 6 Ohio St. 187.

If the lower proprietor is unable to show any actual damage he cannot maintain his action except for unreasonable and unauthorized diversion of the stream. *Gillis v. Chase*, 67 N. H. —, 31 Atl. 18.

So long as a reasonable use by the upper proprietor does no actual and perceptible damage to the lower proprietor no action will lie. *Elliot v. Fitchburg R. Co.* 10 Cush. 191, 57 Am. Dec. 85.

In *Williams v. Morland*, 4 Dowl. & R. 583, 2 Barn. & C. 910, it is said that if the lower proprietor has enough water flowing through his land to supply his land he cannot complain that the upper proprietor holds back a part of the flow of the stream.

However, a majority of the cases are the other way. In *Glynne v. Nichols*, 2 Show. 507, an action on the case was brought for diverting a watercourse, which was defended on the ground that the use to which it was applied was not stated. But *Glynne v. Nicholas*, Comb. 43, states that judgment was given for the plaintiff.

The lower owner is entitled to redress if, in case it is not given, the use by the upper proprietor will develop into an adverse right by prescription. *Ware v. Allen*, 140 Mass. 513. The court says that in the *Elliot* case no question was raised of encroachment upon the rights of plaintiff by which in time he might be entirely deprived of them.

If the sflowage will ripen into an adverse

a considerable quantity of white and sometimes jellied white, sulphur, and magnesia, or other substance, which gathers about grass, weeds, or trash, and which gives the channel of the ditch an unclean, slimy, and repulsive appearance near and about the point where said tile drain enters the ditch, and extending not exceeding 80 or 40 feet from the mouth of said tile drain, but in no way poisonous or injurious to live stock or human beings; and said water, after being used in ordinary baths as used in defendants' bath house, and flowed through said tile drain to said branch, is not poisonous, or necessarily injurious to live stock. That said waters of said well are strongly impregnated with sulphureted hydrogen gas, which gives a strong sulphurous odor at said well at the public fountain, in the baths, and at the end of said tile where the same enters the branch, which odor is not unhealthful, but is strong and offensive to the senses, and sometimes becomes very offensive to persons living in the vicinity of said tile drain where it enters the said ditch. That said waters, after passing through said tile and parting with the white sulphur, magnesia, etc., as above described, if mixed with the sand and clay of the soil for some time, form a black mud, greasy and filthy in appearance, strongly impregnated with sulphur,—sometimes, in cases of acute pains, used in mud baths with much success,—which mud, when stirred up, gives out a strong, sulphurous odor, very unpleasant to the senses, but has nothing necessarily unhealthy about it. Such black

The mere fact that the injury suffered by the plaintiff is small will not prevent his recovery. *Thompson v. Crocker*, 9 Pick. 59.

One who constructs a grating across a water-course in such a way that it will be likely to accumulate rubbish and back the water upon an upper proprietor will be liable for the injuries in case it does so. *Babbitt v. Safety Fund Nat. Bank*, 169 Mass. 361.

The upper proprietor is entitled to nominal damages in case of the throwing back of water upon his land, although no actual injury is proved. *Pastorius v. Fisher*, 1 Rawle, 27.

The fact that the obstruction of the water does not become injurious to the upper proprietor until he changes his works is immaterial. *Johnson v. Lewis*, 18 Conn. 303, 33 Am. Dec. 405.

The mere throwing the water back in the channel upon the land of the upper proprietor although it does not overflow its bank, is actionable. *Wright v. Moore*, 38 Ala. 593, 32 Am. Dec. 731.

Nominal damages may be recovered in case the water is diverted so as to materially diminish its flow, although there is no proof of actual damage. *Stowell v. Lincoln*, 11 Gray, 434.

If a person stops the current of a stream that has immemorially flowed in a given direction, and thereby prejudices another, he subjects himself to an action, although the use to which the injured person puts the stream is not immemorial. *Saunders v. Newman*, 1 Barn. & Ald. 258.

If the right of the lower owner is invaded he may maintain an action without proof of specific injury. *Tillotson v. Smith*, 32 N. H. 94, 64 Am. Dec. 355.

One entitled to use a stream of water may maintain an action for the partial diversion of it, although he is not at the time particularly injured. *Harrop v. Hirst*, L. R. 4 Exch. 43, 38 L. J. Exch. N. S. 1, 19 L. T. N. S. 426, 17 Week. Rep. 164.

A riparian owner has a right, irrespective of any actual damage sustained by him, to complain of an obstruction to the stream. *Norbury v. Kitchin*, 15 L. T. N. S. 501, 9 Jur. N. S. 132.

It is not necessary to show actual damage to the property of the plaintiff, but it is sufficient to show obstruction of his right. *Sampson v. Hoddinott*, 1 C. B. N. S. 590, 3 Jur. N. S. 243, 26 L. J. C. P. N. S. 148.

That the injury from the setting back of water by a dam is small will not prevent the maintenance of the action. *Alexander v. Kerr*, 2 Rawle, 83, 19 Am. Dec. 616; *Rigney v. Tacoma Light & Water Co.* 9 Wash. 576, 26 L. R. A. 426.

If a considerable portion of the water is ob-

right if not interrupted an action will lie, although the injury is small. *Bassett v. Salisbury Mfg. Co.* 28 N. H. 455.

An invasion of the rights of the lower owner causing actual damage or calculated to found a claim which may ripen into an adverse right will entitle the person injured to relief. *Young v. Bankier Distillery Co.* [1893] A. C. 691.

Some injury must be caused to the lower owner to give him a right of action. But it is sufficient that in case the action is not brought a prescriptive right will be acquired by the other party. *Parker v. Griswold*, 17 Conn. 288, 42 Am. Dec. 789.

Nominal damages may be recovered in case of the wrongful diversion of water from a mill, although no actual injury is sustained. *Munroe v. Stickney*, 48 Me. 462.

Special damages need not be proved to support the action. *Piumleigh v. Dawson*, 6 Ill. 544, 41 Am. Dec. 199.

If the lower owner throws the water back upon a mill wheel of the upper proprietor the latter may maintain an action to protect his right, although the water is not thrown out of the banks and no perceptible damage is done. *Hendrick v. Cook*, 4 Ga. 241.

For an unreasonable use of the stream by an upper proprietor an action will lie in favor of a lower proprietor notwithstanding the latter has suffered no actual damage. *New London Water Comrs. v. Perry*, 69 Conn. 461.

If the water is diverted from the stream the lower owner may recover nominal damages, although he is not actually injured by the diversion. *Butman v. Hussey*, 12 Me. 407.

If the use which the upper owner makes of the stream is not a reasonable use, or if it causes a substantial and actual damage to the proprietor below by diminishing the value of his land, though at the time he has no mill or other work to sustain present damage the action may be maintained. *Elliot v. Fitchburg R. Co.* 10 Cush. 191, 57 Am. Dec. 85.

An interference with the right of the riparian owner to the flow of the water along his land to his injury is a wrong for which he is entitled to an appropriate remedy. *Morrill v. St. Anthony Falls Water Power Co.* 26 Minn. 222, 37 Am. Rep. 399.

An injunction may issue to restrain the unlawful diversion of a stream, although the injury to the complaining party is incapable of ascertainment. *Helbron v. Fowler Switch Canal Co.* 75 Cal. 426.

A diversion of a large portion of the water renders the one making it liable, although the lower proprietor sustains no present actual damage. *Newhall v. Ireson*, 8 Cush. 595, 54 Am. Dec. 790.

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appearance only extends for a short distance below the mouth of the tile. That in the year 1893, in pursuance of a petition by defendants and others, and particularly at the instance of the city authorities of said city, such proceedings were had in the circuit court of Morgan county that a public ditch, under the drainage laws of Indiana, was established, beginning north of where the Pike street ditch intersects said branch, and following the course of said branch to the line between plaintiff and Satterwhite, and thence to the White river, to the depth of 2 feet and more; the plaintiff being made a party thereto, and assessed to aid in constructing the same. That defendants were assessed and paid benefits arising to their said lots by said ditch to the amount of \$182.50,

verted from the stream without any reasonable use for it the lower owner will be entitled to nominal damages. *Shotwell v. Dodge*, 8 Wash. 337.

In *Adams v. Barney*, 25 Vt. 225, which was a case of opposite proprietors, the court says it is not needful for one to appropriate the water of a stream to some special use before he can complain of its diversion by another.

Special damages for injuries to an unoccupied mill site cannot be recovered for diversion of water therefrom, although there may be a general recovery for interference with the flow of the stream. *Clark v. Pennsylvania R. Co.* 145 Pa. 438.

In *Crown v. Wellsville Water Co.* 3 N. Y. Supp. 177, where a water company had appropriated the water of a stream for its uses, it was held that so far as the water of the stream was required for the convenience and uses of the lower owner, he was entitled to be protected. But as to the surplus water over and above what is required for his convenience and use he has no cause of complaint, for in the appropriation of the excess he is not injured. There must not only be an appropriation of the water to entitle the party through whose premises the stream passes to make it the subject of complaint, but in addition to that he must be damaged or injured by the appropriation.

But in *New York Rubber Co. v. Bothery*, 132 N. Y. 293, which was a case of opposite proprietors, one of them drew the water from a dam higher up the stream, and discharged it below the complainant's land. The court held that there was a right to recover nominal damages if there was a material interference with the flow of the water, although the complaining party had not begun to make any use of the water.

The owner of land on the banks of a river may maintain an action to restrain the fouling of the stream without showing that the fouling is actually injurious to him. *Crossley v. Lightowler*, L. R. 2 Ch. 478, 36 L. J. Ch. N. S. 584, 15 Week. Rep. 801, Affirming L. R. 3 Eq. 296.

If there is an injury to a right an action will lie although actual perceptible damage is not shown. *Embrey v. Owen*, 6 Exch. 353, 20 L. J. Exch. N. S. 212, 15 Jur. 633.

Injury is shown by an averment that the hydraulic power of the water is destroyed or impaired to such a degree as to render it utterly insufficient and worthless for the use of the complainant. *Cornling v. Troy Iron & Nail Factory*, 30 Barb. 311.

If a dam causes the filling up of a stream with sand, and the raising of the water so as to leave the land on each side wet and unfit

presumably because of their drainage thereto from their sanitarium aforesaid; and when said ditch was completed they were apportioned 500 feet of said ditch, to be by them kept in repair. That said city was assessed and paid for benefits arising from the drainage of a half dozen of her streets by said ditch the sum of \$500, and was apportioned 1,000 feet thereof to be kept in repair by said city. That defendants, because of plaintiff's objection, attempted to run said waters into a sink dug on their said lot down through the soil, 12 feet square, to the gravel underbed, but the same failed to carry off or sink said water. That defendants' said lots do not at any place reach said branch and ditch, and are not nearer thereto than 800 feet. That

for cultivation, the owner may recover for the injury. *Athens Mfg. Co. v. Rucker*, 80 Ga. 291.

But the lower proprietor has no ground for complaint for the diversion of water from the stream if he has not been deprived of any water accustomed to flow naturally to his land. *Potter v. Burden*, 38 Ala. 651.

The lower owner cannot interfere with the building by the upper owner of a structure in the bed of the stream if it does not sensibly and injuriously affect his rights. *Norway Plains Co. v. Bradley*, 52 N. H. 109.

It is not every injury to the lower proprietor that will confer a right of action; it is necessary to take into consideration the capacity of the stream, the adaptation of machinery to it, and all the attendant circumstances, and if, in view of all these, the lower proprietor is materially injured, he is entitled to redress. *Dilling v. Murray*, 6 Ind. 324.

In case of the diversion of a stream the law presumes that the lower owner has been injured. *Hart v. Evans*, 8 Pa. 22.

The law implies damages from flooding the ground of another though it be in the least possible degree and without actual prejudice. *Alexander v. Kerr*, cited in 1 Rawle, 28.

If a dam flows water back on the upper owner the law presumes damage, and no special damage need be shown in order to sustain an action. *Woodman v. Tufts*, 9 N. H. 88; *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53.

An interference with the right of the riparian owner to have the water flow through his land imports at least nominal damages. *Creighton v. Evans*, 53 Cal. 55.

If the lower proprietor can make use of the water only by means of dams which will flood the land of the proprietor above him, he cannot recover damages for a diversion of the water from the stream. *Shotwell v. Dodge*, 8 Wash. 337.

So, a lower proprietor has no right of action for diversion of the water of a stream if an intervening right of a proprietor above him deprives him of the use of water for the loss of which he brings suit. *Olney v. Fenner*, 2 R. I. 211, 57 Am. Dec. 711.

If the title to the bed of the river is in the public, the lower proprietor who has obtained no right from the public to build a dam cannot maintain an action for the diversion of the stream from his dam, but he may maintain an action for the diversion of the stream so as to cut off the right of access to the water. *Fulmer v. Williams*, 122 Pa. 191, 1 L. R. A. 603; *Williams v. Fulmer*, 151 Pa. 405.

The upper proprietor cannot interfere with the erection of a bridge by the lower proprietor on the ground that it may obstruct navigation

within the last year plaintiff has sold to one Shireman 9 lots, 66 by 132 feet, at \$100 to \$125 per lot, bordering on said branch, and said Shireman has erected two, and is engaged in erecting and building a third dwelling house thereon, one of which is within 10 feet and over the mouth of defendants' tiledrain where it enters said branch, and also sold two lots near the same place, at \$150 each, to a Mr. Reed, who has also erected thereon a commodious dwelling. All of said houses are, and have been for some time, occupied by families. Also, sold one Hubbard other lots in the same vicinity at \$150 each. That similar lots at other points about the city can be bought, with the same or lower prices, equally as well situated, and surrounded with facilities for

residences, and no complaint is made of any inconvenience on account of said waters by any of the purchasers of said lots. That the only other available drainage for said sanitarium waters would be a sewer to White river, 1 mile distant, and which could not, with any hope of success, be constructed and put in operation for less than \$3,500 to \$4,000, to which would have to be added the cost of the right of way, which right of way the owners of said land refuse to grant. That the water flowing from said sanitarium when baths were being taken to the usual extent and amount were found to be purer, and to be possessed of less organic and injurious matter, than the waters of said branch taken from above, and unaffected by said bath-house flowage. The flow-

if it does not interfere with the navigation as it has been exercised in the stream. *Orr Ewing v. Colquhoun*, L. R. 2 App. Cas. 839.

Mere nonuse does not forfeit right.

In one case it was held that the one who first erects a mill has a right to maintain it as against the proprietors above and below, although the effect is to prevent the full use of the stream by such proprietors for mill purposes. *Cary v. Daniels*, 8 Met. 468, 41 Am. Dec. 532.

But this right seems to be under the Massachusetts mill acts. *Gould v. Boston Duck Co.* 13 Gray, 442.

So, there is no right to use water for irrigation as against the right of the lower owner to use the water for a mill which has stood for forty years. *Cook v. Hull*, 3 Pick. 269, 15 Am. Dec. 208.

Although prescriptive right is not necessary to sustain an action for stopping a stream flowing to a mill. *Sands v. Trefuses*, Cro. Car. 575.

The mode in which the lower owner has been making use of the stream will be immaterial in case he wishes to make a new use of it with which the use by the upper proprietor will conflict. *Buddington v. Bradley*, 10 Conn. 213, 26 Am. Dec. 386.

The mere fact that the upper mill has gone to decay will not give the lower owner a right to throw the water back on its wheels. *Hatch v. Dwight*, 17 Mass. 289, 9 Am. Dec. 145.

The mere fact that expense has been incurred in procuring machinery to be used in connection with the milldam will not prevent the upper proprietor from objecting to the dam in case it floods his land. *DeVaughn v. Minor*, 77 Ga. 809.

Other wrongdoers.

The fact that others contributed to the fouling of the stream will be no defense to the one against whom suit is brought, if he was guilty of the offense. *Crossley v. Lightowler*, L. R. 2 Ch. 478, 36 L. J. Ch. N. S. 584, 15 Week. Rep. 801, Affirming L. R. 3 Eq. 296.

The fact that other proprietors beside defendant have polluted the stream, so that pollution by defendant is immaterial, will not prevent an action against him. *Wood v. Waud*, 3 Exch. 748, 18 L. J. Exch. N. S. 305, 13 Jur. 472.

One person cannot justify the fouling of a stream by proving that it is fouled by other persons also. *Blackburne v. Somers*, Ir. L. R. 5 Eq. 1.

It will be no defense to a person unlawfully diverting water from a stream that others are doing likewise. *Heilbron v. Kings River & F. Canal Co.* 76 Cal. 11; *Gould v. Stafford*, 77 Cal. 66.

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The mere fact that the water was polluted before it reached the upper proprietor will not justify him in adding to the pollution as against a lower proprietor. *Ferguson v. Firmenich Mfg. Co.* 77 Iowa, 576.

But in case several different parties discharge sewage into the stream at different places, acting separately and independently of each other, one is not liable for the damage done by all. *Chipman v. Palmer*, 77 N. Y. 51, 83 Am. Rep. 566.

Who may maintain action.

A person who owns only to the center of the stream, and has acquired no right to extend his dam to the opposite shore, which belongs to a lower millowner, cannot maintain an action against the latter for flowing back the water in the stream so as to interfere with his dam. *Jewell v. Gardiner*, 12 Mass. 311.

A reversloner may maintain an action for the throwing back of water upon his freehold by a dam, although there is no immediate and visible injury. *Ripka v. Sergeant*, 7 Watts & S. 11, 42 Am. Dec. 214.

A lower proprietor who adds to the pollution of the water before it reaches a point where he wishes to use it for domestic purposes will not be heard to complain of an upper proprietor who causes the pollution of the stream. *Ferguson v. Firmenich Mfg. Co.* 77 Iowa, 576.

It has been held that a riparian proprietor cannot grant any rights to a nonriparian proprietor to use the water of the stream, which will entitle the latter to maintain an action against an upper proprietor for pollution of the water. *Stockport Waterworks Co. v. Potter*, 3 Hurlst. & C. 300, 10 Jur. N. S. 1005, 10 L. T. N. S. 748.

Also that a person who is not a riparian proprietor, but who has acquired the right to use the water for propelling a mill, may maintain an action in case a lower proprietor backs the water upon his tail-race. *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236.

But the mere fact that a riparian owner has obtained the right from the owner above him to take the water from the stream on his land and conduct it by a race to his mill, will not prevent him from maintaining an action as a riparian owner against a proprietor higher up the stream for the wrongful diversion of the water. *Nuttall v. Bracewell*, L. R. 2 Exch. 1, 36 L. J. Exch. N. S. 1, 12 Jur. N. S. 989, 15 L. T. N. S. 313, 4 Hurlst. & C. 714.

Refusal of relief.

Relief is sometimes refused because not sought in proper form.

Equity will not interfere to prevent the backing of water by a milldam upon a mill right until the right has been established at

age of said waters in said branch as aforesaid rendered the lands of plaintiff in the immediate vicinity somewhat less desirable for residence, and somewhat injuriously affected the value of their use and occupation. The plaintiff, believing said water impure and unfit for stock to drink, erected a fence upon her land to shut her stock off from said waters, at a small cost, and was in consequence deprived of the use of the portion of said tract lying south of the ditch for pasturage purposes, to her damage in the sum of \$50.

The conclusions of law stated on these facts are that the law is with the plaintiff; that she is entitled to an order and judgment restraining and enjoining the defendants from causing or permitting the water from their bath house

which shall have been used in bathing and cleansing persons afflicted with infectious, syphilitic, or other similar disorders to flow, by means of a tile drain or otherwise, into the branch or stream in question, or upon or over the lands of the plaintiff, and that she be entitled to recover the sum of \$50 as her damages.

The principles laid down, exemplified, and elucidated in the opinion when this case was in this court before more than warrant us in adjudging that the court erred in its conclusions of law. We need not repeat what was then said, but refer to it as the law of this case. The finding seems somewhat contradictory as to whether appellee has suffered any injury whatever, and therefore it is self-destructive

common law. *Porter v. Witham*, 17 Me. 292.

Although it has been held that the fact that the complainant has not established his right at law is no ground for demurrer to the bill. *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763.

Relief has also been refused where it would have been inequitable.

Injunction will not be issued for trivial injury. *Shreve v. Voorhees*, 3 N. J. Eq. 25.

An injunction will not issue to enable the lower proprietor to establish his right to nominal damages. *Myers & E. Co. v. Philadelphia, J. & C. Pass. R. Co.* 12 Mont. Co. L. Rep. 46.

The lower proprietor is not entitled to an injunction unless the flow to his land has been appreciably, or at least perceptibly, diminished by the diversion above. *Moore v. Clear Lake Waterworks*, 68 Cal. 146.

In *Walton v. Mills*, 86 N. C. 290, continuance of an injunction until settlement of the rights at law was refused to prevent the upper proprietor from abstracting water from the stream for use in washing ore at the suit of one who desired to make a similar use of the water lower down the stream, where it appeared that plaintiff was not making any present use of the water, and might be compensated in damages in case the right of the upper owner was sustained, while the upper owner's loss would be irreparable in case he was compelled to fill up his trenches and cease using the water.

Although an upper riparian owner has no right to divert water and not return it before it reaches the land of the lower owner in case it is necessary to do so to run his mill, and it can be used by the lower owner for his mill with equal advantage when taken from the tail-race as when taken from the channel of the river itself, a court of equity may refuse to enjoin the diversion of the water, and leave the parties to their remedy at law. *Mason v. Cotton*, 4 Fed. Rep. 792, 2 McCrary, 82.

An injunction will not be granted, although the plaintiff has established his right at law, if the injunction, because of the changed surroundings, will not restore the stream to a condition in which the plaintiff can use it, while it will destroy the business of defendant. *Wood v. Sutcliffe*, 2 Sln. N. S. 166, 21 L. J. Ch. N. S. 253, 16 Jur. 75.

An injunction will not be issued where it appears that the effect to defendant will be to stop his works while the plaintiff is not seriously injured by the pollution of the stream. *Elmhirst v. Spencer*, 2 Macn. & G. 45.

A water company cannot enjoin the reasonable use of the stream by the owner of a saw-mill further up the stream for the mere purpose of making the water of the stream more fit for

its use. *People, Ricks Water Co. v. Elk River Mill & Lumber Co.* 107 Cal. 221.

A lower riparian proprietor is not entitled to an injunction against the diversion by an upper riparian owner of the water from the stream if it does not appear that his right to have the water flow through his land is injured by any material diminution of the flow of the stream through his lands. *Loud Gold Min. Co. v. Blake*, 24 Fed. Rep. 240.

Although in a New York case it was held that the mere fact that the restoration of the stream will be of great damage to the defendant and of but slight advantage to the plaintiff will not prevent the court from compelling it. *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191.

The court will not interfere by injunction to restrain the casting of sewage into a river if the injury to the plaintiff is slight, and that to the defendant will be great from the injunction. *Lillywhite v. Trimmer*, 16 L. T. N. S. 318, 15 Week. Rep. 763, 36 L. J. Ch. N. S. 525.

The casting of sewage into the stream will not be enjoined if it occasions no, or only slight, injury to the complaining party. *Atty. Gen. v. Gee*, L. R. 10 Eq. 131, 23 L. T. N. S. 290.

A water company cannot be enjoined from taking water from a stream in favor of a railroad company asserting its right to take water for its engines under its right as a riparian owner. *Philadelphia & R. R. Co. v. Pottsville Water Co.* 132 Pa. 418.

The upper proprietor will not be required to tear down a manufactory built over the water-course if he has provided a drain to carry the water, but the lower proprietor will be left to his action at law for the temporary stoppage of the flow. *Edleston v. Crossley*, 18 L. T. N. S. 15.

Extent of recovery.

Where a millowner has only the right of using a reservoir and dam he can recover in case a lower riparian owner erects a dam which interferes with his, only for the injury to his easement. *Robertson v. Woodworth*, 42 Conn. 163.

Right against continuer of wrong.

The one who continues the dam is as much liable as the one who erects it. *Cobb v. Smith*, 35 Wis. 21.

But a request must be made upon one who merely continues the obstruction for its removal before an action will lie. *Johnson v. Lewis*, 13 Conn. 303, 33 Am. Dec. 405.

One who acquires title from the builder of the dam will be liable for the injury done by its continuance after notice and request to abate it. *Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91.

H. P. F.

as to that matter. At all events, the statement of the harmlessness of the waters, and the price that appellee has been able to sell her lands for as compared with other land similar in character in said city, neutralizes the statement that she is damaged; but if she was damaged, as held in the former opinion, it is *damnum absque injuria*, because the rightful use of one's own land may cause damage to another without any legal wrong.

The judgment is reversed, with instructions to restate the conclusions of law in favor of the defendants, and render judgment for the defendants thereon.

Jordan, J., was absent, and took no part in this opinion.

Rehearing denied.

ALABAMA SUPREME COURT.

Charles COX, *Appt.*,

v.

STATE of Alabama.

(.....Ala.....)

Cohabitation with a bigamous wife in violation of Crim. Code 1896, § 4406, continues while the parties live together ostensibly as husband and wife, presenting to the community the appearance of the open and demoralizing example of living in an illicit relation, although in fact such relations have ceased because of the wife's physical incapacity.

(June 16, 1896.)

A PPEAL by defendant from a judgment of the Circuit Court for Jackson County convicting him of cohabiting with a second wife while his first wife was still living. *Affirmed.*

The facts are stated in the opinion.

Messrs. Tally & Proctor, for appellant: Sexual intercourse is an essential element of the offense charged, and is implied by the use of the word "cohabit."

It is adulterous cohabitation to which the statute refers.

Beggs v. State, 55 Ala. 108; *Ashley v. State*, 109 Ala. 48; *Sullivan v. State*, 82 Ark. 187; *State v. Gartrell*, 14 Ind. 280; *Taylor v. State*, 86 Ark. 84; 19 Cent. L. J. 142; *Burns v. Burns*, 60 Ind. 259; *Com. v. Munson*, 127 Mass. 459, 34 Am. Rep. 411; *Cannon v. United States*, 116 U. S. 55, 29 L. ed. 561; *Dunn v. Dunn*, 4 Paige, 425.

Mr. William C. Fitts, Attorney General, for the State.

Brickell, Ch. J., delivered the opinion of the court:

The indictment is founded on the last clause of § 4406 of the Criminal Code of 1896, which in its entirety reads: "If any person having a former husband or wife living marries another, or continues to cohabit with such second husband or wife in this state, he or she must, on conviction, be imprisoned in the penitentiary for not less than two, nor more than five, years." The statute was originally enacted as part of the Penal Code of 1841 (Clay's Dig. p. 432, §§ 4, 5), and, with changes of verbiage and structure not affecting its construction, has been incorporated in all subsequent revisions or codifications of the statute (Code 1853; §§ 8233, 8238; Rev. Code 1867, §§ 3599, 3600, Code 1876, §§ 4185, 4186; Crim. Code 1896, §§ 4016, 4017). In *Beggs v. State*, 55 Ala. 108-110, the first case in which it became necessary to construe the statute, it was said: "When this statute is read in connection with the common law existing at the time of its enactment, it is apparent two offenses are thereby created; or, rather, the common-law offense of bigamy is declared, and the punishment which must follow conviction defined, and a statutory offense, the continuance of cohabitation under the vicious marriage, making bigamy, punishable as the latter offense, is created. The offense of bigamy remains, indictable and punishable at the place of its commission. If the second marriage was in this state, the county of its commission is the only place in which an indictment for the offense will lie. As to this offense, the common law is not changed. Necessity for a change is obviated by the creation of the new offense,—the cohabitation under the second marriage. If the marriage was in another state, and the cohabitation in this state, the wrong done here is the evil example of persons living together as husband and wife, who do not in fact and in law sustain that relation,—the open continuance of an adulterous connection."

The evidence without conflict shows that the defendant, having a wife living, he and she being residents of the county of Jackson, in this state, married Martha Hughes, in the state of Tennessee, subsequently living with her as his wife in the county of Jackson, then removing to the state of Tennessee, and there living with her as his wife. About five weeks before the finding of the indictment, they returned to the county of Jackson, lived together as man and wife under the same roof, occupied the same bed, acknowledging each other as husband and wife, and in all respects so conducted themselves in the presence of the community. The defendant introduced evidence tending to show that, six or seven years prior to the trial, said Martha, by reason of a serious surgical operation to which she had been compelled to submit, was incapacitated from sexual intercourse, and since the operation he had not had sexual intercourse with her, and for more than three years had not had such intercourse with her in the county of Jackson. Upon this phase of the evidence, the defendant requested several instructions, basing the right to an acquittal upon the proposition that continuous sexual intercourse is an indica-

NOTE.—For presumptions in cases analogous to the above, see also *Goss v. Froman* (Ky.) 8 L. R. A. 102; *Woodward v. Blue* (N. C.) 10 L. R. A. 662, 41 L. R. A.

penable element of the statutory offense. We do not doubt that sexual intercourse is a necessary ingredient of the statutory offense. From its original enactment, through all subsequent revisions or codifications of the statute, the statute has been associated with other statutes creating or declaratory of offenses of which such intercourse is the essential, criminalizing element. Originally, it was associated with the statute denouncing the offense of a man and woman living together in adultery or fornication, and the statute defining incest, and fixing its punishment. Clay's Dig. pp. 429, 430, §§ 2-6. Without now tracing the statute through subsequent revisions or codifications, it will be found in the Criminal Code of 1886 (§§ 4012-4019), associated with the statutes in relation to incest, living in adultery or fornication, seduction, and miscegenation. Apart from the association of the statute with other statutes, the terms of the statute, "continues to cohabit with such second husband or wife," imply or involve sexual intercourse. The word "cohabit," and its derivative, "cohabitation," are words of large signification. "Cohabit," in its general sense, is defined in the Century Dictionary: "To dwell together; inhabit or reside in company, or in the same place or country." And a specific definition is: "To dwell or live together as husband and wife; often with reference to persons not legally married, and usually, but not always, implying sexual intercourse." There is a corresponding definition of "cohabitation." In Bouvier, Law Dict. (Rawle's ed.), "cohabit" is defined, "To live together in the same house, claiming to be married;" and, when used without reference to the relation of the parties as husband and wife, the definition is, "To live together in the same house." Mr. Bishop's definition of "cohabitation" is: "To cohabit is to dwell together." Matrimonial cohabitation is the living together of a man and woman ostensibly as husband and wife." 1 Bishop, Mar. & Div. § 777. And from such cohabitation, he adds, "the carnal act is presumed." 2 Bishop, Mar. & Div. § 628.

It is one proposition to assert that sexual intercourse is a necessary element of the statutory offense, and quite another to assert that it must be continuous,—that it must attend the whole period of time during which the parties live together ostensibly as husband and wife. The question was very fully discussed and considered in *Cannon v. United States*, 116 U. S. 55, 29 L. ed. 561. The 3d section of the act of Congress for the suppression of polygamy reads: "That if any male person, in a territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor," etc. 22 Stat. at L. 31, chap. 47, § 3. Cannon was indicted for a violation of this act, and sought to defend upon the ground that he did not have sexual intercourse with the woman with whom he was dwelling, after the enactment of the act. The court said: "The principal question argued at the bar was the proper construction of § 3 of the act of 1882. That question depends on the meaning of the word 'cohabit,' in the section. The meaning contended for by the defendant is indicated by his offer to show

by Clara C. Cannon nonaccess, and facts to rebut the presumption of sexual intercourse with her, and the actual absence of such intercourse; and by requests for instructions to the jury, which are based on the view that the word 'cohabit' necessarily implies the idea of having sexual intercourse. But we are of opinion that this is not the proper interpretation of the statute, and that the court properly charged the jury that the defendant was to be found guilty if he lived in the same house with the two women and ate at their respective tables one third of his time or thereabouts; and held them out to the world, by his language or conduct, or both, as his wives; and that it was not necessary it should be shown that he and the two women, or either of them, occupied the same bed or slept in the same room, or that he had sexual intercourse with either of them. . . . It is the practice of unlawful cohabitation with more than one woman that is aimed at,—a cohabitation classed with polygamy, and having its outward semblance. It is not, on the one hand, meretricious, unmarried intercourse with more than one woman. General legislation as to lewd practices is left to the territorial government. Nor, on the other hand, does the statute pry into the intimacies of the marriage relation. But it seeks, not only to punish bigamy and polygamy when direct proof of the existence of these relations can be made, but to prevent a man from flaunting in the face of the world the ostentation and opportunities of a bigamous household, with all the outward appearances of the continuance of the same relations which existed before the act was passed, and without reference to what may occur in the privacy of those relations. Compacts for sexual nonintercourse, easily made and as easily broken, when the prior marriage relations continue to exist, with the occupation of the same house and table and the keeping of the same family unity, is not a lawful substitute for the monogamous family, which alone the statute tolerates."

By the bigamous marriage in Tennessee, sexual intercourse was contemplated and followed in this state, and in the county of Jackson originally. It is true that, prior to the finding of the indictment, the statute of limitations had operated as a bar to a prosecution for the original vicious cohabitation. But the parties returned to this state, living under the same roof, acknowledging each other as husband and wife, and presenting to the community every indicia of that relation. The carnal act may not have been committed. That was prevented by the incapacity of the woman, not by the desire or intent of the parties to abstain from it. If capacity had been restored, it would have been resumed. The incapacity, so far as may be inferred from the evidence, was a fact known only to the parties. It was not known in the community in which they were dwelling together. Cases may possibly occur in which parties may abandon cohabitation,—a living together ostensibly as husband and wife; as parties may abandon living together in adultery or fornication, and they may continue under the same roof. But in such cases, to relieve from criminality there must be such external evidence of the abandonment as will neutralize the appearance to the

community of the open and demoralizing example of living in an illicit relation. The law intends to preserve and promote the institution of marriage, to prohibit pretenses or false assumptions of its existence, and to prevent the

public scandal and disgrace following the living in that ostensible relation.

There was no error in the refusal of the instructions requested by the defendant, and the judgment of the court below must be affirmed.

CALIFORNIA SUPREME COURT.

Albert MEYER, *Respt.*,

v.

City of SAN DIEGO *et al.*, *Respts.*

R. NICCOLLS *et al.*, Interveners, *Appts.*,

Consolidated with

SAN DIEGO WATER COMPANY, *Appt.*,

v.

City of SAN DIEGO *et al.*, *Respts.*

(.....Cal.....)

A judge who owns real estate in a city, that is taxable for the city's bonded indebtedness, is disqualified to sit in a suit to contest the validity of a contract which will involve the creation of a bonded debt of the city to a large amount, necessitating a special tax for forty years that will directly affect the value of all real property subject to it.

(*Van Fleet and Harrison, JJ., dissent.*)

(May 31, 1898.)

APPEAL by interveners from an order of the Superior Court for San Diego County denying a motion for change of venue because of the disqualification of the judge before whom the action was pending. *Reversed.*

The facts are stated in the opinion.

Mr. L. L. Boone, for appellants:

This action is prosecuted by taxpayers of the city, on their own behalf and on behalf of all the taxpayers thereof. Though not named, all of said judges are in reality parties to the suit.

Code Civ. Proc. § 883.

Each one of said judges could have brought the action, and each of them had the same right to intervene as had the present interveners.

1 Freeman, Judgm. § 178; 2 Black, Judgm. § 584; *Gibson v. Trinity County Supers.* 80 Cal. 366.

Under a statute permitting any "interested" party to appear before a board of equalization and have redress against an unjust valuation, it was held that any taxpayer was "interested" in the proceedings.

Dundas Mort. Trust Invest. Co. v. Charlton, 32 Fed. Rep. 193; *Hyatt v. Allen*, 54 Cal. 353.

The interest of Judge Torrance is not merely in the questions of law involved in the controversy, nor is it uncertain or remote, but is a direct and immediate interest in the result of the action.

It is such an interest which disqualifies.

Code Civ. Proc. § 170; *North Bloomfield*

NORM.—As to disqualification of a judge for interest or relationship, see *Ex parte Harris* (Fla.) 6 L. R. A. 718; *Ex parte Alabama State Bar Assn.* 41 L. R. A.

Gravel Min. Co. v. Keyser, 58 Cal. 323; *Austin v. Nalle*, 85 Tex. 520.

The most minute interest is sufficient to disqualify unless the objection be removed by some positive provision of law to that effect.

Clark v. Lamb, 2 Allen, 396; *Internal Improvement Fund v. Bailey*, 10 Fla. 280; *Baldwin v. McArthur*, 17 Barb. 414.

At common law citizens of a municipality who were taxpayers were incompetent to sit as judges in cases where their municipality was a party.

London v. Wood, 12 Mod. 669; *Hesketh v. Braddock*, 8 Burr. 1847; *Peck v. Essex County Freeholders*, 21 N. J. L. 656; *Tolland v. Berkshire County Comrs.* 13 Gray, 18; *Clark v. Lamb*, 2 Allen, 396; *Wood v. Stoddard*, 2 Johns. 194.

Two cases decided by the Texas court hold that the interest of a judge as a taxpayer disqualifies him, under a law substantially the same as ours, from sitting in a case involving the validity of the bonds of a municipality.

Austin v. Nalle, 85 Tex. 520; *Wetzel v. State*, *Holland*, 5 Tex. Civ. App. 17. See also *Pearce v. Atwood*, 18 Mass. 324; *State v. Cisco* (Tex. Civ. App.) 83 S. W. 244; *Heilbron v. Campbell* (Cal.) 23 Pac. 122; *North Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 315.

Messrs. Works & Works and Trippet & Neale for H. I. Capron and San Diego Water Co.

Messrs. Gibson & Titus for Southern California Mountain Water Co.

Mr. William H. Fuller for plaintiff.

Messrs. H. E. Doolittle and T. L. Lewis for city of San Diego.

Henshaw, J., delivered the opinion of the court:

The plaintiff instituted an action against the city of San Diego, and against the Southern California Mountain Water Company, for the twofold purpose, (1) of setting aside as illegal and void a contract between the city and the water company defendant, involving an expenditure of \$1,500,000 of the moneys of the city to be obtained by the sale of its bonds; and (2) to enjoin the issuance and sale of the bonds to carry out the contract.

The bond issued had been voted at a special election called under an ordinance submitting to the electors the proposition of incurring a bonded debt of \$1,500,000 "for the acquisition by said city, for the use of said city and of its inhabitants, of and from the Southern California Mountain Water Company, of a water right, reservoir sites, a meter-house site, and rights of

(Ala.) 12 L. R. A. 134; and *State, Colcord v. Young* (Fla.) 19 L. R. A. 696.

way, and for the construction by said city of waterworks for the use of said city and its inhabitants." The controlling acts under which the election was held and the bonds voted are the statutes relating to the issuance of municipal bonds for public improvements. Stat. 1889, p. 399, Stat. 1891, p. 132; and Stat. 1893, p. 61. These acts prescribe, not only the mode by which such indebtedness may be incurred, but ordain as well the limit of indebtedness, the character of the bonds, the rate of interest, and the place of payment. They also enjoin upon the municipal authorities the duty of levying and collecting a special annual tax sufficient to pay interest, and provide a sinking fund for the ultimate redemption of the bonds.

Plaintiff is a taxpayer of the city. Other taxpayers were allowed to intervene in the cause. The San Diego Water Company had instituted a similar suit against these defendants, and the actions were consolidated.

Before the trial there was presented a motion for a change of venue, upon the ground of the disqualification of Judge Torrance in whose department the action was pending. Grounds identical with those urged as disqualifying Judge Torrance were asserted to exist in the case of the other judges of the superior court of the county. The affidavits used at the hearing show that the judge was the owner of real property situated and taxed in the city of San Diego for municipal purposes, and taxable for the payment of a bonded indebtedness such as that the validity of which is a question in the case. It also was made to appear that the issuance of the bonds in controversy and the carrying out of the contract between the city and the defendant water company would necessitate a special tax for forty years, and directly affect the value of all real property subject to it. Upon the other hand, a determination that the contract and proceedings were illegal would result in a decree enjoining the issuance of the bonds, and relieve all property within the municipality from the burden of the bond-redemption tax. The trial judge concluded that he was not disqualified, refused to grant the motion, and retained the action. From this ruling and order the San Diego Water Company and certain interveners prosecute their appeals.

By § 170 of the Code of Civil Procedure it is provided that no justice, judge, or justice of the peace shall sit or act in any action or proceeding to which he is a party or in which he is interested. This is but an expression of the ancient maxim that no man ought to be a judge in his own cause,—a maxim which appeals so strongly to the sense of justice that it is said by Lord Coke to be a natural right, so inflexible that an act of Parliament seeking to subvert it would be declared void. Co. Litt. § 212. It is a principle which finds expression in the Constitutions of many of our states; which declare the right of a citizen to be tried by judges as free and impartial as the lot of humanity will permit. It is a principle whose strict observance is dictated both by natural justice and an enlightened public policy; for it is not enough that a judicial decision be sound. It is of next importance that the tribunal rendering it be free from the charge of in-

terest or the taint of partiality, else public confidence will be destroyed and judicial usefulness gravely impaired.

But what is the "interest" which will disqualify? for it is manifest that just bounds must be set to the meaning of the word, since, if a judge be not disqualified, it is as much his duty to retain the action as it is to remove it when the recusal is well founded. *Heinlen v. Heilbron*, 97 Cal. 101.

In the oft quoted case of *Hesketh v. Brad-dock*, 8 Burr. 1856, the interest imputed to the jurors, and to the officer who returned them, rested upon the fact that they were members of the municipal corporation which was seeking to recover a penalty due. The whole penalty was but £5, yet the proceeding was quashed by the court of King's bench, Lord Mansfield saying: "The law has so watchful an eye to the pure and unbiased administration of justice that it will never trust the passions of mankind in the decision of any matter of right. . . . There is no principle in the law more settled than this,—that any degree, even the smallest degree of interest in the question depending, is a decisive objection to a witness, and much more to a juror, or to the officer by whom the jury is returned. . . . If, therefore, the sheriff, a juror, or a witness be in any sort interested in the matter to be tried, the law considers him as under an influence which may warp his integrity, or pervert his judgment, and therefore will not trust him. The minuteness of the interest won't relax the objection, for the degrees . . . cannot be measured. No line can be drawn but that of a total exclusion of all degrees whatsoever." But this, it should be noted, is rather a declaration of the principle than a definition of the disqualifying interest; and while in terms this case does not include the judge as coming within the principle of disqualification, it is not to be doubted that it applies with equal strength, and with more reason, to such an officer. *Dimes v. Grand Junction Canal Co.* 16 Eng. L. & Eq. 63. The disability of a witness to testify because of interest induced great hardship, and led to many absurdities. Thus, one was not debarred from being a witness if it was determined that his interest was equally balanced, nor was the heir apparent to an estate incompetent to testify in support of the claim of his ancestor, though his expectation of inheriting might be immediate and well-nigh certain. Again, the interest of a parent in a child, or of the child in the parent, was not a disqualifying interest, but only such as to affect the credibility of the witness. The injustice and hardship of the rule as to witnesses soon became so apparent that by statute it was entirely abrogated, and now no interest disqualifies a witness, its sole effect being to impair his credit.

In the case of jurors, however, who are judges of the fact, and of the magistrates, judges, and justices, who are judges of the law, and frequently both of the law and facts, there has been far less relaxation of the principle; and this, if for no other reason, because the courts themselves, in their desire to preserve the administration of justice free from the taint of unfairness, have inclined to a strict enforcement of the principle, and also because

there are well-defined limits to the power of the legislature, should it ever seek to overthrow so salutary a rule. Thus, in *North Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 315, this court, citing § 170 of the Code of Civil Procedure, declares that the provision should not receive a technical or strict construction, but rather one that is broad and liberal; and quotes with approval the language of the supreme court of Michigan in *Stockwell v. White Lake Twp. Board*, 23 Mich. 350, to the following effect: "The court ought not to be astute to discover refined and subtle distinctions to save a case from the operation of the maxim when the principle it embodies bespeaks the propriety of its application. The immediate rights of the litigants are not the only objects of the rule. A sound public policy which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observance." And in *Heilbron v. Campbell* (Cal.) 23 Pac. 123, it is said again by this court: "It should be the duty and desire of every judge to avoid the very appearance of bias, prejudice, and partiality; and to this end he should decline to sit . . . in any case in which his interest in the subject-matter of the action is such as would naturally influence him either one way or the other."

Upon the latter proposition, that of the power of the legislature to modify or abrogate the rule, statutes have been passed and upheld by the courts which remove the disqualification of jurors and of judges who are merely corporators of a municipal corporation and taxpayers therein, which corporation is a party interested. These statutes have been countenanced by the courts upon the ground that the interest of the juror or judge is so remote, trifling, and insignificant that it may fairly be supposed to be incapable of affecting the judgment or of influencing the conduct of the individual. These statutes, it is to be remembered, however, are in derogation of the common-law rule, and it will always be a judicial question, as to any particular statute, whether or not, by its terms, or in its effect, it violates this fundamental principle of judicial decision. Thus, Judge Cooley: "But, except in cases resting upon such reasons, we do not see how the legislature can have any power to abolish a maxim which is among the fundamentals of judicial authority. The people of the state when framing their Constitution may possibly establish so great an anomaly if they see fit; but, if the legislature is intrusted with apportioning and providing for the exercise of the judicial power, we cannot understand it to be authorized in the execution of this trust, to do that which has never been recognized as being within the province of the judicial authority." Cooley, Const. Lim. 6th ed. p. 508. The only other exception to the operation of the maxim is that which arises in the nature of the government of the state, and has its existence in absolute necessity. Thus, to illustrate, where the legality of a bonded indebtedness of the state comes before its tribunals, they must act, or the right remain forever without the possibility of its remedy. In such cases, however, the judges are as fair and impartial as the lot of humanity doth permit, and trial before such

is all that the Constitution, or Lord Coke's *jus natura*, can preserve to any man.

It has been pointed out that in most of the states the common-law rule disqualifying a juror for interest by reason of the fact that he is a corporator of the city or town which is a party to the suit has been changed by statute, and that these statutes have been upheld by the courts upon the ground of the remoteness and contingency of the interest. In our own state, § 602 of the Code of Civil Procedure declares the grounds upon which challenges for cause may be taken; and subdivision 5 provides, as a ground of challenge, "interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation." Nothing herein expressly removes the disqualification of the judge, which, alike with that of the juror, existed at common law. But, if the interest of a juror so situated, is too remote to disqualify him as a trier of fact, equally, it may be argued, would a like interest be insufficient to disqualify a judge; and thus, without express statutory enactment upon the question, the conduct of judges in trying actions, where the sole ground of their disqualification is the fact that they are corporators and taxpayers of the municipal corporation which is a party thereto, has always been countenanced and upheld. Yet here it may be remarked that the state is not without some statutory enactments upon the question. Many may be found conferring upon municipal courts and the judges therein jurisdiction of petty offenses for the violation of ordinances and for the collection of revenues under such ordinances. It has never been, and at this day may not be, seriously questioned that a judge of such municipal court is not disqualified by reason of interest merely because of the fact that he is a member and taxpayer of the municipal corporation, either in civil cases where its ordinances are under consideration, or in criminal cases where the penalties, fines, and forfeitures for the violation of such ordinances accrue to the municipal treasury.

In a very great number of the cases which have come under review in the consideration of this question, nearly all have to do with the interest of the judge or juror as a member of such public corporation, and in these, where the ancient rule has not been modified by statute, that rule is for the most part observed in all its strictness. Of these cases there may be cited as instructive upon the question: *State v. Stuart*, 23 Me. 112; *State v. Woodward*, 84 Me. 293; *Com. v. Ryan*, 5 Mass. 90; *Pearce v. Atwood*, 13 Mass. 324; *Internal Improvement Fund v. Bailey*, 10 Fla. 213; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114; *Northampton v. Smith*, 11 Met. 390; *Foreman v. Marianna*, 43 Ark. 324; *Peck v. Baxter County Freeholders*, 21 N. J. L. 656; *Saule v. Freeman*, 24 Fla. 209; *Com. v. Reed*, 1 Gray, 472; *Ellis v. Smith*, 42 Ala. 849; *Fine v. St. Louis Public Schools*, 80 Mo. 166; *Stockwell v. White Lake Twp. Board*, 22 Mich. 341; *Fiske v. Paine*, 18 R. I. 632; *Dimes v. Grand Junction Canal Co.* 16 Eng. L. & Eq. 63; *Oakley v. Aspinwall*, N. Y. 547.

In *Northampton v. Smith*, 11 Met. 390, Chief Justice Shaw, with his usual clearness, has defined this disqualifying interest. He says: "(1) We think it is not to be a mere possible, contingent interest; not an interest in the question or general subject to which the matter requiring adjudication relates; but one that is viable, demonstrable, and capable of precise proof. . . . It must therefore depend upon facts capable of being precisely averred and proved, and thus put in issue and tried. . . . (2) It must be a pecuniary or proprietary interest,—a relation by which, as a debtor, or creditor, an heir or legatee, or otherwise, he will gain or lose something by the result of the proceedings,—in contradistinction to an interest of feeling or sympathy or bias, which would disqualify a juror. [It may be here remarked, to prevent misunderstanding, that by an amendment to § 170 of the Code of Civil Procedure, bias or prejudice upon the part of a judge is now made a ground of disqualification, and a reason for the removal of a cause.] (3) It must be certain and not merely possible or contingent. . . . It must be direct and personal, though such a personal interest may result from a relation which the judge holds, as the member of a town, parish, or other corporation, where it is not otherwise provided by law, if such corporation has a pecuniary or proprietary interest in the proceedings."

Thus, the interest which one has in a public question, merely because he is a member of the civic body to be affected by the question, is not the interest which the law has in mind. In the case from which we have just quoted, the judge in probate was not held to be disqualified because in a will before him there was a bequest of money to trustees to be devoted to the use and benefit of indigent persons in certain towns, of one of which the judge was an inhabitant. So, in *Foreman v. Marianna*, 48 Ark. 524, the judge, who was an inhabitant of the town, was not for that reason held to be disqualified to sit in and determine upon proceedings for the annexation of territory to the town, although an election had been called to pass upon the question of annexation, and the judge had voted thereat. And so, in *Sauls v. Freeman*, 24 Fla. 209, the fact that the circuit judge, with other registered voters of the county, had signed a petition addressed to the county commissioners, asking for a change of the county site, did not disqualify him for interest from sitting in a mandamus proceeding to compel the commissioners to call an election upon the question. In these and like cases the so-called "interest" of the judge is found to be remote, doubtful, and speculative, in no way certain in fact, nor susceptible of precise measurement.

But, upon the other hand, where, in any litigation, there is any certain, definable, pecuniary, or proprietary interest or relation which will be directly affected by the judgment that may be rendered, in every such case, without exception, so far as an exhaustive examination of the authorities goes, the disqualification of the judge is held to exist. Has the judge any pecuniary or personal right or privilege directly affected by or immediately dependent upon the result of the case? As that question is answered, so is answered the question of his

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disqualification for the interest which we have been considering. In *Heilbron v. Campbell*, (Cal.) 23 Pac. 122, the action was between divers claimants to a tract of land to which the judge himself asserted title. The judge was not a party to the suit, nor would the judgment rendered be binding between him and the other litigants. Yet this court in bank held the interest to be disqualifying, and properly so; for though generally speaking, an interest in the legal question, as distinguished from a pecuniary interest in the result of the case, is no valid ground of disqualification, there is to this the well settled exception that where the judge has a law suit pending or impending with another person, which rests upon a like state of facts, or upon the same point of law as that pending before him, this is a valid ground of recuscation. *Davis v. Allen*, 11 Pick. 466, 22 Am. Dec. 386; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114.

In *North Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 315, the action was by the city of Marysville to restrain the mining company from prosecuting its hydraulic work, because the effect of its mining operations was to injure the lands of the corporation. The judge owned land, not within the municipality, but similarly situated, and equally affected by the mining operations complained of. In an action for an injunction by the city against the mining company it was held that the judge had such a direct and immediate interest in the result of the action as to disqualify him.

Even more immediate and direct is the interest of the judge in the case at bar than that which appeared in the *North Bloomfield Gravel Min. Co. Case*. The disqualification does not spring from the fact that the judge is a citizen, inhabitant, and taxpayer of the city of San Diego, nor yet from the fact that the municipality is a party litigant in the action. It arises from the circumstance that he owns property within the city which may or may not be liable for the burden of a special tax for the period of forty years, as he shall decide. The validity of this tax is directly called in question. The judge himself under the circumstances shown, could have instituted as plaintiff this identical action. "The rule is well settled that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others." Story, Eq. Pl. §§ 97, 98; 1 Freeman, Judgm. § 178; *Brown v. Trousdale*, 188 U. S. 389, 84 L. ed. 987; *Gamble v. San Diego*, 79 Fed. Rep. 487. He would have been entitled to intervene as well as those who in fact have intervened. The judgment which he renders in the case will be binding upon his rights and his property. His interest is in the outcome of the litigation, and it is a direct measurable, pecuniary interest.

The distinction between this case and that of *Oakland v. Oakland Water Front Co.* 118 Cal. 249, is readily to be observed. Here, as has been said and shown, the judge is to decide directly whether or not property which he owns shall be made subject to the burden of a special tax. In the *Oakland Water-Front Case*, the city sought to recover lands which had been granted to it by the state under cer-

tain trusts. Even if the city succeeded, it was at least doubtful whether the control of these lands would result in profit or loss to its finances. It was still more doubtful whether their management would affect the tax rate of the city in the slightest degree. The judge had no other interest in the litigation than that which he possessed in common with other taxpayers, and which arose from the fact that he was an inhabitant and taxpayer of the city. It was not a direct, measurable, or pecuniary interest in the litigation or its outcome. The interest was remote, contingent, and speculative. It might thus be fairly stated: If the city recovered the property, and if it successfully managed or sold it, the result might be to lessen the rate of taxation, and thus, under all these contingencies, to reduce in some slight, indeterminate, and undeterminable extent the tax rate upon the judge's property. Clearly, such a remote and contingent interest is readily to be distinguished from that in the case at bar, where the judge, in a cause directly involving the legality of a tax imposed and to be imposed upon his land, does by his *ipse dixit* declare whether the burden shall remain or be removed.

In *Austin v. Nalle*, 85 Tex. 520, the question of the interest of the judge under circumstances identical with those of the case at bar was presented, and the court reached the conclusion here declared. The same principle was invoked and the same ruling made in *Wetzel v. State*, 5 Tex. Civ. App. 17, and again in *State v. Cisco* (Tex. Civ. App.) 88 S. W. 244.

It is urged that the case of *Wade v. Travis County*, 72 Fed. Rep. 985, is authority against this position. This is in a measure true. It was an action in the circuit court of the western division of Texas, and the question of the disqualification of a Federal judge by reason of his pecuniary interest, under facts similar to those here presented, was considered by the court. Its decision upon the proposition is in the following language: "Authorities examined by the court leave the question in some doubt, and, for the purpose of having it definitely determined by an appellate tribunal, we have concluded to hold that that disqualification on the part of the district judge does not exist. . . . And we suggest to counsel the propriety of preserving proper exceptions in order that the point may be conclusively settled by the court of appeals." It may be conceded that so far as it goes this case is against the conclusion which we have reached; but it should be said in this connection that it is the only case of its kind, and, as appears

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from the language of the learned judge, he decided as he did only in order that the question might be definitely laid at rest by the appellate tribunal.

As it is uncontradicted in this record that the same disqualification which existed in the case of Judge Torrance existed as to the other judges of the superior court of the county, it follows from what has been said that the motion for change of venue should have been granted.

The order is therefore reversed.

We concur: **Beatty, Ch. J.; Garoutte, J.; Temple, J.**

McFarland, J., concurring:

I concur in the judgment of reversal. I also concur generally in the opinion of Mr. Justice Henshaw, except that I desire to a little more pointedly emphasize the distinction between the case at bar and a case where a city in which the judge is a taxpayer is a party, and where there is merely a possibility that a judgment against the city might result in an increased levy of taxes, and a judgment in favor of the city might bring about a reduction of taxation. In the latter case—and in others that could be mentioned, where a similar principle applies—the interest is too shadowy, indirect, remote and contingent to be within the rule that a man cannot be a judge in his own case. See *Dallas v. Peacock*, 89 Tex. 58; *Oakland v. Oakland Water-Front Co.* 118 Cal. 249, and cases there cited. But in the case at bar the interest of the judge was not indirect, remote, or contingent; it directly involved the immediate imposition of a special annual tax upon his property to continue for forty years.

Van Fleet, J., dissenting:

I dissent. The case is not, to my mind, distinguishable in principle from that decided in *Oakland v. Oakland Water-Front Co.* 118 Cal. 249, where it was held that the trial judge was not disqualified. The interest of Judge Torrance in the subject of litigation is not different in kind, however much it may differ in degree, from that possessed by the trial judge in that case. In my judgment the principle announced in the opinion of the court is one susceptible of indefinite extension, to the great detriment of the practical administration of justice, and the application of which to the facts of this case is, I think, opposed by the weight of modern authority.

I dissent: **Harrison, J.**

DISTRICT OF COLUMBIA COURT OF APPEALS.

William MAY, Trustee, etc., of John Frederick May, Deceased, et al., Appts.,
v.

Sarah Maria MAY et al.

(5 App. D. C. 552.)

1. A will will not be construed by the courts before necessity of action under it arises.
2. A provision in a will creating a trust giving the beneficiaries power to remove the trustee and appoint another without aid of the courts, for what they may deem good and sufficient cause, is valid, and will be given effect by the courts.
3. Power of removal of a trustee, given the beneficiaries by the will creating the trust, must not be exercised wantonly, capriciously, or arbitrarily, and its exercise may be reviewed by a court of equity.
4. Deep-seated and irreconcilable dissension between the beneficiaries of a trust and the trustee, not superinduced for the mere purpose of getting rid of the latter, is sufficient to justify his removal under a power given the beneficiaries by will, even if his conduct is otherwise unobjectionable.
5. Failure of one of the beneficiaries of a trust to participate in the removal of the trustee under a power contained in a will creating it, required to be exercised by all the beneficiaries, will not render the removal invalid, where such beneficiary was represented by another under a power of attorney, and subsequently ratifies it and all action in the premises.
6. A trustee under a will who files a bill for the construction of certain clauses in the will will not be allowed his costs out of the trust fund, if the prayer of a cross bill by the beneficiaries that their action in removing him, which, under the will, they had the power to do, and he had no power to resist, was ratified, is granted, and no construction of the will made.

(March 5, 1896.)*

APPEAL by complainant from a decree of the Supreme Court of the District of Columbia removing petitioner from his trust upon cross bill of defendants in a proceeding by him to obtain construction of a will. *Affirmed.*

The facts are stated in the opinion.

Messrs. Robert Gilmore and W. D. Davidge for appellants.

Messrs. Enoch Totten and William H. Dennis, for appellees:

The requirements of "concurrence" of the wife, and "unanimous resolution" of the other heirs, show that their action was to be effective in itself. The words "good and sufficient cause," occurring earlier in the sentence, are to be reconciled with what comes later by regarding them as precatory, cautionary, or directory only.

*This decision was affirmed by the Supreme Court of the United States May 10, 1897 [107 U. S. 810, 42 L. ed. 179].

NOTE.—The question of the effect of a provision in an instrument creating a trust giving the beneficiaries the power to remove a trustee seems to be a new one.

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Cummer v. Butts, 40 Mich. 322, 29 Am. Rep. 530; *Hoge v. Richmond & D. R. Co.* 93 U. S. 1, 23 L. ed. 781; *Walker v. Brungard*, 18 Smedes & M. 758.

Appointment of a trustee under a power, while a suit is pending, is not contempt of court, nor is it void.

1 Perry, Tr. § 293.

The mere filing of a bill, before any decree is made, does not, of itself, affect such a power of removal.

3 Perry, Tr. § 474; *Cafe v. Bent*, 8 Hare, 249; *Neves v. Burrage*, 14 Q. B. 504.

If there were no other reasons, the discordant relations between Wm. May and the *cestuis que trust*, and, more especially, with the other trustee, would be sufficient for a change of cotrustee.

Uvedale v. Kittrick, Cas. in Ch. pt. 2, p. 130; *Swale v. Swale*, 22 Beav. 584; *McPherson v. Cox*, 96 U. S. 404, 24 L. ed. 746; *Cavender v. Cavender*, 114 U. S. 464, 29 L. ed. 312; *Irvine v. Dunham*, 111 U. S. 327, 28 L. ed. 444; 2 Story, Eq. Jur. § 1288; *Deraimes v. Dunham*, 22 Hun. 86; *Re Morgan*, 66 N. Y. 618, 63 Barb. 631; *Re McGillivray*, 188 N. Y. 308; *Re Simon*, 2 Pa. Dist. R. 194. Affirmed 155 Pa. 215; *Marsden's Estate*, 3 Pa. Dist. R. 281; *Gartside v. Gartside*, 118 Mo. 348; *Scott v. Rand*, 118 Mass. 215; *Wilson v. Wilson*, 145 Mass. 490; *Letterstedt v. Broers*, L. R. 9 App. Cas. 371.

Good faith and honesty did not excuse actual misconduct in the execution of the trust; carelessness in collecting assets and charging herself therewith warranted removal; concealment of rents collected warranted removal, and making restitution did not excuse.

Re Smith, 26 N. Y. S. R. 235; *Re Mayer*, 66 How. Pr. 106; *Savage v. Gould*, 60 How. Pr. 284; *Clemens v. Caldwell*, 7 B. Mon. 171; *Deen v. Cozens*, 7 Robt. 178; *Cavender v. Cavender*, 114 U. S. 464, 29 L. ed. 312; *Dickerson v. Smith*, 17 S. C. 289; 2 Perry, Tr. § 821; *Middleton v. Dodwell*, 13 Ves. Jr. 266.

A trustee should be removed when he shows a disposition to violate the duties of his trust, so as to endanger the trust property.

Harper v. Straus, 14 B. Mon. 48; *Coventry v. Atty. Gen.* 7 Bro. P. C. 235.

Although, by the first codicil, Wm. May is appointed "cotrustee," he is only to "exercise the powers" given in the will, jointly with the widow, and is not given any estate.

Sidebotham v. Watson, 11 Hare, 170.

Morris, J., delivered the opinion of the court:

Dr. John Frederick May, of the city of Washington, in the District of Columbia, died in this city on May 1, 1891, leaving a will duly executed and bearing the date of February 4, 1890, and also two codicils thereto, one executed on March 27, 1891, and the other on April 23, 1891. He left a large estate, most of it being realty situated in the city of Washington, and a house in the city of New York.

As to the effect of a provision giving the beneficiary the right to appoint a trustee in case of vacancy, see *Stearns v. Fraleigh* (Fla.) 39 L. R. A. 705.

He also left surviving him his wife, the appellee Sarah Maria May, and six children, all of age, namely, the appellant William May, who was the oldest, and the appellees Alice Beaver Webb (married), Edith Sibyl Randolph (widow), Caroline Kane Wright (divorced), Julia May and Frederick May (both unmarried). By the will he devised and bequeathed all his estate, both real and personal, to his wife Sarah Maria May, her heirs and assigns, in trust for the purposes thereafter named; which were so far as recited: 1. That his wife should receive at least the same provision to which she would be entitled by law under her right of dower, and therefore that she should receive one third of the net annual income of his estate during her life, one third of the personal property absolutely, and the use of the house in Washington in which they had resided during her life. 2. That the estate should be kept intact and no division made of it while any of his children lived, and that the rents and profits, except the thirds left to his wife, should be applied to the payment of his debts and the cancellation of any mortgage or encumbrance that there might be on the estate, and after the full payment of such debts and encumbrances, should be divided equally between all his children, subject to the disposition made in favor of his wife. 3. That, in the event of a sale by the trustee of any portion of the property, which sale the trustee was not to be precluded from making whenever it was manifestly for the benefit of the estate, the proceeds of sale should be reinvested in safe first mortgage on real estate. There was also a power given to the trustee to remortgage any portion of the estate that should be subject to mortgage at the time of the testator's death, in the event of inability to discharge the mortgage. And it was provided that, upon the death of any of his children, the share of such child should go to his or her issue, if there were any. There were some specific bequests of personal property not important to be here enumerated; and a special provision was made of a legacy to his daughter Julia in the event of her marriage. His wife was made executrix of the will, as well as trustee; and she was exempted from giving bond in either capacity, and empowered to appoint a trustee to succeed her, if she should deem it best at any time to do. This was the substance of the original will.

By the first of the two codicils which he added to his will shortly before his death, he associated his oldest son, the appellant William May, in the trusteeship with his wife. This codicil was as follows:

"I hereby appoint my son William May co trustee with my wife Sarah Maria May, my said son and my wife to have and exercise the powers and authority in my said will mentioned and created, except as hereinafter otherwise directed. It is my further wish, and I hereby will and direct, that my said son William May shall take charge of my real estate (except my present dwelling house, which shall be and remain in the exclusive charge of my wife during her life), and care for and manage the same for the best interests of my said estate and in accordance with the terms of my said will, and he shall collect the rents and

income of my said real estate, and pay the lawful taxes and assessments, and other expenses thereon, and shall keep the same in good repair. It is my will, and I so direct, that the taxes, insurance, and repairs on my said dwelling house shall be paid out of the general income of my other real estate. For the said service of my son William May in caring for and managing said estate and for collecting the rents and paying the taxes and assessments, and other services, as hereinbefore directed, he shall and may retain from money so collected, as his compensation, a commission equal to 5 per centum of the amount of money by him collected from said estate, and the said William May shall render to my said wife full and true accounts of the rents by him collected, and of the disbursements by him made, in the execution of this trust, such accounts to be rendered each and every month, and shall be accompanied by the vouchers for such disbursements. After the death of my wife said accounts shall be rendered to my other heirs. It is my will that no commissions shall be paid to my wife as trustee.

"I hereby further will and direct that for good and sufficient cause my other heirs, with the concurrence of my wife, if she be living, shall have and they are hereby given the power, by their unanimous resolution, to remove my said son William May from his office as such trustee and to appoint another person in his stead. It is my wish that neither of my said trustees shall be required to give a bond or other security, in reference to the execution of the trusts created by my said will or this codicil."

The second codicil merely provided specifically for the payment of some debts arising from trust funds that had been placed in his hands; and is unimportant in the present controversy.

The will and codicils were duly admitted to probate by the supreme court of the District of Columbia, holding a special term for orphans' court business, on June 19, 1891, and administration of the personality was committed to the widow, Sarah Maria May, as the executrix named in the will. That administration, it seems, had not been concluded when the present proceedings were begun, on May 2, 1892. The trustees forthwith entered upon the performance of their duties as such with regard to the real estate; and the appellant, William May, took immediate charge and control of the collection of the rents of the property and of its management.

Dissension, however, very soon arose between William May on the one side, and his mother, brother, and sisters, on the other; and as usual in such cases, the dissension became intense and bitter. There is in the record a painful disclosure of domestic discord which should have been avoided, and into the details of which we do not deem it necessary for the purposes of this case to enter. Even the filing of the bill of complaint in the cause, apparently and on its face a proper proceeding, was regarded by the other parties as, under the circumstances, an unnecessary and wanton act of hostility dictated by ulterior motives on the part of the appellant.

This bill was filed on May 2, 1892. The principal purpose of it, in respect of the construction sought to be had from the court, was to determine whether the testator had not died intestate with regard to the bulk of his estate after the termination of the life estate devised to the widow. There was an intimation in it of the dissension that had arisen, and an allegation of embarrassment therefrom to the complainant, William May, in the execution of his duties as trustee. And the prayer of the bill was, in a general way, for the construction of the will, and for the further administration of the estate under the direction of the court.

The defendants answered the bill; and the burden of their several answers was that the complainant had misbehaved in his trusteeship by his intolerant and overbearing conduct, and by false and erroneous charges in his accounts, which necessitated the employment of an expert accountant to restate them.

After replication filed and before any testimony was taken, the hostility between the parties had become such that on November 25, 1892, all the children and heirs at law of the testator John F. May, other than the complainant and appellant William May, with the concurrence and co-operation of the widow Sarah Maria May, joined in the execution of an instrument of writing, purporting to be their unanimous resolution, in pursuance of the power given to them by the testator in the first codicil to his will, for the removal of William May from the trusteeship for good and sufficient cause. Seven causes, among others, were specified in the document; and these were, in substance, that the accounts rendered by the complainant were erroneous and untrue; that he had sought to have credit for items to which he was not entitled; that he had altered and falsified vouchers; that by his intolerant conduct he had made communication with him by his cotrustee impossible; and that he had been absent an unreasonable time from the District of Columbia. William H. Dennis, esquire, a member of the bar of the District of Columbia, was designated in the resolution as the successor of the appellant in the trusteeship; and to him the appellant was directed to turn over the possession of the property, and all the books, papers, and documents appertaining thereto.

The resolution was signed in person by all those who purported to concur in it, except Frederick May, who was then absent in South America, and whose signature was appended to it by his mother Sarah Maria May, under a power of attorney given her by him to act for him in all matters appertaining to his father's estate. On May 8, 1893, after his return from South America, Frederick May executed another paper, which is found in the record, purporting to be a full ratification of his mother's action, and of the proceedings that had been had in his name during his absence.

When the resolution was communicated to William May, on December 28, 1892, he declined to comply with it, or to recognize its validity. And on January 8, 1893, he filed a petition in this cause, setting forth the attempt thus made to remove him, and praying for a restraining order against the defendants and against Mr. Dennis to prevent their inter-

ference with him in the execution of the trusteeship. The restraining order was issued, and remained in force until the final hearing of the cause.

Thereupon the defendants on March 8, 1893, filed a cross bill against the appellant William May to procure the ratification of their action in removing him from the trusteeship, for an injunction against his further management, for the settlement of his accounts, and for the appointment of a receiver during the pendency of the suit. The application for a receiver under this cross bill was refused; but the appellant was required to give bond, which he accordingly gave, and the parties proceeded to take testimony. The burden of this testimony was the manifestation of family difficulties and family discords, past and present, and the question of the conduct or misconduct of William May as trustee of the estate.

Upon the hearing of the cause, a decree was rendered ratifying the action of the defendants in their removal of the appellant, William May, from the trusteeship. The appellant was directed to deliver the estate and all that appertained to it to the substituted trustee, and to settle his accounts before the auditor; and he was enjoined and restrained from further interference with the trusteeship. There was no attempt in the decree to construe the will, except in one comparatively unimportant particular, with reference to the settlement of the appellant's accounts; and this was to the effect that the one third of the net income of the estate provided by the will to be paid to the widow should not be subject to be diminished by deductions for the fund which was directed to be accumulated for the payment of the testator's debts and encumbrances on his real estate. From the opinion, which we find in the record, of the learned justice who signed the decree in the court below, we are advised that it was deemed premature at this time to enter into any further construction of the will.

William May, the complainant in the original bill, and defendant in the cross bill, appealed from that decree to this court.

There are three assignments of error: (1) The refusal or failure of the court below to construe the will; (2) the removal of the appellant from the trusteeship; (3) the direction of the court below that the widow was to be paid one third of the net income of the estate, without deduction on account of interest on the mortgages.

1. With reference to the first assignment of error, it does not appear that the court below has refused to construe the will, but has regarded it as premature so to do, before any exigency has arisen for such construction. And in this view we concur. It does not seem to us that the construction of the will is of any present practical importance, or that it is required until it becomes necessary to take some action under the will, and the action to be taken is rendered doubtful by the obscurity of the will.

2. It is conceded by counsel on both sides that the question of paramount importance in the case is that of the removal of the appellant from the trusteeship. To the determination of that question the testimony taken by the parties was mainly, if not exclusively, di-

rected; and that is the question which is principally treated in the excellent and exhaustive opinion rendered in the case by the learned justice who heard it in the court below. The original purpose of the suit, a construction of the will, if such was in fact the original purpose, has become for the present a secondary consideration; and the personality of the trustee, who is to administer the trusts of the will, has become the principal, and almost the sole, subject of controversy.

We fully concur in the sentiment expressed by the learned justice below, that such differences between relatives as are manifested in this record are most regrettable, and that courts should refrain as far as possible from magnifying the points of personal difference. It is satisfactory to feel, in the view which we take of this case, that it is wholly unnecessary for us to weigh the conflicting statements of the parties, or to determine any question of misconduct or moral delinquency on either side, if such there be, and that we may determine the controversy so far as it is incumbent on us to determine it without reference to the mutual recrimination of the parties.

By the codicil to his will the testator gave to his widow and his heirs at law, other than the appellant William May, the power to remove the latter from the trust which was vested in him by the will and codicil, whenever they found good and sufficient cause so to do, and their resolution to that effect was unanimous. The right to have the trustee removed is one which the heirs, or any one or more of them, would have had through the instrumentality of a court of equity without any such provision in the will. For good and sufficient cause, any one beneficiary, even against the unanimous wish of all the others, might procure the removal of a trustee and the substitution of another in his place by a court of equity. We must assume, therefore, that the testator in this instance intended to vest in the designated heirs a power or a right which they did not have by law; and that power or that right was to determine for themselves, at least in the first instance, without the need of recourse to a court of equity, what should constitute a good and sufficient cause for the removal of their trustee, and to effect such removal by their own united action. That this power must not be exercised wantonly, capriciously, or arbitrarily, must, of course, be conceded. That its exercise is subject to review by a court of equity must also be conceded. But the law which gives a man the right to dispose of his property by will, and which seeks to give effect to every provision of the will that does not contravene some fixed rule or principle of jurisprudence, can find nothing contrary to public policy in the grant of a power that enables beneficiaries to deal summarily with their trustees without being compelled to seek the aid of a court of equity for the purpose. Extraordinary and unusual powers of this kind will, of course, be strictly scrutinized, and their exercise closely supervised in proper cases by the courts. But, as there is no law to prevent or prohibit their creation, we must hold that, with reference to them, a testator's will is entitled to be carried into effect as much as in any other particular.

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The power to remove their trustee was vested in the defendants to this cause. The power to determine when there was good and sufficient cause for such removal was necessarily in them also, subject to the restraining power of a court of equity against the abuse of it. They exercised their right to determine that good and sufficient cause existed; they found that there was such cause; and they removed the trustee accordingly. Upon the face of their proceeding, it is beyond question that they acted within the scope of their authority.

But was their action in fact an abuse of their power, instead of a legitimate exercise of it? Was there good and sufficient cause for the removal of the trustee? Or was the finding by the defendants of such cause a mere pretense for the exercise of arbitrary and unreasonable authority? As we have stated, we will not enter into any investigation of the causes of dissension between the parties, or of the reasonableness or unreasonableness of their respective positions. That there is a dissension, bitter and uncompromising, is beyond question. That such dissension precludes intercourse between the parties, is their mutual declaration. If there can be no intercourse between them, no communication of views, their joint execution of their joint trust is an impossibility. The due execution of the trust requires concurrence of action, and consultation preliminary to action. The trusts are all active trusts, in which the judgment and discretion of both trustees are necessary for their proper execution; and we must suppose that it was to secure this concurrence of action, and to prevent the dissension that would militate against it, that the testator created the power of removal which he called into existence in his codicil. It is not necessary that there should be actual misconduct or moral delinquency on the part of a trustee to justify his removal; any failure, disability, or inability to perform the trust would be sufficient. *Hill, Trustees*; 2 Story, Eq. Jur. §§ 1287, 1288; 1 Perry, Tr. § 275. And it is also true that mere disagreements do not constitute sufficient cause for the removal of a trustee; for otherwise, the purposes of an appointment might sometimes be frustrated. 1 Perry, Trusts, § 276; *Forster v. Davies*, 4 De G. F. & J. 133.

But unquestionably, the existence of dissension, deep seated and irreconcilable, not superinduced for the mere purpose of getting rid of a trustee who is in the faithful performance of his duty, but dissension such as imperils the due and proper execution of the trust, is sufficient to justify the removal of a trustee, even if otherwise the conduct of the trustee is unobjectionable. 2 Story, Eq. Jur. § 1288; *Lettersstedt v. Broers*, L. R. 9 App. Cas. 371, 386; *Irvine v. Dunham*, 111 U. S. 327. 28 L. ed. 444; *McPherson v. Cox*, 96 U. S. 404, 24 L. ed. 746.

In the case last cited of *McPherson v. Cox*, in which the Supreme Court of the United States declined to sanction the removal of a trustee, where there was ill will between him and the beneficiary of the trust, that court said: "Where a trustee is charged with an active trust, which gives him some discretionary power over the rights of the *cestui que trust*, and which brings him into constant personal

intercourse with the latter, it may be conceded that the mere existence of a strong mutual ill feeling between the parties will, under some circumstances, justify a change by the court." And the court in that case refused to discharge the trustee on the ground that there was no active trust requiring personal intercourse between the parties, and because there was another trustee without whose concurrence and co-operation the objectionable trustee could effect nothing. But the circumstances here are those of an active trust, requiring for their due execution a constant intercourse and constant co-operation between the parties, with the existence of ill will between the appellant and his cotrustee, who is also the present principal beneficiary, as to make co-operation impossible. It is unnecessary to inquire into the causes of the dissension. It is plain that the case has arisen in which the supreme court has said that a change of trustee by the court would be justifiable.

In another case that court has said: "Where there is a failure of suitable trustees to perform a trust, either from accident or from the refusal of the old trustee to act, . . . or from any other cause, courts of equity will appoint new trustees." *Irvine v. Dunham*, 111 U. S. 834, 28 L. ed. 447.

It should not be forgotten that this is not a case of original application to a court of equity to remove a trustee in which a just and sufficient cause for removal must be stated and proved, and in which a court of equity is not quick to seek cause for such removal, but rather an application to the court by the parties in interest to ratify a removal already made by themselves, and which they had the express right to make under the testator's will. Ordinarily, the removal of a trustee is to that extent a contravention of the wishes of the creator of the trust, and is justified only because the trust itself is the main thing to be regarded, and the trustee to carry into effect is of secondary consideration; and the effort of the court is to do that which the person creating the trust must be assumed to have desired to do if he had anticipated the contingency that demanded a change of instrumentality. Here we have a removal made apparently in accordance with the express wishes of a testator, and the court is merely asked to sanction it, because the trustee resists the removal. It is difficult to imagine a case in which the wishes of beneficiaries would be better entitled to respect and recognition by the court than the present, without any reflection on the honor or integrity of the trustee.

It is objected, however, that it was not competent for the donees of the power in this instance to exercise it, after the institution of this suit, without the permission of the court previously had and obtained; and the cases of *Webb v. Shaftesbury*, 7 Ves. Jr. 487, and *Jones v. Stockett*, 2 Bland, Ch. 409, 435, are cited in support of this position. It is probably sufficient answer to this objection to say that the sanction of the court has, in fact, been given to the action of the parties, and that the action of the court in giving that sanction is not in itself a proper subject for review by us.

It is also objected that the action of the parties in the matter of removal of the trustee was

irregular, for the reason that Frederick May did not participate in it except by power of attorney given to his mother, and that the case was one of discretion in which there could be no delegation by power of attorney. This we deem it entirely unnecessary to determine, inasmuch as Frederick May subsequently ratified the removal, and the filing of the cross bill, and all that had been done in the premises; and there is no reason to suppose that the unanimous resolution required for the removal of the trustee might not be the result of correspondence, or might not have been reached in some other way than by the corporeal presence of all the parties meeting in conclave to deliberate upon the subject.

We find no reason to dissent from the action of the court below in directing the appellant to surrender the estate to the substituted trustee, and to settle his accounts, and restraining him from further interference with the trust.

3. Error is assigned, also, upon the direction given by the court below for the settlement of the trustee's account, to the effect that the widow was entitled to be paid the one-third interest which she took under the will without deduction of interest upon the mortgages upon the trust property. But this assignment of error is not greatly insisted upon by the appellant; and the direction given by the court is so plainly in accordance both with the letter and the spirit of the will that we deem it unnecessary to discuss the question at any length.

On the whole, we are of opinion that *the decree of the court below is right, and should be affirmed*, with costs. And it is so ordered.

A motion to amend the decree as to costs having been made, *Morris, J.*, on March 20, 1895, delivered the following opinion:

A motion has been filed in this cause on behalf of the appellant for an amendment of the decree of this court, so that he should be allowed his costs incurred in this cause, including such reasonable counsel fees as the supreme court of the District of Columbia might deem it just and proper to allow.

On behalf of the motion it is urged that the bill of complaint in the cause was filed for a construction of the will under which the appellant was executing his trust; that the trust was a most important one; and that the ground of the decision of this court, as well as of the decision of the court below, was upon matter that did not arise until after the filing of the bill, answer, and replication, namely, the removal of the appellant from his trust by the appellees under the power confided to them by the will.

While it is true, as a general rule, that a trustee should be allowed his costs, even in many cases including counsel fees, incurred in proceedings instituted by him to aid him in the execution of his trust, the present does not seem to us to be such a case. The proceeding was apparently premature. No exigency had arisen for the institution of the suit. The good faith of the appellant in filing the bill has been seriously questioned. Even if we should assume that he was justified in filing the bill, the costs incurred in the matter of the bill, answer, and replication are but a small part

of the costs of the case. The bulk of those costs were incurred in the way of taking testimony upon the question upon which the parties actually went to issue. And to allow the appellant his costs now would be substantially to charge the appellees with the cost of doing what we have held they were fully justified in doing, and which the appellant was not justified in resisting.

The costs which we have allowed in our decree are the costs of the appeal to this court.

Having affirmed the decree of the supreme court of the District of Columbia, we have not sought to interfere with the allowance of costs by that court. Certainly it does not seem proper that we should do so at this time. Least of all does it seem proper that we should direct, as we are asked to do, that the supreme court of the District of Columbia should allow counsel fees in the case to the appellant.

We are compelled to overrule the motion of the appellant.

GEORGIA SUPREME COURT.

J. E. PAULK, *Plff. in Err.*,

v.

Mayor, etc., of SYCAMORE.

(.....Ga.....)

*1. Courts of equity will not by injunction prevent the institution of prosecutions for criminal offenses, whether the same be violations of state statutes or municipal ordinances; nor will they, upon a petition for an injunction of this nature, inquire into the constitutionality of a legislative act, or the validity or reasonableness of an ordinance making penal the act or acts for the doing of which prosecutions are threatened.

2. There was no error in denying the injunction.

(April 11, 1898.)

ERROR to the Superior Court for Irwin County to review a judgment denying an injunction to restrain the prosecution of criminal proceedings against plaintiff and his employees under provisions of defendant's charter making penal the sale of intoxicating liquors within the corporate limits. *Affirmed.*

The facts are stated in the opinion.

Messrs. W. A. Hawkins and Thomson & Whipple, for plaintiff in error:

The local prohibition law of Irwin county is unconstitutional and void.

Papworth v. State, 103 Ga. 86.

Section 10 of the charter of Sycamore, found in Acts 1890-1, p. 818, is almost identical in language with Irwin's local prohibition act, and is equally as sweeping and prohibitive in its terms.

A municipality can have no more power to override a general state law by local legislation than the state itself has, the municipality being the creature of the state.

Where there is a general law making a county dry, no municipal corporation in the county can allow or regulate the sale of liquors though their charters may purport to so authorize.

Turner v. Forsyth, 78 Ga. 688; *Tatum v. State*, 79 Ga. 176.

In *Hill v. Dalton*, 72 Ga. 814, the supreme

court held that Dalton could by ordinance prohibit sale of liquors.

This decision, however, does not affect our case, as it was prior to the general local option act of 1884-5, Dalton's charter having been granted in 1874.

The town of Sycamore has no charter power whatever to regulate the sale of liquor or control it in any way, outside of § 10.

A municipal corporation can pass or enact no ordinance not authorized by its charter.

Robinson v. Franklin, 1 Humph. 156, 34 Am. Dec. 625, and notes; *State v. Ferguson*, 33 N. H. 426.

Equity will interfere where one's civil rights and private property are interfered with.

Atlanta v. Gate City Gaslight Co. 71 Ga. 107.

Not only will injunction lie, but is the proper remedy, less expensive, cheaper, or more conducive to the best interest of all concerned.

Gould v. Atlanta, 55 Ga. 688.

Injunction will lie to restrain operation of illegal ordinance when municipal authorities threaten to continually harass one.

Schoen Bros. v. Atlanta, 97 Ga. 697, 83 L. R. A. 804.

Mr. J. H. Martin, for defendant in error:

The plaintiff in error had a complete and adequate common-law remedy; and in fact the court granted the certiorari applied for by the plaintiff in error and his brother on the same day and at the same time that he denied the injunction.

See *Montezuma v. Minor*, 70 Ga. 191; *Turner v. Forsyth*, 78 Ga. 688; 2 Dill. Mun. Corp. 4th ed. §§ 926 et seq.; *Taylor v. Americus*, 39 Ga. 59; *Macon v. Shaw*, 16 Ga. 172; 1 Beach, Pub. Corp. § 587.

The action of the council in imposing the fine was a quasi criminal action, and as such a court of equity will not restrain or obstruct the mayor and council of Sycamore.

Ga. Code, 4914.

If certiorari was not adequate, then the writ of prohibition was the remedy, and not injunction.

See Code, § 4885; *Montezuma v. Minor*, 70 Ga. 191; *Turner v. Forsyth*, 78 Ga. 684; *Hart v. Taylor*, 61 Ga. 156.

Fish, J., delivered the opinion of the court.

The plaintiff in error brought his petition to enjoin criminal proceedings against him and his employees, under the provisions of the charter of Sycamore prohibiting and making penal the sale of intoxicating liquors within its

*Headnotes by FISH, J.

NOTE.—For injunction against criminal proceedings, see *Crighto v. Dahmer* (Miss.) 21 L. R. A. 84, and note; also *Neaf v. Palmer* (Ky.) 41 L. R. A. 219, 41 L. R. A.

incorporate limits, and to enjoin similar proceedings under a municipal ordinance prohibiting, under penalty of fine or imprisonment, the keeping of such liquors in the city for the purpose of sale or barter. He alleged that the municipal ordinance in question is void, and has been repealed, and that, if the corporate authorities are allowed to institute and carry on the threatened prosecutions, "it will not only harass and jeopardize his personal liberty, without any lawful authority, but it will also interfere with him in the enjoyment of his civil rights, break up his business, and cause him to sacrifice and lose his . . . property and stock of goods, and damage him in a large amount, and all without authority and without adequate redress," and that his damages will be irreparable.

In *Gault v. Wallis*, 53 Ga. 675, it was held that "courts of equity have no jurisdiction to interfere with the administration of the criminal laws of the state by injunction or otherwise." And in *Phillips v. Stone Mountain*, 61 Ga. 386, it was held: "No injunction, or order in the nature of injunction, will be granted to restrain proceedings in a criminal matter." In *Garrison v. Atlanta*, 68 Ga. 64, where these decisions were followed, the principle is reaffirmed in the following language: "Injunction will not be granted to restrain a criminal proceeding." These decisions seem to be decisive of the questions raised in the present case, and but for a later decision of this court, which is invoked in behalf of the plaintiff in error, and which we shall presently consider, we should not deem it necessary or profitable, in this opinion, to do more than cite and follow these adjudications. The case in 61 Ga. 386, is especially in point, owing to its similarity to the case now under consideration. In that case certain retail liquor dealers sought to enjoin prosecutions under a municipal ordinance, which was passed after they had obtained their license to sell, on the ground that the ordinance was void, and materially restricted their business. This court, speaking through Bleckley, J., who delivered the opinion, said: "Whatever may be the infirmities of the penal ordinances of Stone Mountain, an injunction in the present case was properly denied. If unlawful convictions take place before a municipal court, reversal can be had in the superior court, as a court of law, by certiorari. This is a plain and adequate remedy, and a court of equity need not and cannot interfere. Chancery takes no part in the administration of criminal law. It neither aids the criminal courts in the exercise of jurisdiction, nor restrains or obstructs them." The principle upon which these decisions are founded has long been well settled by a great current of authority, both in this country and in England. In *Re Sawyer*, 124 U. S. 200, 31 L. ed. 402, it was reaffirmed by the Supreme Court of the United States in the most emphatic terms. The first headnote in that case is: "A court of equity has no jurisdiction of a bill to stay criminal proceedings." And in the opinion of the court it is said: "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of the rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon

of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of courts of common law, or of the executive and administrative department of the government." Further on, in the same opinion, after stating that "the modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there," and that "Mr. Justice Story, in his Commentaries on Equity Jurisprudence, affirms the same doctrine," it is said: "And in the American courts, so far as we are informed, it has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under statutes of the state or under municipal ordinances,"—citing *West v. New York*, 10 Paige, 539; *Davis v. American Soc. for Prevention of Cruelty to Animals*, 75 N. Y. 362; *Tyler v. Hamersley*, 44 Conn. 419, 422, 26 Am. Rep. 479; *Stuart v. La Salle County Supers.* 83 Ill. 341; *Decron v. First Municipality*, 4 La. Ann. 11; *Levy v. Shreveport*, 27 La. Ann. 620; *Moses v. Mobile*, 52 Ala. 193; *Gault v. Wallis*, 53 Ga. 675; *Phillips v. Stone Mountain*, 61 Ga. 386; *Cohen v. Goldsboro Comrs.* 77 N. C. 2; *Waters Peires Oil Co. v. Little Rock*, 39 Ark. 412; *Spink v. Francis*, 19 Fed. Rep. 670, 20 Fed. Rep. 567; *Suess v. Noble*, 81 Fed. Rep. 555.

To this formidable and strong array of authorities we might ourselves add a number of more recent decisions to the same effect by our American courts, but we do not deem it necessary to do so. Counsel representing the plaintiff in error, recognizing the fact that the three Georgia decisions that we have cited, particularly the one rendered in 61 Ga. 386, in the *Stone Mountain Case*, are against their contentions, rely upon the ruling of this court in *Atlanta v. Gate City Gaslight Co.* 71 Ga. 106, and considering the principle announced in the fifth headnote to that case simply as an abstract proposition, applicable to all cases in which some sort of a property right may be injuriously affected by a criminal prosecution, we can understand the confidence with which they invoke that decision in behalf of their client. But the principle there announced is to be considered and applied in the light of the extraordinary facts disclosed by the record and discussed in the opinion of the court in that case. There are wide differences between that case and the one at bar. In that case, the city of Atlanta, to use the language of the court, had "stood by and seen this company make an outlay of \$140,000 in the exercise of their rights under this charter, without intimating to them that objection would be made to their use of the streets for the purposes authorized, and without the use of which their enterprise would not have been undertaken and could not be prosecuted, and without which they would lose their entire outlay and be involved in irretrievable ruin." And then, when the gaslight company was ready to begin the work

of laying its mains, the municipal authorities sought to prevent it from exercising its valuable, vested, corporate franchises, by first refusing to allow it permission to excavate or obstruct the streets of the city for the purpose of laying its pipes, and then threatening, under certain city ordinances, to prosecute and punish any of its agents or employees who, without such permission, should undertake to do so. The court, after demonstrating that "the permission of the city of Atlanta was not required to enable the complainant to exercise its franchises," says: "Upon every principle of equity, this failure to notify the complainant of their intention until this heavy expenditure had been made, would estop them. Such conduct is fraudulent in the eye of the law, and where practised upon an innocent party, who is seeking bona fide to carry out the provisions of its charter, by availing itself of the powers and privileges thereby granted would, if anything could, debar them from now being heard." The court seems also to have been of the opinion that the municipal ordinances making penal the excavation or obstruction of the streets of the city, without permission of the municipal authorities, were void in so far as they affected the vested rights of the gaslight company under its legislative charter. And the court, on page 126, strikes what it appears to us is the real keynote of the case, when it says: "Where it is manifest, as in this case, that a prosecution and arrest is threatened for an alleged violation of city ordinances for the sole purpose of preventing the exercise of civil rights conferred directly by law, injunction is a proper remedy to prevent injury to the party thus menaced." It will be seen that the distinguishing feature of that case, and the one which was successfully employed in invoking the interposition of equity, was the patent fact that the threatened prosecutions under the municipal ordinances were being used, not for the legitimate purpose of preventing the streets of the city from being unlawfully injured or obstructed, but for the purpose of destroying the valuable, vested franchises of the Gate City Gaslight Company. And equity, seeing the palpable fraud which was being perpetrated, under color of what purported to be a simple police regulation, stretched forth its strong arm to prevent the irreparable damages which would ensue if it did not afford its protection to the rights which were thus imperiled. It was long ago decided that "an injunction will be granted to prevent the franchise of a corporation from being destroyed, as well as to restrain a party from violating it, by attempting to participate in its exclusive privileges." *Osborn v. Bank of United States*, 9 Wheat. 788, 6 L. ed. 204. We think, therefore, that the true principle which underlies the case that we have just been discussing, as we gather it from its peculiar facts and the opinion of the court, is that when the damages would be irreparable, if the threatened injury is not prevented, equity, if properly appealed to, will not permit valuable vested corporate franchises, granted by the state, to be seriously impaired or practically destroyed by prosecutions instituted under color of municipal ordinances, which are wrested from their legitimate purposes and fraudulently used, in a matter to

which they cannot apply, as a means with which to prevent the exercise of these franchises.

A similar case to the one in 71 Ga. 106, is that of *Port of Mobile v. Louisville & N. R. Co.* 84 Ala. 115, where the supreme court of Alabama held that "where a city attempts, by an ordinance, unlawfully to destroy the franchise of a railroad company, a court of equity will not refuse to interfere by injunction for the reason that the ordinance is quasi criminal in character." Somerville, J., delivering the opinion of the court, said: "It cannot be tolerated that a municipal corporation . . . should escape the grasp of a court of chancery, in a clear case of equitable cognizance, by the device of adding a penalty to an illegal and void ordinance." How different from such a case as the one in 71 Ga. 106, is the one at bar. Here no question as to the destruction or invasion of civil rights which had become vested under a legislative charter is presented; and, so far as the record discloses, the municipal authorities of Sycamore are simply endeavoring, in good faith, to enforce the penal provisions of the charter and ordinance of the city, the enactment of each of which appears to have been a bona fide effort to exercise the police power, for the protection and preservation of the peace and good order of the community. The plaintiff in error, with full knowledge that the charter of the city contained a provision prohibiting the sale of intoxicating liquors within its incorporated limits, and that one of its ordinances prohibited the keeping of such liquors for sale or barter therein, after seeking and taking legal advice, deliberately purchased a stock of whisky, beer, etc., procured state and Federal licenses, opened a "store" in that city, and commenced selling his stock, in defiance of the law and the ordinance. Having voluntarily gotten himself into this predicament, he now invokes the aid of equity to extricate him therefrom, upon the plea that his business will be ruined, without authority of law, unless he is afforded this relief. He deliberately undertook to test the validity of both the local law and ordinance of Sycamore, by voluntarily and knowingly engaging in the business which they prohibited. He has ample opportunity to make this test in the courts having jurisdiction over criminal matters, and a court of equity will not invade their domain in his behalf.

A case which is almost the exact counterpart of this one is that of *Burnett v. Craig*, 30 Ala. 185, 68 Am. Dec. 115, in which there was a bill for injunction, which alleged that the town council of Cahaba had passed an ordinance fixing a license for retailing within its incorporate limits; that the complainant had obtained a state license, and, acting upon legal advice that the ordinance was illegal, had opened a store in that town, and commenced retailing spirituous liquors; that he was thereupon arrested for violating the ordinance, and fined and imprisoned; that he had instituted a proceeding, which was still pending, to test the ordinance; and that the council still threatened to fine and imprison him as long as he persisted in carrying on his business. The prayer was that the municipal authorities be enjoined until the validity of the ordinance was

determined by the legal proceedings. The bill was dismissed, in the court below, for want of equity; and the case was carried to the supreme court, where the judgment of the lower court was affirmed, the higher court holding that "chancery . . . [will not] restrain quasi criminal proceedings on the part of the municipal authorities [of a municipal corporation] for repeated violations of an alleged invalid ordinance." This case was subsequently referred to in *Port of Mobile v. Louisville & N. R. Co.* 84 Ala. 115, as not being at all in conflict with the decision rendered in that case.

The case made by the plaintiff in the court below falling within the general and well-established rule applicable to cases in which an injunction is sought to restrain criminal or quasi criminal proceedings, the judge committed no error in refusing to grant a temporary injunction.

Judgment affirmed.

All the justices concur, except Cobb, J., absent for providential cause.

ILLINOIS SUPREME COURT.

PEOPLE of the State of Illinois, *ex rel.*
Edward C. AKIN, Attorney General,

v.

Joseph KIPLEY, Superintendent of Police
et al.

SAME

v.

Adolph KRAUS *et al.*, Civil Service Commissioners.

(171 Ill. 44.)

1. Authorizing civil service commissioners to make rules for the examination of persons applying for appointments to public office does not delegate to them legislative power.
2. The legislature may select any means for the administration of a municipal government which it thinks best adapted to that end, and may provide for the election of municipal officers by the people, or authorize any officers or persons to fill the offices by appointment.
3. A law providing that appointments to municipal offices or positions shall be made according to merit and fitness, and that such merit and fitness must be ascertained by competitive examination, is within the power of the legislature.
4. Judicial power is not delegated to civil service commissioners by giving them authority to investigate complaints against officers and matters as to the enforcement of the civil service law with the right to administer oaths and secure the attendance of witnesses by subpoena, and providing that a court may compel obedience to such subpoena.
5. Issues in a proceeding for contempt by disobeying an order of court do not require trial by jury.
6. The trial of charges against officers for their removal is not within the constitutional provision for trial by jury.
7. A public office, or the prospective fees of an office, are not the property of the incumbent within the constitutional provision against depriving a man of property.
8. The constitutional provision for trial by jury does not apply to special summary jurisdictions unknown to the common law and not providing for that mode of trial.
9. A statute to operate only in cities

which adopt it by vote of the people is not unconstitutional as special legislation.

10. The disqualification from holding office for five years, prescribed by § 35 of the Illinois civil service act of 1895 as a punishment for conviction under the preceding section, so far as that punishment is authorized without an indictment, is in violation of Const. art. 2, § 8, requiring indictment for criminal offenses except where the punishment is "by fine or imprisonment otherwise than in the penitentiary."
11. An unconstitutional provision for disqualifying a person convicted under civil service law from holding office can be eliminated without invalidating its other provisions.
12. The words "heads of any principal department of the city," in § 11 of the Illinois civil service act of 1895, excluding such heads of departments from the classified service, refer to heads of the departments as they existed at the time when the act was passed, and do not extend to subordinates, even where the department has but one head.
13. An officer whose appointment is subject to confirmation by the city council, even though he be a subordinate in one of the principal departments of the city, is excluded from the classified service by § 11 of the Illinois civil service act of 1895, if the office had been created and was in existence when the act was passed.
14. Ordinances to be valid must be reasonable, and must spring from an honest exercise of legislative discretion.
15. An ordinance which purports to change certain subordinate officers into heads of principal department, and require their appointments to be confirmed by the city council in order to remove them from the classified service for which appointments must be made by examination under Illinois civil service act of 1895, and place them in the list of those exempt from examination, which includes heads of principal departments and officers whose nominations must be confirmed by the city council, is invalid as an attempt to nullify the statute.

(Phillips, Ch. J., and Boggs, J., dissent from proposition 12.)

(December 22, 1897.)*

*A writ of error to take this case to the Supreme Court of the United States was dismissed by that court on April 18, 1898.

NOTE.—For constitutionality of civil service laws, see also *Rogers v. Buffalo* (N. Y.) 9 L. R. A. 379; *People, McClelland, v. Roberts* (N. Y.) 81 L. R. 41 L. R. A.

A. 309; *Re Keymer* (N. Y.) 35 L. R. A. 447, and *Chittenden v. Wurster* (N. Y.) 37 L. R. A. 808.

APPPLICATION for a writ of mandamus to compel respondents to carry out the provisions of the civil service law. *Granted.*

Statement by **Magruder, J.:**

At the June term, 1897, of this court, to wit, on June 1, 1897, the attorney general filed a motion for leave to file an original petition for mandamus. Leave was granted to file the petition, and it was so filed on June 2, 1897. The petition prays for summons for Joseph Kiple, superintendent of police of Chicago, and Adolph Kraus, Dudley Winston, and Hempstead Washburne, civil service commissioners, requiring them to answer the petition. The petition alleges that vacancies exist in the positions of assistant superintendent of police, inspectors of police, and captains of police; that such positions have not been filled in accordance with the terms of the "Act to Regulate the Civil Service of Cities;" that upon the occurrence of such vacancies, it was the duty of the superintendent of police, as the head of the department of police of the city of Chicago, to notify the civil service commissioners of said city of such vacancies; that, upon such notification, it was the duty of said commissioners to submit to the said superintendent of police the names of not more than three applicants in each grade or class next below the grade or class in which the vacancy existed, for promotion to such vacancies; that said superintendent of police claims the power to fill vacancies in the positions of assistant superintendent of police, inspectors of police, and captains of police in said city; that, in violation of the provisions of said act, said superintendent has assumed to fill some of such vacancies by appointing persons not in the classified lists formulated by said civil service commission, and not designated or selected by the said commission for appointment or promotion; that said superintendent has attempted to appoint one Lyman Lewis as assistant superintendent of police, and one John J. Harkness as inspector of police. The petition further alleges the passage of the "Act to Regulate the Civil Service of Cities," on March 20, 1895; the adoption of the same by the city of Chicago at the general city election held on April 2, 1895; the proclamation of George B. Swift, then mayor of said city, issued on July 1, 1895, declaring the adoption of said act, and that the same was in full force after the date of said proclamation; the appointment by said Swift, as mayor, on July 1, 1895, of three civil service commissioners under said act, to wit, John M. Clark, Robert A. Waller, and Christoph Hotz; the qualification of said commissioners; and the adoption by said commissioners of certain "Civil Service Rules," which rules are appended as an exhibit to said petition. The petition further alleges that on April 6, 1897, Carter H. Harrison was elected mayor of said city, as the successor to said Swift, and qualified as such mayor; that thereafter said Waller resigned his position as one of said civil service commissioners, and said Clark and Hotz were removed from said commission by the said Carter H. Harrison, mayor; and the respondents Winston, Kraus, and Washburne were appointed commissioners in place of said Clark, Waller, and Hotz, and have

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duly qualified and are acting as such commissioners. The petition also alleges that the rules of the first board of commissioners, which were adopted as aforesaid, have not been altered or changed; that, by such rules the old board of commissioners, in the year 1895, classified the offices of assistant superintendent of police, inspectors of police, and captains of police, and thereby brought them within the terms and provisions of said civil service act; that by an opinion in writing addressed to the mayor, and signed by the respondents, who constitute the present board of commissioners, and promulgated on or about May 22, 1897, the positions of assistant superintendent of police and inspectors of police were held by the present board of commissioners not to be required to be classified under said act, and to be exempt from the rules and regulations of said commissioners. The petition also sets forth ordinances of the city of Chicago, showing that, before and at the time of the passage of the civil service act, there was established an executive department of the municipal government of Chicago, known as the department of police, embracing the superintendent of police and other officials; that there was created the office of superintendent of police, who should be the head of said department of police, and should hold his office for the term of two years, and until his successor should be appointed and qualified. The ordinances referred to in the petition also provide that said superintendent of police shall be appointed by the mayor, by and with the advice and consent of the city council. It is also alleged in the petition that, prior to the passage of said civil service act, ordinances had been adopted by the city council of Chicago relating to the department of public works, the department of health, and other departments, by which a head of each department was established in terms similar to the provisions relating to the department of police. The petition represents that on April 15, 1897, the respondent Joseph Kiple was, by Carter H. Harrison, mayor of said city, appointed superintendent of police, and was afterwards duly confirmed by the city council, and qualified as such superintendent, and caused the city to be divided, or accepted a division of said city theretofore made, into four divisions and fifteen districts, and assigned, or recognized as having been assigned, to each division an inspector of police, and to each district a captain of police. The petition prays that a writ of mandamus may issue to the said Joseph Kiple, as superintendent of police, directing and commanding him to notify the civil service commissioners of vacancies existing in the positions of assistant superintendent of police, inspectors of police, and captains of police in said city, and to said Kraus, Winston, and Washburne, as such civil service commissioners, commanding them to submit to said Kiple, as such superintendent of police, the names of not more than three applicants for promotion for each vacancy from the grade next below that in which such vacancy or vacancies exist, etc.

On June 14, 1897, the respondent Kiple filed a separate answer, in which, among other things, he set up that the said civil service act was unconstitutional and void. The said an-

answer admits that the present civil service commissioners, on May 22, 1897, promulgated the opinion mentioned in the petition, holding that the positions of assistant superintendent of police and inspectors of police were not required to be classified under said civil service act, and were exempt from the rules and regulations of said commissioners. The answer avers that the true construction of the third and eleventh sections of said act, if the same have any force or validity, is stated in the opinion of May 22, 1897, a copy of which opinion is annexed to the answer and made a part thereof. The answer also adopts and makes a part thereof a certain opinion dated May 5, 1897, given by Charles S. Thornton, corporation counsel of said city, to the said Carter H. Harrison, mayor, therein holding that said positions of assistant superintendent of police, inspectors of police, and captains of police, and other subordinate positions in the department of public works, of buildings, of health, of fire, and of police, are not required to be classified under said act, and are exempt from its provisions, and from the rules and regulations of the commissioners. The answer of the respondent Kipley avers that the said respondent has followed the construction of the provisions of said act as given in the opinions aforesaid. The answer further sets up that the respondent neither admits nor denies that, by the rules referred to in the petition, the first board of civil service commissioners for the year 1895 classified the offices of assistant superintendent of police, inspectors of police, and captains of police, as stated in the petition; but in his answer the said Kipley positively denies that the said positions were by said rules, or could be, brought within the terms and provisions of said civil service act. The answer furthermore admits the existence of the vacancies in the department of police referred to in the petition, and that the said respondent Kipley has caused the same to be filled. On June 15, 1897, the people, by the attorney general, demurred to the answer of the respondent Kipley.

On June 14, 1897, the respondents Kraus, Washburne, and Winston, civil service commissioners, aforesaid, filed their answer to the petition, and filed and annexed thereto a copy of the answer filed by them in another proceeding for mandamus instituted against them, as civil service commissioners, at the same time at which the present proceeding was instituted, but to which the said Kipley was not made a party defendant. The said civil service commissioners also adopt, as a part of their answer, the answer filed herein by said Kipley, except so much of Kipley's answer as attacks the validity and constitutionality of said civil service act. The answer of said commissioners admits the appointment of Lyman Lewis as assistant superintendent of police, and John J. Harkness as inspector of police by the said Kipley, and alleges that, as said Lewis and Harkness are not made parties to the petition, the petition is defective. The answer of the respondents Kraus, Winston, and Washburne, in the proceedings for mandamus commenced against them alone, and without joining Kipley, and which is made a part of their answer in the present proceeding, refers to and in-

dorses and adopts the said opinion promulgated by them, and addressed to the mayor, on May 22, 1897. The answer of the commissioners, by the adoption of said opinion, and of their answer in the other proceeding, claim that certain positions in the police, fire, and health departments, and in the departments of buildings, and of public works, in the city of Chicago, other than the heads of those departments, as mentioned in the ordinances referred to in the petition, are not required to be classified under the civil service act, and are exempt from its provisions. The positions claimed by the commissioners in their answer to be thus exempt and not subject to classification are, in the department of public works, the following positions, to wit, secretary to commissioner of public works, city engineer, superintendent of streets, superintendent of water, superintendent of sewerage, superintendent of special assessments, superintendent of maps; in the department of buildings, secretary to commissioner of buildings, deputy commissioner of buildings; in the department of health, assistant commissioner of health, in the department of police, secretary of the department of police, assistant superintendent of police, inspector of police; in the fire department, first assistant fire marshal, superintendent of city telegraph, fire inspector, secretary of fire department, etc. On June 15, 1897, the people, by the attorney general, filed a demurrer to the answer of the respondents who are civil service commissioners.

Subsequently, after the adjournment of this court in the June term, 1897, and on the 28th day of June, A. D. 1897, the city council of the city of Chicago passed an ordinance entitled "An ordinance to designate certain public officials who shall be selected by the mayor with the concurrence of the council," which ordinance is as follows:

"Be it ordained by the city council of the city of Chicago:

"Sec. 1. That the following list of public officials shall be designated as 'Heads of Principal Departments,' as said term is used in § 11 of 'An Act to Regulate the Civil Service of Cities,' approved and in full force March 20, 1895, and shall be nominated by the mayor, and shall be confirmed by the city council, *viz.*: City engineer, superintendent of streets, superintendent of water, superintendent of sewerage or sewers, superintendent of special assessments, superintendent of water pipe extension, superintendent of city pipe yards, secretary of police department, assistant superintendent of police, fifteen captains of police, four inspectors of police, chief sidewalk inspector, assessor of the water department, district foreman of street repairs, district foreman of water-pipe extension, district foreman of sewer cleaning, district foreman for street cleaning.

"Sec. 2. All ordinances or parts of ordinances inconsistent herewith are hereby repealed.

"Sec. 3. This ordinance shall take effect and be in force from and after its passage."

This ordinance was approved by the mayor, Carter H. Harrison, on July 1, 1897.

On July 10, 1897, the respondent Joseph Kipley, superintendent of police, filed a plea in this court, setting up that since the filing of

his answer to the petition herein, and since the last adjournment of the court, the city council of Chicago had adopted the said ordinance of June 28, 1897. The plea then sets forth said last-mentioned ordinance in full, and alleges that the same is in full force and effect, and that thereby, upon the respondent's failure to notify said civil service commissioners, and to submit to them the appointment of certain subordinate police officers of said city, they have been if they ever were within the same, wholly taken away from and removed out of the control, jurisdiction, and power of the said civil service commissioners, and that such matters are now expressly excepted by the terms of said ordinance from the force and effect of the civil service act. The plea then quotes in full §§ 3 and 11 of said act, and submits said last-named ordinance to the court, to be read and construed in view of said sections. On October 18, 1897, the attorney general filed a demurrer to said plea.

Messrs. Smith, Blair, & Smith and Murry Nelson, Jr., with Mr. Edward C. Akin, Attorney General, for petitioners:

The proceeding of mandamus, as established by statute, is an action at law.

Dement v. Rokker, 126 Ill. 174; *People, Hemstreet, v. Crabb*, 156 Ill. 155.

The substantive allegations of the petition are not denied, and therefore are admitted.

Chicago & A. R. Co. v. Suffern, 129 Ill. 274. The act concerning civil service in cities is constitutional.

Owners of Lands v. People, Stookey, 118 Ill. 296; *People, Kern, v. Chase*, 165 Ill. 527, 36 L. R. A. 105; *Opinion of the Justices*, 188 Mass. 601.

The act is remedial, and should be favorably construed with reference to the evils that prompted it.

Lieber, Hermeneutics, Ham. ed. 159; *Potter, Dwarrr. Stat.* pp. 73, 231; *Wolcott v. Pond*, 19 Conn. 597; *Soby v. People*, 134 Ill. 66; *Rockford, R. I. & St. L. R. Co. v. Heflin*, 65 Ill. 366; *Rigg v. Willon*, 13 Ill. 15. 54 Am. Dec. 419; *Streeter v. People*, 69 Ill. 595; *Re Keymer*, 148 N. Y. 219, 35 L. R. A. 447; *Rogers v. Buffalo*, 123 N. Y. 173, 9 L. R. A. 579; *Chittenden v. Wurster*, 152 N. Y. 345, 37 L. R. A. 809; *United States v. Curtis*, 12 Fed. Rep. 824; *Ex parte Curtis*, 106 U. S. 871, 27 L. ed. 232.

The civil service act should not be rendered meaningless, or the city council permitted to defeat its purpose.

Soby v. People, 134 Ill. 66; *East St. Louis v. Renshaw*, 153 Ill. 491; *Hawes v. Chicago*, 158 Ill. 653, 30 L. R. A. 225; *Bloomington v. Chicago & A. R. Co.* 134 Ill. 451; *Tugman v. Chicago*, 78 Ill. 405; *Cairo v. Feuchter*, 159 Ill. 155; *Caldwell v. Alton*, 33 Ill. 416, 85 Am. Dec. 282; *Bloomington v. Wahl*, 46 Ill. 489; *Title Guarantee & T. Co. v. Chicago*, 162 Ill. 505; *Palmer v. Danville*, 154 Ill. 156; *Lake View v. Tate*, 180 Ill. 247, 6 L. R. A. 268; *Huesing v. Rock Island*, 128 Ill. 465.

Mandamus is the proper remedy.

Brokaw v. Blooming Twp. Highway Comrs. 130 Ill. 482; *People, Peair, v. Upper Alton School Dist. Bd. of Edu.* 127 Ill. 618; *Dement v. Rokker*, 126 Ill. 174; *People, German Ins. Co., v. Getzendaner*, 137 Ill. 284; *Pike County Comrs.* 41 L. R. A.

v. People, Metz, 11 Ill. 202; *Swift v. Klein*, 163 Ill. 269; *Chicago & A. R. Co. v. Suffern*, 129 Ill. 274.

Mr. Edwin Burritt Smith, also for petitioners:

The vital question presented by these important cases is this: Have municipal authorities power to nullify the civil service law? If what has been attempted in Chicago by the present city administration is sustained here, a single additional ordinance of a few lines will, as to that city, annul the act.

The rule is elementary that municipal authorities must act within the scope of their authority and in accord with the laws of the state.

Alton v. Aetna L. Ins. Co. 82 Ill. 45; *Agnew v. Brall*, 124 Ill. 312; *Huesing v. Rock Island*, 128 Ill. 465.

An ordinance must be reasonable, and if it is unreasonable, unjust, and oppressive the courts will hold it invalid and void. . . . The question of the reasonableness or unreasonableness of a municipal ordinance is one for the decision of the court, and in determining that question the court will have regard to all existing circumstances or contemporaneous conditions, the objects sought to be obtained, and the necessity or want of necessity for its adoption.

Hawes v. Chicago, 158 Ill. 653, 30 L. R. A. 225.

Ordinances, to be valid, must be reasonable, —not unfair and oppressive,—and must spring from an honest exercise of legislative discretion.

Bloomington v. Chicago & A. R. Co. 134 Ill. 451.

The real question upon this ordinance is whether the provision for the nomination by the mayor of the "officials" named and for their confirmation by the council is a valid exercise of municipal power, and operates to exclude them from the classified service.

The purpose accomplished by the ordinance —the object attained—may always be considered, indeed, must be, in determining the validity of the ordinance.

Smith v. McDowell, 148 Ill. 56, 22 L. R. A. 393.

The only possible construction of § 11, which is not destructive of the law, is strictly to confine the exemption of "heads of any principal department" to the heads of the principal departments of the city government as they existed when the act was adopted, and such few similar additional departments, if any, as may be reasonably created from time to time to meet the needs of a growing city.

In New York, where by the Constitution all appointments are required to be made according to merit, to be ascertained, so far as practicable, by competitive examination, it is a question of law whether competitive examination for appointment to a given position is practicable. Under this provision the supreme court of that state has announced that "competitive examination is the rule, and 'pass' examination and exemption from examination the exception."

Chittenden v. Wurster, 14 App. Div. 483.

Our statute assumes that competitive examination is practicable as to all positions in the

civil service, except those named in § 11 of the act.

Competitive examination is the rule; exemption from it is the exception. The presumption is that all positions are within the classified service, unless clearly excepted by § 11 of the act. The ordinance is unreasonable and void.

The merit system of appointment securely rests upon its direct advantage to the public service.

The act secures to all the right to compete for public employment, the right of freedom of contract with the largest employer of skilled and unskilled labor. No one has a right to be or remain employed by the public, but all have an equal right to compete for public employment. One of the main objects of the civil service law is to preserve this right.

This court has always jealously guarded the fundamental rights of citizenship in Illinois.

Bracerille Coal Co. v. People, 147 Ill. 66, 23 L. R. A. 840; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79.

These fundamental doctrines have been given full effect by this court in sustaining the right of citizens to compete for private employment. But all citizens, having the proper requirements of age, health, and moral character, have a right to compete for public as well as private employment. The spoils system everywhere denies and ignores this right.

The merit system is in entire accord with democratic institutions.

Nothing short of the merit system is really democratic. Nothing less than the open competition which it provides can secure to all citizens their equal right to compete for public employment.

An earnest desire for the general welfare would suggest a fair trial of this new system. A strict and full enforcement of the legislation already enacted in this state on that subject would be the only means of making the experiment.

Rogers v. Buffalo, 128 N. Y. 173, 9 L. R. A. 579.

Experience has demonstrated that competitive examinations have greatly benefited the public service.

People, McClelland, v. Roberts, 148 N. Y. 864, 51 L. R. A. 899; *Re Keymer*, 148 N. Y. 219, 35 L. R. A. 447.

The duty rests upon the legislature and the courts to enforce the civil service provision of the Constitution in their letter and spirit.

Chittenden v. Wurster, 152 N. Y. 345, 37 L. R. A. 809.

In public life, wherever the semi barbarous maxim, "To the victor belongs the spoils," is recognized, the discretion of the appointing officer, to be exercised only in the public interest, is a myth. He merely registers and legalizes appointments to office which have been made for him by the irresponsible chief or chiefs of his party machine.

Rogers v. Buffalo, 128 N. Y. 173, 9 L. R. A. 579.

Messrs. Thomas A. Moran, John W. Eila, and Levy Mayer, for respondents:

The demurrers in each case must be carried back to the petition.

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People, Hemstreet, v. Crabb, 156 Ill. 155.

In the case against the superintendent of police the petition does not make a case for relief against these respondents. No present necessity for relief is shown.

North v. University of Illinois Trustees, 137 Ill. 296; *People, Morgan, v. Curyea*, 16 Ill. 547; *Cristman v. Peck*, 90 Ill. 150.

There is not sufficient showing that the acts required to be done by these respondents fall within their legal duties.

People, Rinard, v. Mount Morris, 145 Ill. 427; *Swigert v. Hamilton County*, 130 Ill. 538; *People, Montony, v. Elgin*, 66 Ill. 507; *People, Phillips, v. Lueb*, 85 Ill. 484.

Future or contingent cases cannot be anticipated on mandamus. It is not a substitute for a mandatory injunction.

2 Spelling, Extraordinary Relief, § 1385.

The occasion for action by these respondents has not yet arrived, as shown by the petition. Civil Service Act, §§ 9, 10, 18.

This defect goes to the whole petition.

People, Harless, v. Yates, 40 Ill. 126; *High, Extr. Legal Rem.* 3d ed. § 440.

The petition is defective in form.

In the case against the commissioners the petition asks more than in any event it shows grounds for demanding, and is bad.

Reg. v. Twitty, 2 Salk. 434; *State, Rader, v. Union Twp. Committee*, 43 N. J. L. 518; *People, Poughkeepsie Highway Comrs., v. Dutchess County Supers.* 1 Hill, 50.

This being an original case in this court the rules of the common law apply.

People, Cunningham, v. Thistlewood, 103 Ill. 189; *High, Extr. Legal Rem.* 3d ed. § 450; *People, Hemstreet, v. Crabb*, 156 Ill. 155; *People, Rinard, v. Mount Morris*, 145 Ill. 427.

There is no doubt whatever as to the civil service law being constitutional.

The legislature has power to institute such a system of appointments to inferior municipal county or state offices and places of employment.

People, Dunham, v. Morgan, 90 Ill. 562; *Opinion of the Justices*, 138 Mass. 601, 145 Mass. 537.

The civil service law is not local or special legislation.

People, Grinnell, v. Hoffman, 116 Ill. 601, 56 Am. Rep. 793; *West Chicago Park Comrs. v. McMullen*, 184 Ill. 170, 10 L. R. A. 215; *Cummings v. Chicago*, 144 Ill. 566.

The power of investigation given to the commissioners, whether for general purposes under the act, or for purposes of removal from office, is not judicial in the sense that powers exercisable only by the courts are conferred on the commission.

Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545; *People, Grinnell, v. Hoffman*, 116 Ill. 601, 56 Am. Rep. 793; *Re Meador*, 1 Abb. (U. S.) 817; *Re Clark*, 65 Conn. 17, 28 L. R. A. 242; *State, Atty. Gen., v. Hawkins*, 44 Ohio St. 98; *Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 872; *Noyes v. Bybee*, 45 Conn. 882; *DeCamp v. Archibald*, 50 Ohio St. 625; *People, Steitz, v. Rice*, 57 Hun. 62; *People, Secretary of State, v. State Ins. Co.* 19 Mich. 895; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 87 Fed. Rep. 612, 2 L.

R. A. 289, 2 Inters. Com. Rep. 351; *Fong Yue Ting v. United States*, 149 U. S. 712, 37 L. ed. 912; *Donahue v. Will County*, 100 Ill. 106; *Stern v. People, St. Clair County*, 102 Ill. 550; *People, Dunham, v. Morgan*, 90 Ill. 562; *Cameron v. Parker*, 2 Okla. 277; *Fuller v. Ellis*, 98 Mich. 104; *McMaster v. Herald*, 56 Kan. 231.

The powers of the legislature are plenary, and no limitation appearing in the Constitution to the contrary, all agencies necessary to carry out the administration of the law may be established.

People, Peoria County, v. Hill, 163 Ill. 186, 38 L. R. A. 634; *Interstate Commerce Commission v. Brimson*, 154 U. S. 476, 38 L. ed. 1057, 4 Inters. Com. Rep. 545; *Re Gross*, 78 Fed. Rep. 107; *Re Chapman*, 166 U. S. 661, 41 L. ed. 1154; *Re Meador*, 1 Abb. (U. S.) 317; *Stunwood v. Green*, 2 Abb. (U. S.) 184; *People, Steitz, v. Rice*, 57 Hun. 62; *Re Llewellyn*, 2 Pa. Dist. R. 631; *Re Superintendent of Poor*, 6 App. Div. 144; *Re Lippman*, 8 Ben. 95.

There is no infringement of the right of trial by jury in the proceeding before a circuit court to compel the giving of testimony. That is a purely statutory proceeding, civil in its nature.

Re Strouse, 1 Sawy. 605; *Interstate Commerce Commission v. Brimson*, 154 U. S. 476, 38 L. ed. 1057, 4 Inters. Com. Rep. 545; *Ward v. Farwell*, 97 Ill. 612; *People, Peoria County, v. Hill*, 163 Ill. 186, 38 L. R. A. 634.

The general legislative construction of the constitutional question involved is in favor of the power, acts establishing it being common in all the states.

People, Steitz, v. Rice, 57 Hun. 62; *Re Superintendent of Poor*, 6 App. Div. 144; *Re Clark*, 65 Conn. 17, 28 L. R. A. 242; *Opinion of the Justices*, 138 Mass. 601; *Covington v. East St. Louis*, 78 Ill. 548; *Woods v. Gary*, 25 Wash. L. Rep. 591.

Mr. Charles S. Thornton for respondent Joseph Kipley.

Magruder, J., delivered the opinion of the court:

1. The civil service commissioners, who are respondents in this case, do not set up in their answer the unconstitutionality of the civil service act, nor do they adopt that part of the answer of the respondent Kipley, the superintendent of police, which attacks the constitutionality of the law. But the respondent Kipley, in his answer, expressly alleges that the act is unconstitutional, and relies upon its unconstitutionality as a defense to the matters and things set up in the petition. By the demurrer filed by the petitioner to the answer of Kipley, the question of the constitutionality of the law is directly raised. The plea filed on July 10, 1897, setting up the ordinance of June 28, 1897, is a plea *puis darrein continuance*. That plea relies upon the ordinance of June 28, 1897, as a defense, and, under the technical rules applicable to such a plea, it may be that the defenses set up in the answer of Kipley are superseded, and the substantive averments of the petition confessed. It has been held that, where a plea *puis darrein continuance* is filed, everything is confessed except the matter contested by the plea. *East St. Louis v. Renshaw*, 153 Ill. 491. In this view it would seem to follow that the question of the constitutionality of the

law, as raised in the answer of Kipley, has been waived by the filing of the plea *puis*. Counsel for the respondent Kipley insists that, in an original proceeding by mandamus in this court, the question of the constitutionality of the act can be raised at any time before the issuance of the peremptory writ, irrespective of the filing of the plea *puis darrein continuance*. He contends that the court will not in such a proceeding enforce by mandamus an unconstitutional law, if, at any time in the progress of the proceedings, such unconstitutionality is made apparent, and is brought to the attention of the court. This contention receives some support from the following remark made by this court in *People, Rindard, v. Mount Morris*, 145 Ill. 427: "It has been held that defects in substance in the petition may be taken advantage of at any time before granting the peremptory writ." Without determining, however, whether the contention thus made by counsel is absolutely correct or not, we deem it proper to dispose of the question of the constitutionality of the act, in view of the fact that the counsel for the respondent Kipley furnishes us with an elaborate argument against its constitutionality, and the petitioner and the respondents who are civil service commissioners present equally elaborate arguments in favor of its constitutionality. The subject is thus urged upon our attention by all the parties to this controversy. The civil service act, passed by the legislature of this state on March 20, 1895, is not the first law of its kind which has appeared in this country. Such a law has been passed by the Congress of the United States to be applied to the civil service under the Federal government. Statutes of the same kind have also been adopted in the states of Massachusetts and New York. The civil service law, which was in force in the state of New York for more than ten years before the year 1894, had so commended itself to popular approval, and had been so beneficent in its results, that its underlying principle was embodied in the new or amended and revised Constitution of that state, adopted by the people in 1894, and which went into effect on January 1, 1895. The provision upon this subject in the New York Constitution of 1894 is as follows: "Appointments and promotions in the civil service of the state and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness, to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive. . . . Laws shall be made to provide for the enforcement of this section." Const. art. 5, § 9. The evils sought to be remedied by legislation of this character are well known and well understood. These evils are such as grow out of what is generally called "the spoils system" in the matter of appointments to public office. This system rests upon what Mr. Justice Peckham, now of the Supreme Court of the United States, then a member of the court of appeals of the state of New York, speaking for the latter court in *Rogers v. Buffalo*, 123 N. Y. 173, 9 L. R. A. 579, calls "the semibarbarous maxim that to the victors belong the spoils." Under the system thus designated as "the spoils system," party service and party fealty are made the tests for appointments to office. Wherever this system

prevails, political work done by the applicant, and his supposed power to do more, are regarded as the chief reasons for his appointment to office. Public office is thus made to be the reward for political work. All the offices are "parceled out by the chiefs of the victorious party to their faithful followers in recognition of past political services or in expectation of future support of the same nature. Possession of office, under such a system, is to be the reward of party fidelity and party service." *Rogers v. Buffalo*, 128 N. Y. 178, 9 L. R. A. 579. Where an appointment is made under the system in question, the officer making it is apt to ignore any sense of personal or official responsibility to the people, and to substitute in its stead a feeling of responsibility to his party only. The appointments to offices are such as the leading men therein choose to ask for. *Rogers v. Buffalo*, 128 N. Y. 178, 9 L. R. A. 579. Where civil service laws have been adopted, they have been so adopted for the purpose of doing away with the evils which necessarily result from "the spoils system." Those evils have been fitly characterized as inefficiency, extravagance, the interruption of public business by place hunters, corruption of the electoral franchise, and political assessments. A distinguished writer on the Constitutional History of the United States has spoken of the maxim, "To the victors belong the spoils," as being "an inviolable principle of American politicians," and he says: "It is owing only to the astonishing vitality of the people of the United States, and to the altogether unsurpassed and unsurpassable favor of their natural conditions, that the state has not succumbed under the onerous burden of the curse." 2 Von Holst, *Const. Hist. of U. S.* 26. To do away with the onerous burden of this curse in the cities of Illinois, the act of March 20, 1895, was passed by the legislature of this state. The foundation principles of the act are that appointments to municipal offices or employments must be made according to merit and fitness, to be ascertained by competitive examinations, free to all, and that promotions from lower to higher grades in the public service must be made upon the basis of merit. That this is so will appear from the examination of the various provisions of the act. Section 8 of the act provides for the classification of all the offices and places of employment in any city which has adopted the act, with reference to the examinations therein provided for, with certain exceptions, and that the offices and places, so classified by the civil service commission, shall constitute the classified civil service of the city. Section 6 provides that all applicants for offices or places in such classified service, with certain exceptions, shall be subjected to examination, which shall be public, competitive, and free to all citizens of the United States, with specified limitations as to residence, age, health, habits, and moral character; that such examinations shall be practical in their character, and shall relate to those matters which will fairly test the relative capacity of the persons examined to discharge the duties of the positions to which they seek to be appointed, and shall include tests of physical qualifications and health, and, when appropriate, of manual skill; that no questions in any examination

shall relate to political or religious opinions or affiliations. Section 8 provides that from these examinations the commission shall prepare a register for each grade or class of positions, in the classified service of the city, of the persons whose general average standing, upon examination for such grade or class, is not less than the minimum fixed by the rules of such commission, and who are otherwise eligible; and that such persons shall take rank upon the register as candidates in the order of their relative excellence as determined by examination, without reference to priority of time of examination. Section 9 provides that the commission shall, by its rules, provide for promotions in such classified service on the basis of ascertained merit and seniority in service and examination, and shall provide, "in all cases, where it is practicable," that vacancies shall be filled by promotion; that all examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examination; that it shall be the duty of the commission to submit to the appointing power the names of not more than three applicants for each promotion having the highest rating. Section 10 provides that "the head of the department" or office, in which a position classified under this act is to be filled, shall notify said commission of that fact, and said commission shall certify to the appointing officer the name and address of the candidate standing highest upon the register for the class or grade to which said position belongs, with a certain exception in regard to laborers; that the appointing officer shall notify the commission of each position to be filled separately, and shall fill such place by the appointment of the person certified to him by said commissioner therefor, etc. Section 34 provides that any person who shall wilfully, or through culpable negligence, violate any of the provisions of this act, or any rule, promulgated in accordance with the provisions thereof, shall be guilty of a misdemeanor, and shall, upon conviction thereof, be punished by a fine of not less than \$50, and not exceeding \$1,000, or by imprisonment in the county jail for a term not exceeding six months, or both such fine and imprisonment, in the discretion of the court.

In 1884 the state of Massachusetts passed a civil service act, whose general provisions are substantially the same as those of the Illinois act now under consideration. The supreme court of Massachusetts, being requested by the house of representatives of that state to give their opinion upon the constitutionality of certain provisions of the act, held that the legislature has the constitutional right to provide for the appointment of civil service commissioners, and to delegate to them the power to make rules, not inconsistent with existing laws, to guide and control their discretion, and the discretion of the officers of the cities in whom the appointing power is vested; that the duty of determining and ascertaining the qualifications of such officers and servants cannot be performed directly by the legislature, but must be delegated to certain officers or agents; that it is not a delegation of power to enact laws, but merely a delegation of admin-

istrative powers and duties; that there was no provision of the Constitution which prevented the legislature from enacting that such rules, when duly made, should be binding upon the officers and citizens to whom they apply, and that they might be enforced by suitable penalties; that the power of the legislature to make or to authorize local laws for the administration of local affairs was beyond question. *Opinion of the Justices*, 138 Mass. 601.

In 1883, the legislature of the state of New York passed a civil service law which is similar in most of its features to the Illinois act. In *Rogers v. Buffalo*, 123 N. Y. 173, 9 L. R. A. 579, it was held that the provision of the act which creates a board of commissioners consisting of two or more persons, and which provides that not more than a certain proportion shall be taken from one party, does not amount to an arbitrary exclusion from office, or to a general regulation requiring qualifications not mentioned in the state Constitution, and is not unconstitutional; and that a provision therein which required an applicant for appointment to a position in a public office to show his fitness therefor was not an illegal test, within the meaning of the Constitution. In the course of the opinion delivered by Mr. Justice Peckham in the latter case he says: "Looking at it as a matter of common sense, we are quite sure that the framers of our organic law never intended to oppose a constitutional barrier to the right of the people through their legislature to enact laws which would have for their sole object the possession of fit and proper qualifications for the performance of the duties of a public office on the part of him who desired to be appointed to such office. So long as the means adopted to accomplish such end are appropriate therefor, they must be within the legislative power. The idea cannot be entertained for one moment that an intelligent people would ever consent to so bind themselves with constitutional restrictions on the power of their own representatives as to prevent the adoption of any means by which to secure, if possible, honest and intelligent service in public office. . . . Statutes looking only to the purpose of ascertaining whether candidates for an appointive office are possessed of those qualifications which are necessary for a fit and intelligent discharge of the duties pertaining to such office are not dangerous in their nature, and in their execution they are not liable to abuse in any manner involving the liberties of the people."

The Illinois act contains a similar provision to that in the New York act, namely, that not more than two members of the civil service commission shall, at the time of appointment, be members of the same political party. Section 31 of the Illinois act provides that no comptroller, or other auditing officer of a city which has adopted the act, shall approve the payment of or be in any manner concerned in paying, any salary or wages to any person for services as an officer or employee of such city, unless such person is occupying an office or place of employment according to the provisions of law, and is entitled to payment therefor. Section 32 provides that no paymaster, treasurer, or other officer

or agent of a city which has adopted the act shall wilfully pay, or be in any manner concerned in paying, any person any salary or wages for services, as an officer or employee of such city, unless such person is occupying an office or place of employment according to the provisions of law, and is entitled to payment therefor. The New York act provided that clerks and other subordinates in the civil service of the state should be appointed or selected from lists produced, as therein provided, after competitive examination, and that it should be unlawful for the comptroller to pay the compensation of any clerk in the civil service who had not been appointed pursuant to the provisions of the law, and whose name had not been certified to him by the civil service commission. In *People, McClelland, v. Roberts*, 148 N. Y. 360, 81 L. R. A. 399, the facts showed that the relator was appointed to a certain position without having passed the civil service examination, and that his name had never been certified to the comptroller by the civil service commission, and that for that reason the comptroller refused to pay the claim. It was there held that the relator was not entitled to a mandamus to compel the comptroller to pay him the salary attached to such position, in the absence of a certificate from the civil service commission that he had been duly appointed pursuant to the civil service act; and the act was there held to be constitutional, the court saying: "The power of the legislature to enact the law, as it appears on the statute book, has never been doubted or questioned." Again, in *Chittenden v. Wurster*, 153 N. Y. 845, 87 L. R. A. 809, which was an action brought by taxpayers of the city of Brooklyn to enjoin the fiscal officers of the city from paying the salaries earned by them to certain employees, who were appointed to their positions without competitive examinations, it was held that the New York act, with the exception of a provision which exempted certain soldiers and sailors from competitive examination where the compensation did not exceed \$4 per day, was not repugnant to the Constitution of the state. See also *Peck v. Bolknap*, 130 N. Y. 394; *Re Keymer*, 148 N. Y. 219, 85 L. R. A. 447.

The act passed by the legislature of Illinois on March 20, 1895, is not unconstitutional in requiring examinations as therein provided for, as tests for appointments to public office, nor in requiring promotions to be made in the manner therein specified, nor in attaching a penalty to the violation of the provisions of the act. The act does not delegate legislative power to the civil service commissioners by authorizing them to make the rules therein provided for. In this state, when the general assembly creates a municipal government, it has the power to provide the manner of filling the offices of such government. The legislature may select any means for the administration of the municipal government which it thinks best adapted to that end. It may provide for the election of municipal officers by the people, or may authorize any officers or persons to fill the offices by appointment. *People, Dunham, v. Morgan*, 90 Ill. 558. It has therefore the right to enact a law which provides that appointments to mu-

municipal offices or positions shall be made according to merit and fitness, and that such merit and fitness must be ascertained by competitive examination. In most instances, before the passage of the civil service act, the municipal officers, having the power to make appointments to office, removed their appointees at their own pleasure. It is certainly not a violation of the organic law to require them to conform to and obey regulations which make merit and fitness the necessary qualifications for office.

It is contended, however, by counsel for the respondent Kipley, that the act is unconstitutional and void upon the alleged ground that it delegates to the civil service commissioners the exercise of judicial functions. This contention rests upon the character of the provisions contained in §§ 12, 14, and 38 of the act. Section 12 provides that no officer or employee in the classified civil service of any city, who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense; that such charges shall be investigated by or before said civil service commission, or by or before some officer or board appointed by said commission to conduct such investigation; that the finding and decision of such commission or investigating officer or board, when approved by said commission, shall be forthwith enforced by such officer; that, in the course of an investigation of charges, each member of the commission, and of any board so appointed by it, and any officer so appointed, shall have the power to administer oaths, and shall have power to secure by its subpoena both the attendance and testimony of witnesses and the production of books and papers relevant to such investigation. Section 14 provides that the commission shall investigate the enforcement of the act and of its rules, and the action of the examiners therein provided for, and the conduct and action of the appointees in the classified service in its city, and may inquire as to the nature, tenure, and compensation of all offices and places in the public service thereof, add that, in the course of such investigations, each commissioner shall have power to administer oaths, and said commission shall have the power to secure by its subpoena both the attendance and testimony of witnesses and the production of books and papers relevant to such investigations. Section 38 provides that any person who shall be served with a subpoena to appear and testify or to produce books and papers, etc., under the orders of the commission, in the course of such investigations above specified, and who shall refuse or neglect to appear or to testify or to produce books and papers relevant to said investigation, as commanded in such subpoena, shall be guilty of a misdemeanor, and shall, on conviction, be punished as provided in § 34, which has already been referred to; that any circuit court of this state, or any judge thereof, either in term time or vacation upon application of any such commissioner or officer or board, may, in his discretion, compel the attendance of witnesses, the production of books and papers, and giving of testimony before the com-

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mission, etc., by attachment for contempt or otherwise, in the same manner as the production of evidence may be compelled before said court.

We regard the question of the constitutionality of the act, so far as its constitutionality is attacked upon the ground that there is a supposed delegation of judicial functions to the civil service commissioners, as settled by the case of *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 88 L. ed. 1047, 4 Inters. Com. Rep. 545. The 12th section of the Interstate Commerce Act passed by Congress provided (36 Stat. at L. 743, chap. 128) that the interstate commerce commission should have power to require, by subpoena, the attendance and testimony of witnesses, and the production of books, etc., relating to any matter under investigation; that in case of disobedience to a subpoena the commission might invoke the aid of any circuit court of the United States in requiring the attendance and testimony of witnesses and the production of books and papers and documents under the provisions of said section; that any of the circuit courts of the United States, within the jurisdiction of which such inquiry was carried on, might, in case of refusal to obey a subpoena issued to any common carrier, subject to the provisions of the act, or other persons, issue an order requiring such common carrier or other person to appear before said commission and produce books and papers, if so ordered, and give evidence touching the matter in question; and that any failure to obey such order of the court might be punished by such court as a contempt thereof. In the *Brimson Case*, 154 U. S. 447, 88 L. ed. 1047, 4 Inters. Com. Rep. 545, it was held that the provisions of said 12th section, as above set forth, were not in conflict with the Constitution of the United States; that the party subpoenaed to testify or to produce books and papers was bound to obey the subpoena if the testimony sought, and the books and papers called for, related to a matter under investigation, which the commission was legally entitled to investigate. The Constitution of the United States provides that "the judicial power shall extend to all cases in law and equity, arising under the Constitution, the laws of the United States and treaties made, or which shall be made under their authority. . . . to controversies to which the United States shall be a party," etc. Const. art. 3, § 2. In that case the Supreme Court of the United States held that the issue made before the circuit court upon the application of the commission for an order to compel the giving of testimony or the production of books and papers was a "case" or "controversy," within the meaning of the Federal Constitution, which authorized the circuit court to act, and that the judgment of the circuit court rendered in pursuance of such application was none the less judicial in its character because the effect of it was to aid an administrative body in the performance of the duties legally imposed upon it by Congress in execution of a power granted by the Constitution. As we understand the *Brimson Case*, it also holds that where an act of Congress made the refusal of a witness, duly summoned, to appear and testify before the commission in respect to a mat-

ter rightfully committed to that body for examination, an offense against the United States, punishable by fine or imprisonment or both, a criminal prosecution or a proceeding by information could be instituted against the party who had committed such offense. The Constitution of Illinois (art. 6, § 12) provides that "the circuit courts shall have original jurisdiction of all causes in law and equity," etc. In the civil service act the commission is authorized to subpoena witnesses to testify and to produce books and papers in the investigation of a matter which is clearly within its power to investigate, for the reasons already stated. This being so, upon the refusal of the witness to obey the subpoena the application of the commission to the circuit court for an order requiring such persons so to appear before the commission and give evidence or produce books and papers would constitute such a case as would authorize the circuit court to act. The judicial function is performed by the court, and not by the commission. The commission is not authorized to punish the party for contempt, but the circuit court, upon the application of the commission, makes the order to produce the papers, and, upon failure to obey the order, inflicts the punishment as for a contempt. There is here no delegation of the judicial functions to the commission, but simply a provision for the exercise of judicial functions by the circuit court. The views here advanced do not conflict with the decision of this court in *Puterbaugh v. Smith*, 181 Ill. 199, which latter case was decided before this question was passed upon by the Supreme Court of the United States in *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545. It was held in the *Puterbaugh Case* that so much of a certain act, entitled "Evidence," as authorized a judge in vacation to punish in a summary manner, by fine and imprisonment, or fine or imprisonment, a person who should refuse to obey a subpoena of a notary public to appear and have his deposition taken, or to subscribe his name to a deposition, was unconstitutional; but the decision in that case was placed upon the ground that the witness there merely acted in contempt of the notary's authority, and not in contempt of the authority of the circuit court. Here, however, the civil service act does not provide for punishment of the party for failing to obey the subpoena of the commission, but for failing to obey the order made by the circuit court. When the application is made by the commission or commissioners, the court is authorized to compel the attendance of witnesses, by attachment for contempt or otherwise, "in the same manner as the production of evidence may be compelled before said court." The orderly course of the proceeding would require that an order should be made requiring the witness to testify, and that it should appear that the witness refused to obey said order, before the punishment for contempt could be inflicted upon him. The phraseology of § 83 involves the making of such order as a preliminary step before the punishment is inflicted. We are of the opinion that the act is not unconstitutional as delegating judicial power to the commission.

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But, even if the provision authorizing the commission to make application to the circuit court in the manner stated was unconstitutional, it would not necessarily follow that the whole act should fall because of such unconstitutional provision. Where one provision in an act is in conflict with the Constitution, but is so independent of other provisions that without it the latter are complete, and fully capable of execution, the act will be construed the same as if the void part had never been inserted. *Dupee v. Swigert*, 127 Ill. 494.

It is claimed by counsel for the respondent Kipley that the law is unconstitutional as violating those sections of the Constitution which secure the right of trial by jury. The right of trial by jury is not violated by the provisions of the civil service act which provide for the summoning of witnesses and the requiring of such witnesses to testify and to produce books, papers, etc., and which further provide that, in the event of their failure to obey the order of the court in this regard, they shall be punished for contempt. The issue presented by these provisions is not one for the determination of the jury. It is an issue of law, exclusively, and not of fact. In matters of contempt a jury is not required by due process of law. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545; *Re Clark*, 65 Conn. 17, 28 L. R. A. 242.

Counsel also contends that § 12, which provides for the trial of charges against appointees, violates the constitutional right of trial by jury. This is said to be so upon the alleged ground that the office from which the officer or employee is to be removed or discharged in case the charges presented against him are sustained is, with its attending emoluments, the property of the officeholder, and that no man can be deprived of his property without a trial by a jury of his peers. This position is wholly untenable. A public office is not property, nor are the prospective fees of an office the property of its incumbent. An office is a mere right to exercise a public function or employment. It is not the subject of sale, purchase, or encumbrance. The term "office" implies a delegation of a portion of the sovereign power of the government to the person filling the office. Its duties are to be performed for the benefit of the public, and in the public interest. 19 Am. & Eng. Enc. Law, pp. 881, 882. In *Donahue v. Will County*, 100 Ill. 94, it was held that a law which authorizes county boards to remove county treasurers from office for certain violations of their duties was not unconstitutional; that the removal of an official from office was not a judicial act, and in that case could be performed by the county board. In the *Donahue Case*, 100 Ill. 94, the contention that, under the constitutional provision prohibiting any person to be deprived of his property without process of law, a county treasurer could only be deprived of his office by a trial and judgment in a court of law, was held to be wholly untenable. We there said (p. 103): "It is impossible to conceive how, under our form of government, a person can own, or have a title to, a governmental office. Offices are created for the ad-

administration of public affairs. When a person is inducted into an office, he thereby becomes empowered to exercise its powers and perform its duties, not for his, but for the public benefit. It would be a misnomer and a perversion of terms to say that an incumbent owned an office, or had any title to it." In *State, Atty. Gen., v. Hawkins*, 44 Ohio St. 98, the supreme court of Ohio said: "The incumbent of an office has not, under our system of government, any property in it. His right to exercise it is not based upon any contract or grant. It is conferred on him as a public trust to be exercised for the benefit of the public." If the removal of a county official, for cause does not involve the exercise of judicial power, then certainly the removal of a municipal officer is not the exercise of judicial power. *State, Atty. Gen., v. Hawkins*, 44 Ohio St. 98. The legislature has the power to control the municipalities created by it. Such municipalities must look to the state for such charters of government as the legislature shall see fit to provide; and while they have a right to manage their own local concerns and choose their own administrative and police officers, yet this right is subject to such exceptions as the legislative power of the state may see fit to make. Cooley, *Const. Lim.* 6th ed. pp. 208 (notes), 227, 231. Therefore the legislature may direct how municipal officers shall be elected or appointed by the cities and villages in the state, and how such officers may be removed. Moreover, the provisions of the civil service act for the removal or discharge of officers or employees upon written charges are purely statutory provisions. The constitutional provision that "the right of trial by jury, as heretofore enjoyed, shall remain inviolate," was not intended to introduce the right of trial by jury into special, summary jurisdictions, unknown to the common law, and not providing for that mode of trial. *People Peoria County, v. Hill*, 163 Ill. 186, 36 L. R. A. 634.

It is further claimed that the law is unconstitutional as being special legislation. This contention, also, is without force, as the law itself provides for its operation only in those cities which by a vote of the people may adopt it. Laws of this character are not obnoxious to the constitutional inhibition against special legislation. *People, Grinnell, v. Hoffman*, 116 Ill. 601, 56 Am. Rep. 798. The present law has been adopted by the people of the city of Chicago.

Counsel for the respondent Kiple also contends that § 35 of the act is unconstitutional. Section 35 provides that "if any person shall be convicted under the next preceding section, any public office or place of public employment, which such person may hold, shall, by force of such conviction, be rendered vacant, and such person shall be incapable of holding any office or place of public employment for the period of five years from the date of such conviction." We are inclined to agree with counsel that the portion of this section which makes the person therein referred to incapable of holding any office or place of public employment for the period of five years from the date of his conviction is unconstitutional. Section 8 of article 2 of the Constitution of this state provides that "no person shall

be held to answer for a criminal offense unless on indictment of a grand jury, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary," etc. The act seems to contemplate prosecutions by information for the violations of its provisions. No person can be held to answer for any crime, for which an infamous punishment may be imposed by the court, without presentment or indictment by a grand jury. A crime which subjects the party to a disqualification to hold office in case he is convicted of such crime is an infamous crime. Disqualification from holding office, if inflicted as a punishment for crime, is an infamous punishment. *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89. Here § 35 of the act provides for punishing the party guilty of violating its provisions by disqualifying him from holding office. This is not a punishment by fine or imprisonment otherwise than in the penitentiary, and is in addition to such punishment by fine or imprisonment in the county jail, or by both fine and imprisonment, as is specified in § 34. So far, therefore, as the act provides for the infliction of punishment by a disqualification to hold office, where the prosecution is by information, and not by indictment, it is in violation of § 8 of article 2 of the Constitution. It is true that § 35 provides that such disqualification shall only be for five years from the date of the conviction, but, as counsel have furnished us with no authority in favor of the position that a limitation of the disqualification to a period of years is different from a disqualification where no such limitation had been fixed, and has presented us, in the briefs, with no reasons or arguments upon the subject, we assume that the disqualification for a limited period is as much an infamous punishment as though it was not subject to any such limitation. But the obnoxious feature which thus exists in § 35 may be eliminated from the act without invalidating its other provisions. With the exception thus indicated, our conclusion is that the act is not unconstitutional in any of the respects heretofore mentioned, and which have been called to our attention by counsel for the respondent Kiple.

2. The demurrers of the petitioner to the answers and plea raise a further question as to the proper construction of certain provisions of the civil service act. Section 8 of the act provides that "said commissioners shall classify all the officers and places of employment in such city with reference to the examinations hereinafter provided for, except those offices and places mentioned in § 11 of this act. The officers and places so classified by the commission shall constitute the classified civil service of such city, and no appointments to any of such offices or places shall be made except under and according to the rules hereinafter mentioned." Section 6 provides that "all applicants for offices or places in said classified service, except those mentioned in § 11, shall be subjected to examination," etc. The plain meaning of these sections is that the offices and places mentioned in § 11 are not to be classified under the act, and are excepted out of the operation of the provisions of the act. Section 11, which thus designates the officers excepted from the classified service, is as fol-

lows: "Officers who are elected by the people, or who are elected by the city council pursuant to the city charter, or whose appointment is subject to confirmation by the city council, judges, and clerks of election, members of any board of education, the superintendent and teachers of schools, heads of any principal department of the city, members of the law department, and one private secretary of the mayor, shall not be included in such classified service." The present controversy arises out of a difference of opinion between the petitioner and the respondents as to the meaning of the two clauses, "whose appointment is subject to confirmation by the city council," and "heads of any principal department of the city." Under ordinances existing at the time of the passage of the civil service act, certain departments of the municipal government of the city of Chicago, known as the "Department of Police," the "Fire Department," the "Department of Health," the "Department of Public Works," the "Department of Buildings," and the "Department of Law," were in existence and in operation, having been created and established by such ordinances. By the terms of such ordinances, and in pursuance of a practice which had existed for many years, each of these departments had one head, and each of these heads was appointed by the mayor, by and with the advice and consent of the city council. Thus, the ordinance in regard to the police provides as follows: "there is hereby created the office of superintendent of police, who shall be the head of said department of police." The fire ordinance provides as follows: "There is hereby created the office of fire-marshal, who shall be the head of the fire department." The health ordinance provides as follows: "There is hereby created the office of commissioner of health, who shall be the head of said department of health." The ordinance in regard to public works provides as follows: "There is hereby created the office of commissioner of public works, who shall be the head of said department of public works." The ordinance in regard to buildings provides as follows: "There is hereby created the office of commissioner of buildings, who shall be the head of the said department of buildings." The ordinance in regard to law provides as follows: "There is hereby created the office of corporation counsel, who shall be the head of the law department." These ordinances further provide that there shall be certain subordinates or assistants for each of these departments, who are specifically named in the ordinance. By the terms of these ordinances, all of these subordinates or assistants, with a few exceptions, to be hereinafter mentioned, were appointed in each department, by the head of that department, either subject to the approval and consent of the mayor, or without such approval or consent. Thus, the ordinance in regard to police provides as follows: "There is hereby established an executive department of the municipal government of the city of Chicago, which shall be known as the Department of Police, and shall embrace the superintendent of police, an assistant superintendent of police, a secretary of the department of police, a secretary to said super-

police division, one captain of police for each police district, and such number of lieutenants, sergeants, detective sergeants, sergeants of detectives, deak sergeants, patrol men, clerks, photographers, telegraphers, and veterinary surgeons as has been, or may be, prescribed by ordinances." The contention of the petitioner is that the expression, "heads of any principal department of the city," as those words are used in § 11, means when the act is applied to the city of Chicago, the following officers, to wit: The superintendent of police, the fire marshal, the commissioner of health, the commissioner of public works, the commissioner of buildings, and the corporation counsel. On the contrary, the respondents who are civil service commissioners contend that the words, "heads of any principal department of the city" mean, not only the said officials who are designated as heads in the ordinances, but also certain subordinates or assistants named in the ordinances. For instance in the present case it is contended by the civil service commissioners that the assistant superintendent of police, the secretary of the department of police, and the inspectors of police must be regarded as heads of the police department. The respondent Kipley further contends that the captains of police shall be regarded as heads of the police department. The same contention is made in regard to certain of the subordinates and assistants in the other departments above named. Therefore the question which is to be determined in this branch of the case is this: What was the meaning of the legislature when it provided, in § 11, that "heads of any principal department of the city" should not be included in the classified service?

The practice which has prevailed under a Constitution or a statute for a long series of years, unchallenged and unquestioned, can be resorted to as affording strong evidence of the meaning of any phrase or term used in such Constitution or statute. *Burn v. People*, *Lafin*, 45 Ill. 397; *Opinion of the Justices*, 198 Mass. 601. In determining the meaning of a statute, a court will have regard to existing circumstances or contemporaneous conditions, and also to the objects sought to be obtained by the statute, and the necessity or want of necessity for its adoption. *Haves v. Chicago*, 158 Ill. 653, 30 L. R. A. 225. It is conceded by counsel on both sides, in their arguments, that the legislature passed the civil service act with full knowledge of the ordinances of the city of Chicago, which designated each of the officers already named as the head of each of the departments above mentioned. The opinion of the corporation counsel, which is made a part of the answer of the respondent Kipley, makes the following statement: "We find no difficulty in passing upon the question as to what are principal departments in the service of this city, as the ordinances of the city provide for such departments. They are the departments of public works, buildings, fire, health, and police." The respondents, who are civil service commissioners, by adopting the answer of the respondent Kipley, also adopted the statement as to what are the principal departments of the city. It is also admitted in the argument of counsel that the appoint-

is made subject to the approval of the city council. It is also conceded by counsel for the civil service commissioners that the word "heads," as used in § 11, should be given the meaning which it had at the time of the passage of the civil service act. The word "department" had a well understood meaning, and had been used in prior statutes, and in the city and village act itself, at the time when the civil service act was passed. Thus, in § 3 of article 7 of the city and village act the following words are used, to wit: "Neither the city council, nor the board of trustees, nor any department or officer of the corporation," etc. In § 17 of the same article, the city comptroller is authorized to require of all officers a statement of the condition and expenses of their respective offices or "departments." Section 2 of the act in regard to the police and firemen's relief fund provides that "the superintendent or chief officer of the police department, the fire marshal or chief officer of the fire department," and other officials, shall constitute the board therein named. So also, in the act of 1887, in regard to the police pension fund, § 2 speaks of the "superintendent or chief officer at the police department." 1 Starr & C. Anno. Stat. 2d ed. pp. 727, 731, 885, 838. There can be no doubt that the words as used in § 11 were intended by the legislature to refer to heads of the principal departments, as they existed under ordinances then in force. At that time there was no principal department of the city government in Chicago which had more than one head. Each department had a single head. Counsel say that, in the clause "heads of any principal department of the city," the word "heads" is plural, and the words "any department" are singular, and that, therefore, the legislature must have contemplated that there should be two or more heads in one department. In pursuance of this construction, it is then contended that certain subordinate officers in each department, such as the assistant superintendent of police, the secretary of the police department, each police inspector, and each captain of police, may be regarded as one of the heads of the department of police. If it be true that, when the civil service act was passed, each principal department had only one head, and if it be also true, as it is admitted, that the legislature had full knowledge of the ordinance giving one head to each principal department, then the legislature must have intended to refer to each single head of each principal department by the words used in § 11. If the legislature meant that only heads of a department should be excluded from the classified service, then, where a department had only one head, such single head would not be excluded. Such a construction cannot be accepted as correct. The intention evidently was that the head or heads of any principal department should be excepted. If there was only one head, such single head should be excepted; if there were two or more heads, they should be excepted. It might be that the legislature could or would create some department besides and outside of those existing at the time of the passage of the act which should con-

within the meaning of § 11. But, so far as the city of Chicago is concerned, the departments, at the time of the passage of the act, had each only one head, and therefore the words used in § 11 must refer to such heads as then existed. In § 10 immediately preceding § 11, the legislature three times makes use of the expression "the head of the department," or the "head of any department," making use of the singular number. Section 10 provides that "the head of the department," etc., shall notify the commission of a vacancy. Therein the head of the department is authorized, under certain circumstances, with the consent of the commission, to discharge a candidate. Therein, also, the head of any department is authorized, under certain circumstances, with the approval of the commission, to make a temporary appointment. Section 10 also refers to "the head of the department" as the appointing officer. This feature of § 10 corresponds with the ordinances referred to, which make "the head" of each one of the six departments above referred to the appointing officer of most of the subordinates in his department, with a certain limited number of exceptions. It cannot be that after the use, in § 10 of the expressions which refer to one single head of a department, the legislature intended a different meaning, by the use of the words contained in § 11. The expression there used is merely a pluralizing of the expression used in § 10, so as to convey the idea that, where there were several departments and one head in each department, there were heads of departments.

The construction contended for by counsel as to the meaning of the words "heads of any department of the city" would not only destroy and nullify the civil service act itself, but would lead to confusion and uncertainty in its interpretation. If the expression "heads of any principal department" is not to be interpreted to have the meaning given to it in the ordinances in force when the act was passed, what rule of interpretation is to be adopted in determining who are the heads of any principal department, and how many heads there shall be? Counsel say it must be determined who are heads by applying certain tests. It is said that, where an employee is authorized to exercise control in the absence of the chief officer of the department, such employee ought to be considered a head. There is nothing in the act which justifies the application of any such rule, in order to determine who are the heads. It is also said that where an employee has charge of the hiring and employing of a large number of men and the expenditure of large sums of money, and is to be appointed only with the mayor's concurrence, and whose position is next to that of the chief of the whole department, such an employee must be considered a head of the division or department under his supervision. There is nothing in the act which justifies the application of any such test as is thus indicated. It is also said, that where any employee has confidential and business relations with the chief officers in any branch of the city service, he is to be deemed a head. This test also is with-

referred to must be the heads of "any principal department," not the head of a division or a department under the supervision of a subordinate. The "principal" departments are limited in number, being either six departments, or seven departments if the department of finance is included; and each of such departments, as has already been stated, has only one head. If the construction contended for by counsel is correct, then, when § 10 authorizes "the head of the department" to notify the commission of a vacancy, which one of such heads is to give such notice? and why is not the direction that "the heads of the department" should give the notice, instead of a direction that "the head" thereof should give it? The construction thus contended for would prevent the fulfillment of the object contemplated by the act itself. If it be once held that there can be other "heads of any principal department" than those existing in the ordinances at the time the act was passed, then new "heads" may from time to time be created by the common council or the appointing officers; and every foreman who has a squad of men at work under him will be considered the head of a department. The object of the law is to provide for appointment to office upon the basis of merit and fitness; as ascertained by competitive examinations which are open and free to all. But if the doctrine is to prevail that new heads of any principal department may be created whenever the exigencies of politics or the demands of partisan service require it, appointments upon the basis of merit and fitness will soon cease to be made. In addition to this, the act contemplates that promotions shall be made from one grade of the civil service to another, upon the basis of ascertained merit and seniority in service and examination. If, however, every officer who has a number of subordinates under him is to be regarded as the head of a principal department, there can be no opportunity for promotion. If all are heads, and all thus occupy the highest grades, there will be no lower grades from which subordinates can rise by promotion. Thus, the intention of the legislature in passing the act to make both original appointments and subsequent promotions depend upon merit, and upon merit as ascertained by examinations, will be defeated. It is well settled that courts will construe an act of the legislature so as to give effect to the plain intention of the body, as embodied in the act. *Soby v. People*, 134 Ill. 66. In so far as the administration of the civil service act is dependent upon the action of the judicial department, "it is entitled to, and doubtless will receive a fair and liberal construction, not only according to its letter, but its true spirit and the general purpose of its enactment." *People, McClelland, v. Roberts*, 148 N. Y. 360, 31 L. R. A. 399.

But § 11 also says that officers "whose appointment is subject to confirmation by the city council" shall not be included in the classified service. Counsel say that the heads of the principal departments, as created in the ordinances already referred to, are officers whose appointment is subject to confirmation by the city council. It is therefore argued that, if the words "heads of any principal de-

partment of the city" refer only to the single heads already referred to, then § 11 is subject to the criticism of a mere repetition in the matter of the excepted class. The theory of counsel seems to be this: When § 11 said that officers whose appointment is subject to confirmation by the city council shall not be included in the classified service, it said thereby that the head of each principal department, as named in the ordinances, should not be included; and that, this being so, when it afterwards used the expression "heads of any principal department of the city," it merely repeated an exception which had been already made, if the construction contended for by the attorney general is correct. It is true that each head of each principal department comes under both designations in § 11, to wit, the designation "whose appointment is subject to confirmation by the city council," and also the designation "heads of any principal department of the city." But the same is true of several other officials mentioned in § 11. Thus, the section mentions judges and clerks of election. Judges and clerks of election are included in the previous expression, to wit, "officers . . . who are elected by the city council pursuant to the city charter." This is so because § 9 of article 4 of the city and village act provides that the city council shall appoint the judges and clerks of election. It may be said therefore, that the mention of judges and clerks of election in § 11 is a mere repetition of the designation of those officials, which had already been made under the designation of officers elected by the city council pursuant to the city charter. Section 11 mentions, as persons not included in the classified service, "members of any board of education." But "members of any board of education" are included in the previous designations of officers elected by the people, and of officers whose appointment is subject to confirmation by the city council. This is so because § 2 of article 6 of the school law provides that, in school districts having not over 100,000 inhabitants there shall be elected a board of education, while § 17 of that act provides that, in cities having more than 100,000 inhabitants the board of education shall be appointed by the mayor by and with the advice and consent of the common council. 3 Starr & C. Anno. Stat. 2d ed. pp. 3691, 3695. So, also, in reference to members of the law department as mentioned in § 11, the corporation counsel, who is the head of that department, is an official whose appointment is subject to confirmation by the city council. Section 11 designates certain officers with reference to the mode of their appointment, to wit, election by the people, or election by the city council, or appointment subject to confirmation by the city council. It then proceeds to designate certain officials, who may be selected by one or more of the three modes already specified. The fact, therefore, that the mention of "heads of any principal department of the city" is a repetition of a class previously designated, has no particular significance, except in the light of the views hereafter expressed upon that subject.

It is a well settled rule of construction that where there are two provisions, one of which

is general and designed to apply to cases generally, and the other is particular and relating to one subject, the particular provision must prevail, and must be treated as an exception to the general provision. *Dahnke v. People*, 168 Ill. 111, 39 L. R. A. 197. Section 8 provides that the commissioners shall classify all the offices and places of employment in the city with reference to the examinations provided for, except the offices and places mentioned in § 11; and further provides that no appointment to any of such offices or places shall be made, except under and according to the rules provided for in the act. When these words of § 8 are applied to § 11, § 11 means that all officers and employees of "any principal department of the city," except the "head" or "heads" thereof, shall be included in the classified service. This is a broad and general direction, but there is an exception to it. Wherever there is any officer whose appointment is subject to confirmation by the city council, provided the office filled by him had been created and was in existence when the act was passed, such officer is not to be included in the classified service, even though he be a subordinate in one of the principal departments of the city. The same is true if such officer is one elected by the people or elected by the city council. Thus, in the department of law the ordinance provides that that department shall embrace the corporation counsel, the city attorney, the prosecuting attorney, and such number of assistants and clerks as the city council may by ordinance see fit to prescribe and establish. The corporation counsel is made the head of the law department, but the city attorney is an officer who is elected by the people. He, therefore, is not included in the classified service. So, in the ordinance in regard to the department of health, it is provided that that department shall embrace the commissioner of health, the superintendent of police, and others. Although the commissioner of health is made the head of the department of health, yet as the superintendent of police is an official, whose appointment is made by the mayor subject to confirmation by the city council, the superintendent of police is an officer who is not included in the classified service. Still again, the ordinances create a department of finance, of which the city comptroller is made the head. It is provided that this department of finance shall embrace the city comptroller, the city treasurer, and others. But, as the city treasurer is an officer who is required by the statute to be elected by the people, he is not included in the classified service. We are inclined to the opinion that, if any member of any principal department of the city is an official whose appointment is made by the mayor subject to confirmation by the city council, he is not to be included in the classified service, notwithstanding he may not be made the head of the department. Thus it would appear that the two clauses, "officers whose appointment is subject to confirmation by the city council," and "heads of any principal department of the city," should be construed together, in order to make them consistent with each other.

It seems to be contended by counsel for the respondent Kipley that, inasmuch as officers

whose appointment is subject to confirmation by the city council are excepted from the operation of the act, the common council may by ordinance increase the number of officers so to be appointed, and thereby increase the number of exceptions under § 11. Accordingly the plea filed by the respondent Kipley sets up the ordinance of June 28, 1897, which is fully described in the statement of facts preceding this opinion. That ordinance requires that certain subordinate officers or employees in certain of the principal departments of the city government shall be "designated as heads of principal departments," as said term is used in § 11 of the civil service act, "and shall be nominated by the mayor and shall be confirmed by the city council." This ordinance was passed by the city council of Chicago after the present proceeding was commenced in this court, and after the petition and answers had been filed and demurred to. If it is a valid ordinance, and has the effect which it was intended to have, it will certainly nullify and make worthless the civil service act. Its passage is not defended or indorsed by the respondents who are civil service commissioners. We have held that ordinances passed by the common council must be reasonable in order to be valid, and that they must spring from an honest exercise of legislative discretion. *Bloomington v. Chicago & A. R. Co.* 184 Ill. 451; *Hawes v. Chicago*, 158 Ill. 658, 30 L. R. A. 225. The civil service law is binding as well upon the common council of the city as upon the other persons mentioned in the act. *Peck v. Belknap*, 180 N. Y. 394. The ordinance assumes to define the meaning of the words, "heads of any principal department of the city," as those words are used in the civil service act. The power to interpret and construe a statute, or to define the meaning of the terms therein, rests with the courts, and not with the legislature, and certainly not with a subordinate legislative body, like the common council of a city. 23 Am. & Eng. Enc. Law, p. 449. The ordinance does not create any new office or any new department, but simply provides that certain subordinate officials in departments already created shall be designated as heads of principal departments, and shall be appointed in a different manner from that in which existing ordinances require them to be appointed. Such an ordinance is invalid, as being beyond the power of the common council to pass it, in view of the provisions of the civil service act and of the city and village act. As has already been stated, §§ 8 and 11 of the civil service act provide, in effect, that all the subordinate officers and employees of any principal department of the city shall be embraced within the classified service. The ordinance of June 28 provides, in effect, that certain designated subordinates in the principal departments of the city government shall not be included in the classified service. The ordinance is therefore directly in the teeth of the statute.

This will further appear from a consideration of the meaning of §§ 2 and 3 of article 6 of the city and village act, as those sections bear upon, and have reference to, the ordinances hereinbefore mentioned, which existed at the time of the passage of the civil service

act. Section 2 of said article 6 provides that "the city council may, in its discretion, from time to time, by ordinance, passed by a vote of two thirds of all the aldermen elected, provide for the election by the legal voters of the city, or the appointment by the mayor with the approval of the city council, of a city collector, a city marshal, a city superintendent of streets, a corporation counsel, a city comptroller, or any or either of them, and such other officers as may by said council be deemed necessary or expedient. The city council may, by a like vote, by ordinance or resolution, to take effect at the end of the then fiscal year, discontinue any office so created, and devolve the duties thereof on any other city officer," etc. Section 3 provides that "all officers of any city, except where herein otherwise provided, shall be appointed by the mayor (and vacancies in all offices except the mayor and aldermen shall be filled by like appointment) by and with the advice and consent of the city council. The city council may, by ordinance not inconsistent with the provisions of this act, prescribe the duties and confine the powers of all such officers, together with the term of such office," etc. 1 Starr & C. Anno. Stat. 2d ed. pp. 721, 722. Said § 2 provides for the creation of certain offices by ordinance passed by a vote of two thirds of the aldermen elected. Section 2 gives the council power to provide, in the manner therein stated, for such other officers, than those specifically mentioned, as may by said council be deemed necessary or expedient. It thus provides for offices not specifically named in the section, and whose designation cannot be determined until the ordinance therein provided for is passed. In other words, the 2d section gives the common council power to provide in a certain way for the election or appointment of officers whose designation and duties are not mentioned in the statute, but whose designation and duties are to be fixed by ordinances to be subsequently passed. The object of the section cannot be accomplished without action on the part of the city council. Section 3 merely provides for the mode of appointing individuals to the offices created by § 2. The officers referred to in § 3 are the officers to be created by ordinance, as provided in § 2. For example, the common council of the city of Chicago, under the authority contained in § 2, provided for the appointment by the mayor, with the approval of the city council, of a superintendent of police. When the present mayor appointed the respondent Kipley to the position of superintendent of police, he appointed him under the authority contained in § 3. Section 2 creates the office; § 3 provides for the appointment of an individual to the office so created. The ordinance mentioned in § 2, creating the office, must be passed by a two thirds vote of the aldermen elected, but the confirmation provided for by § 3 may be accomplished by a majority vote.

From what has been said it is apparent that the words, "whose appointment is subject to confirmation by the city council," as used in § 11 of the civil service act, refer to officers whose appointment was subject to such confirmation at the time the civil service act went into force. The words used are "is subject,"

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not "may be subject" by some future action of the council. Section 11 refers, by the use of the words last quoted, to officers whose positions had then already been created by virtue of the power contained in § 2 of article 6 of the city and village act. It could not refer to officers whose positions might thereafter be created, because in that view there were no officers whose appointment was subject to confirmation by the city council. The appointment of an officer whose position has not yet been brought into being cannot be subject now and at the present time to confirmation by the city council. The words in § 11 refer to cases where the council had already acted under said § 2 of article 6. In the case at bar the city council of Chicago had already passed ordinances providing for the appointment by the mayor, subject to confirmation by the city council, of the heads of the fire, police, public works, buildings, health, and law departments. The appointments of these officials had been provided for when the act went into force, and they are referred to by the terms of § 11. They were then existing officials, and were made exempt from the operation of the civil service law. It is true that under § 2, the common council might discontinue an office created under § 2, where such an office was unnecessary, in order to devolve its duties upon some other officer.

But the common council had no right to pass an ordinance providing that subordinates in a department already created should be elevated to be the heads of such department. To hold that it had such right would be to hold that it could nullify the civil service act by making every person holding a position, however subordinate, an official whose appointment should be subject to confirmation by the city council, thereby taking his appointment out from the operation of the civil service act. To construe the act so as to permit such a result as this would be to construe it in opposition to the intention of its authors, and not with a view to carrying out such intention. The civil service act provides that all laws or parts of laws which are inconsistent with it, or with any of its provisions, were thereby repealed. Hence, any provision, either of the city and village act, or of any ordinance of the city, which provided for a different mode of appointment than that specified in the civil service act, was repealed, except so far as it might come within the exceptions named in § 11. It is to be noted that the words, "in all cases where it is practicable," are only used in the act in reference to the subject of promotion. The New York Constitution, and the civil service acts passed by the legislature of that state, provided that appointments and promotions in the civil service should be made according to merit and fitness, to be ascertained, "so far as practicable," by examinations. *People, McClelland, v. Roberts*, 148 N. Y. 860, 31 L. R. A. 399; *Chittenden v. Wurster*, 152 N. Y. 845, 37 L. R. A. 809. But in the Illinois civil service act this word "practicable" is not used in connection with the subject of examinations.

Our conclusion upon this branch of the case is that the assistant superintendent of police, inspectors of police, and captains of police, are not excepted from the operation of the civil

service law by the provisions of § 11, or by any other provision in the act. The same is true as to all positions in the other principal departments of the city government herein mentioned which are of a lower grade than the chiefs or heads of those departments, or which are subordinate to such chiefs or heads. This statement, however, is subject to this qualification, namely: That wherever, at the time the civil service act was passed, an office or place of appointment was one the appointment to which was to be made by the mayor subject to confirmation by the city council, it is within the exception named in § 11, and is excluded from the classified service.

3. Certain objections are made to the petition as a pleading. It is contended that the demurrer to the answers should be carried back to the petition. We do not regard the petition as defective in any essential particular. The right of mandamus lies to compel the performance of a public duty, or in the enforcement of a public right, and, in such case, no demand and refusal need be shown. *Brokaw v. Bloomington Twp. Highway Comrs.* 130 Ill. 483; *People, Peair, v. Upper Alton School Dist. Bd. of Edu.* 127 Ill. 613. The respondents who are made parties to the petition are the only necessary parties. *Dement v. Rokker*, 126 Ill. 174. The answers neither admit nor deny some of the averments in the petition. Wherever an averment of the petition, well pleaded, is not expressly denied in the answer, it must be taken to be true. *Chicago & A. R. Co. v. Suffern*, 129 Ill. 274. A petition for mandamus must set forth a clear right on the part of the relator to have the act performed. It must also show that it is the plain duty of the party against whom the remedy is sought to act in the premises. *People, Rinard, v. Mount Morris*, 145 Ill. 427; *People, Montony, v. Elgin*, 66 Ill. 507. We are of the opinion that in this case a clear right is shown on the part of the relator, and a clear duty on the part of the respondents. It was the duty, under the act of the respondent Kipley to notify the commissioners of vacancies that existed in his department under § 10 of the act, and it was the duty of the civil service commissioners to certify to him the names and addresses of the candidates to be appointed to fill the vacancies, in the manner prescribed in the act. Accordingly it is ordered that the writ of mandamus issue to the respondents, the one to give the notice, and the others to make the certification, as prayed in the petition.

Writ awarded.

Phillips, Ch. J., dissenting:

I do not concur in all that is said in this opinion nor in the judgment announced. The phrase, "heads of any principal department," would include more than a single official who is an officer provided for by the city and village act. Included in that phrase would be an employee who, in the absence of the chief officer, would, under his duties, have control of the department, as it also would include an

employee having charge of a distinct branch of service employing a large number of men. Any head of a division having duties to discharge which causes him to be directly responsible to the mayor or city council for the manner in which he supervises and cares for the service entrusted to him, and who has confidential and personal relations to the chief officer in such service, or to the mayor and city council, would, in my opinion, be included in the phrase, "heads of any principal department," as used in § 11 of the act, and not subject to classification, under § 3 of that act. In my opinion, the writ should not be awarded.

Boggs, J., dissenting:

I concur in the view that it was within the constitutional power of the general assembly to enact the "Act to Regulate the Civil Service of Cities," but join Mr. Chief Justice Phillips in dissenting to the conclusion that the law-making power intended that the phrase, "heads of any principal department of the city," incorporated by the general assembly in the 11th section, should be construed by the court to mean the "head" or chief officer only of such department. The appointment of the "head" or chief officer of "each principal department of the city" is subject to confirmation by the city council, and, the general assembly having declared by a prior phrase in the same section that "officers whose appointment is subject to confirmation" should be exempted from the operation of the act, it is not reasonably to be presumed or supposed the latter phrase was inserted merely as a repetition of the former, but that it was employed for the purpose of exempting from the effect of the act other officers than those included in the former exempting clauses. The construction given the phrase under consideration simply refuses to accord it any meaning or force whatever, and, in effect, expunges it from the act, for it is clear the section, as construed by the court, would be given the same effect if the phrase in question did not appear at all. The rejection of a portion of an act is only to be resorted to as a desperate and heroic remedy, necessary to be employed for the preservation of the act itself. It is a universal rule of construction, so frequently declared that the citation of authorities is superfluous, that the words of a statute of common use are to be taken in their natural, plain, obvious, and ordinary signification, "and that a plain, common-sense interpretation of such words is to be accepted, rather than a refined and technical grammatical construction." It must be conceded the meaning of the words "heads of a department" is not, in popular and common acceptance, at all a matter of doubt. It does not mean the "head" alone of the department, but the chief or principal governing officers thereof. The meaning of the word in this instance is the word itself, and there is no occasion to invoke the refinements of construction to defeat it.

Rehearing denied February 4, 1898.

KENTUCKY COURT OF APPEALS.

SUN INSURANCE OFFICE, *Appt.*,N. L. VARBLE, Receiver of Rassinier
Hotel & Wine Company.

(..... Ky.....)

1. **The partial destruction of a building is within the provision of Stat. § 2297,** that a mere agreement of a lessee to repair will not bind him to restore buildings destroyed by fire or other casualty.
2. **A provision of an insurance policy as to prorating** in case of loss of property covered by several policies controls another provision that the interest of a mortgagee or trustee shall not be invalidated by any act or neglect of the mortgagor or owner of the property.
3. **Insurance of a lessor's interest** in the premises on which the lessee also had procured insurance for the lessor's benefit as his lease required him to do will cover such part of the loss insured against as remains after the application of the policies taken by the lessee, where they fail to cover the whole loss because of a stipulation in them for prorating with all other insurance on the premises.

(May 31, 1898.)

A PPEAL by defendant from a judgment of the Circuit Court for Jefferson County in favor of plaintiff in an action brought to enforce payment of a fire insurance policy. *Affirmed.*

The facts are stated in the opinion.

Mr. B. F. Buckner for appellant.*Messrs. Humphrey & Davie* for appellee.

Paynter, J., delivered the opinion of the court:

In July, 1889, Mrs. Leonora Thruston leased her property on Market street, in the city of Louisville, to Octave Rassinier, for the period of fifteen years. By the terms of the lease, Rassinier was to take down the buildings then upon the lots, and in their place erect a new building, which was to be at least of the value of \$8,000. A corporation was organized, known as the Rassinier Hotel & Wine Company, to which Rassinier transferred his lease. Pursuant to the terms of the lease, the old buildings were removed, and a new building was erected, of the value of more than \$15,000. The corporation became involved, and made an assignment for the benefit of creditors. The appellee, Varble, by appropriate orders of the court, was made receiver of the leased property. It is stipulated in the lease that the second party shall keep the premises in repair, and deliver the same at the expiration of the lease in good repair; and, if he fails to keep the same in good repair, then the first party is at liberty to enter on the premises, and make the repairs, etc. It is also stipulated in the lease that "the second party agrees to take insurance and renew the same from time to time as it may expire on the improvements in the

sum of \$8,000, to be assigned to said first party to guarantee the stipulations of this lease. In case of loss by fire, the insurance to be used in replacing said improvements under the conditions herein recited." At the expiration of the lease, Mrs. Thruston was to own the building erected upon her lots. Before the assignment, a mortgage was executed to certain persons as trustees to secure the payment of seventy-two notes of Rassinier to the German Insurance Bank. Various policies of insurance, amounting to \$22,000, were procured upon the building which had been erected; and to the extent of \$8,000 they were for the benefit of Mrs. Thruston, and the balance for the benefit of the trustees. These policies were procured by Varble, receiver. It was provided in the several policies of insurance procured by Varble that, "in case of any other insurance upon the property hereby insured, then this company shall not be liable under this policy for a greater portion of any loss sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein. The appellant issued a policy of insurance to Mrs. Thruston on the building, she and her interest being described in language as follows: "Lessor and owner in remainder as her interest may appear . . . against all direct loss or damage by fire . . . to an amount not exceeding \$5,000." The building was partially destroyed by fire, and the loss was fixed at \$7,094.35. The various insurance companies which had issued policies amounting to \$22,000 paid \$5,780.58 of the loss, which left \$1,313.77 of it unpaid.

The question on this appeal is whether the companies which issued the policies, amounting to \$22,000, should pay the \$1,313.77, or whether the appellant, Sun Insurance Office, should pay it. The building was restored with the money which was paid by the insurance companies other than the appellant, and a sum furnished by Varble, receiver, out of the assets in his hands, under an agreement with Mrs. Thruston. She assigned Varble, the receiver, the benefit of the policy upon which this action was brought; and it is in her right the receiver seeks to recover. The contention of the learned counsel for the appellant may be summarized as follows: (1) That, under the contract of the lease, the tenant was obligated to restore the building to its condition before the fire; and, the receiver having done so, Mrs. Thruston has sustained no loss. Therefore, no cause of action exists against the appellant. (2) That the policies which were issued to Varble, receiver, were on the leasehold interest which he held in the building, and the policy which the appellant issued to Mrs. Thruston was on her reversionary interest therein; therefore, as the policies issued by the other companies and the one issued by the appellant are on different interests in the building, it is not double insurance; hence the appellant is not compelled to contribute with the other companies issuing policies to pay the loss.

At common law, when the lessee expressly

NOTE.—As to rights and liabilities of tenant on destruction of leased premises, see *Porter v. Tull* (Wash.) 22 L. R. A. 612, and note.

41 L. R. A.

covenanted to repair, his liability was not confined to cases of ordinary and gradual decay, but extended to injuries done to the property by fire; and, if the premises were entirely consumed, he was bound to restore them within a reasonable time. *Redding v. Hall*, 1 Bibb, 536; *Bohannons v. Lewis*, 3 T. B. Mon. 380. At common law the tenant was bound to pay the rent, though the premises should be destroyed by inevitable casualty, unless he, by contract, provided otherwise. *Helburn v. Mofford*, 7 Bush, 169. The common law has been abrogated by our statutes. Section 2297, Ky. Stat. reads as follows: "Unless the contrary be expressly provided for in the writing, no agreement of a lessee that he will repair, or leave the premises in repair, shall have the effect of binding him to erect similar buildings, if without his fault or neglect the same may be destroyed by fire or other casualty, nor shall a tenant, unless he otherwise contracts, be liable for the rent for the remainder of his term of any building leased by him, and destroyed during the term by fire or other casualty without his fault or neglect." It is not expressly provided in the lease that the lessee is to erect a similar building to the one on the leased premises in case it is destroyed by fire or other casualty without his fault. An agreement to "repair or leave the premises in repair" does not obligate the tenant to restore the building which is destroyed by fire or other casualty without his fault. The statute does not have reference alone to cases where the premises are "destroyed"—that is, totally destroyed; it has reference to any case where the "fire or other casualty" injured the premises. It occurs to us that it would be unreasonable to suppose that the legislature intended to relieve the tenant from liability to erect a similar building, and compel him to restore it, when only one half of the value of the building is destroyed by fire or other casualty. The effect of such reasoning is that, had the entire building been destroyed, and the loss occurred thereby been \$15,000, the lessee would not have been compelled to erect a similar one; but as the fire injured the building, so as to inflict a loss of only \$7,034.95, he must be held liable therefor, or repair the building. An agreement to "repair or leave the premises in repair" is confined to injuries which result from ordinary use and gradual decay of the property. Besides, the writing evidencing the contract of lease shows that it was not contemplated by the parties that the lessee was under liability to restore the property from the effect of the fire. He was to have the building insured in the sum of \$8,000, and assign the policy to the lessor; and, in case of loss by fire, the "insurance was to be used in replacing the improvements." It must be presumed that the parties knew that a fire might produce, not a total, but a partial, loss of the building, and that a policy of insurance would be for indemnity in case of a partial, as in one of total, loss; hence we must conclude that the parties were contracting with reference to that condition; therefore it was to be used to replace the improvements (meaning those to be placed on the lots by the lessee), whether the loss was partial or total.

From our view of this case it is unnecessary to decide whether or not the doctrine as to the 41 L. R. A.

double insurance is as claimed, nor is it necessary to determine whether Mrs. Thruston's interest as "lessor," which the appellant insured (as well as her interest as owner in reversion), could not be said to be substantially the same interest which the underwriters insured for the receiver, as the interest of the receiver and that of Mrs. Thruston were mutual and common in this, to wit, the restoration of the building for use during the lifetime of the lease. The insurance companies had the right to place in their policies provisions defining and limiting their several liabilities, providing that they should not be liable for a greater portion of any loss sustained than the sum insured bore to the whole amount of insurance on the property "issued to or held by any party or parties having an insurable interest therein." They did not seem willing to contribute proportionately to a loss with the companies alone which issued policies on the same interest in the property, but, by express and unmistakable language, limited their liability so they would not be required to pay a greater portion of any loss sustained than the sum they respectively insured bore to the whole amount on the property. The insurance held by any party having an insurable interest therein must be taken into account. Their liability must be measured by the rule written in the policies, and under it each company had the right to prorate with other policies issued, including the one issued by the appellant, as Mrs. Thruston had an "insurable interest" in the property. It is not the business of a court to make contracts for parties, but to construe and enforce them. Each of the policies issued to Varble, receiver, for the benefit of Mrs. Thruston and the mortgagees, contains a clause as follows: "The interest of the mortgagee, or trustee, . . . shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured." In our opinion this stipulation is limited and controlled by the more particular provision herein considered, relating to prorating in case of loss. In construing a similar clause in a policy of insurance in *Hartford F. Ins. Co. v. Williams*, 27 U. S. App. 493, 68 Fed. Rep. 925, 11 C. C. A. 508, the court said: "In construing a contract like the one now in hand, it is our duty to look to all of the provisions of the agreement, and to give effect to what seems to have been the obvious intent and meaning of the parties. We would not be justified in ignoring an agreement in one part of the instrument, which is as clearly expressed as language could well express it, merely because it limits to some extent the scope of general language employed in another part of the instrument. It is very common in the construction of contracts and statutes to restrict the meaning of general words and phrases, when it is plain to be seen from particular provisions of the contract or statute that they were not intended to have the broad signification of which they are fairly susceptible." It is not claimed that the mortgagor or the owner of the leasehold estate (being the estate upon which the mortgage was given) did or attempted to do any act which invalidated the insurance, or in any degree injured the mortgagees; neither did the mortgagees complain at the act of Mrs. Thruston in procuring the policy of insurance from

the appellant. Eight thousand dollars of the insurance was to be used in replacing the improvements, thus adding value to the property upon which the mortgagees held their lien; and, in case that amount was insufficient to do so, Mrs. Thruston, if she desired to get any rent from the property, would be compelled to incur the balance of such expense. In view of this fact it is difficult to see how the mortgagees are prejudiced by Mrs. Thruston's effort to provide the means for that purpose by taking the additional insurance. If the property was maintained in the condition in which it was when the mortgage was executed, the mortgagees had no right to complain.

Having reached the conclusion that the insurance companies (other than the appellant) have paid that portion of the loss which they contracted to pay, and that the lessee, under the terms of the lease, was not compelled to replace that part of the building destroyed, it follows that the difference between what the companies paid and the total loss must fall upon Mrs. Thruston. The policy which appellant issued to her was to indemnify her against such loss, and it must pay it. We have considered the case of *Eddy v. London Assur. Corp.* 143 N. Y. 811, 25 L. R. A. 686.

The judgment is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Edward E. STONE

v.

BOSTON & ALBANY RAILROAD COMPANY.

(.....Mass.....)

1. **Negligence in storing oil upon a station platform**, and permitting it to remain there in violation of statute, is not the proximate cause of damage by a fire which is started by the careless dropping of a match by a man who comes to the platform to deliver goods, and who is in no sense a servant, agent, or guest of the railroad company.
2. **The negligence of a railroad company in keeping oil on a station platform** is not concurrent with the careless act of a man who starts a fire by dropping a match.
3. **In an action for negligent injury to property** where the court is able on all the evidence to see that the injury was not a probable, but was a remote, result of the negligence, it should so rule as matter of law, and not submit the question to the jury.

(Knowlton, J., dissents.)

(July 1, 1898.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Worcester County made during the trial of an action brought to recover damages for alleged negligence causing the destruction by fire of plaintiff's building which resulted in a verdict in defendant's favor. *Overruled.*

The facts are stated in the opinion.

Messrs. Henry W. King, Charles M. Rice, and W. S. B. Hopkins, for plaintiff: If the defendant was negligent in storing the twenty seven barrels of kerosene upon the oil-soaked wooden platform, uncovered and unguarded, taking into consideration the oil-soaked condition of the ground and rubbish under the platform, the length of time the oil had remained there when the fire took place, the location of the platform with regard to the buildings of the plaintiff, and all other circum-

stances shown by the evidence; and if the burning of the buildings and other property of the plaintiff was the natural and probable consequence of that negligence,—then the defendant was liable, provided that injurious consequences of its negligence might reasonably have been anticipated. And these were questions for the jury.

Lane v. Atlantic Works, 107 Mass. 104, 111 Mass. 186; *Smethurst v. Proprietors of Independent Cong. Church*, 148 Mass. 261, 2 L. R. A. 695; *Derry v. Flitner*, 118 Mass. 131; *McDonald v. Snelling*, 14 Allen, 290, 93 Am. Dec. 768; *Freeman v. Mercantile Mut. Acci. Ass.* 156 Mass. 851, 17 L. R. A. 753; *Wright v. Chicago & N. W. R. Co.* 27 Ill. App. 200; *Mexican Nat. R. Co. v. Mussette*, 86 Tex. 708, 24 L. R. A. 643; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 18 L. R. A. 215; *Banks v. Wabash Western R. Co.* 40 Mo. App. 458; *Huber v. La Crosse City R. Co.* 92 Wis. 636, 31 L. R. A. 583; *Ohio & M. R. Co. v. Trowbridge*, 126 Ind. 391.

In cases where injury has been caused to the plaintiff's property by the explosion of explosive substances stored in large quantities on the defendant's premises, the rule has been more particularly formulated so as to bring such a case under the head of nuisances, declaring the defendant liable for damage caused by explosions in these cases whether the act occasioning the explosion was due to third persons or not.

The court should have admitted the evidence offered by the plaintiff to show that the freight yard and platform were situated in a very populous portion of Spencer.

Wright v. Chicago & N. W. R. Co. 27 Ill. App. 200; *Wilson v. Phasiz Powder Mfg. Co.* 40 W. Va. 413; *Luffin & R. Powder Co. v. Tearney*, 181 Ill. 322, 7 L. R. A. 262; *McAndrews v. Collier*, 42 N. J. L. 189, 36 Am. Rep. 508; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654; *Emory v. Hazard Powder Co.* 22 S. C. 476, 53 Am. Rep. 730; *Wier's Appeal*, 74 Pa. 280; *Myers v. Malcolm*, 6 Hill, 292, 41 Am. Dec. 744; *Cheatham v. Shearon*, 1 Swan, 213; *Wood, Nuisances*, 3d ed. §§ 69, 140; *Cooley, Torts*, 2d ed. p. 723.

If the jury had found that the injury to the plaintiff was the natural and probable consequence of the defendant's negligence in suffer-

NOTE.—For negligent fires, see also *Cook v. Minneapolis, St. P. & S. S. M. R. Co.* (Wis.) 40 L. R. A. 457, and other cases cited in note thereto. 41 L. R. A.

ing a dangerous state of things to exist on its premises, to wit, the unguarded kerosene upon the oil-soaked platform with the oily condition of the rubbish and the ground itself beneath the platform, then it could not avail to excuse the defendant that the act of a third person, to wit, Casserly, had concurred with the negligence of the defendant to contribute a condition necessary to the injurious effect of the negligence of the defendant.

The act of Casserly in throwing down the match with which he had lighted his pipe was really concurrent in point of time with the negligence of the defendant; but even if his act were regarded as negligent and intervening between the negligence of the defendant and the injury to plaintiff, nevertheless it could not avail to excuse the defendant if the jury had found that such an act, considering the unguarded and uncovered condition of the kerosene and the condition of the platform and the ground and rubbish under it, and the inflammable nature of kerosene, and the position of the platform with regard to the public and those whose business brought them by or to the platform, or the freight yard or depot, ought to have been foreseen and provided against by the defendant.

The negligence of the defendant still remained a culpable and direct cause of the injury to the plaintiff.

Lane v. Atlantic Works, 111 Mass. 186; *McCauley v. Norcross*, 155 Mass. 584; *The Joseph B. Thomas*, 81 Fed. Rep. 578; *Derry v. Flitner*, 118 Mass. 181; *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 768; *Eaton v. Boston & L. R. Co.* 11 Allen, 500, 87 Am. Dec. 730; *Griffin v. Boston & A. R. Co.* 148 Mass. 143, 1 L. R. A. 698; *Cayzer v. Taylor*, 10 Gray, 274, 69 Am. Dec. 317; *Elmer v. Locke*, 185 Mass. 575; *Simmons v. New Bedford, V. & N. S. B. Co.* 97 Mass. 361, 98 Am. Dec. 99; *Spicer v. Lynn & B. R. Co.* 149 Mass. 207; *Wright v. Chicago & N. W. R. Co.* 27 Ill. App. 200; *Koelsch v. Philadelphia Co.* 152 Pa. 855, 18 L. R. A. 759; *Chicago, R. I. & P. R. Co. v. Sutton*, 27 U. S. App. 310, 63 Fed. Rep. 394, 11 C. C. A. 251; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 18 L. R. A. 215, 41 Ill. App. 34; *St. Louis, I. M. & S. R. Co. v. Needham*, 32 U. S. App. 635, 69 Fed. Rep. 823, 16 C. C. A. 457; *Chicago, St. P. & K. C. R. Co. v. Chambers*, 32 U. S. App. 253, 68 Fed. Rep. 148, 15 C. C. A. 327; and cases cited; *Banks v. Wabash Western R. Co.* 40 Mo. App. 458; *Johnson v. Northwestern Teleph. Exch. Co.* 48 Minn. 433; *Mexican Nat. R. Co. v. Mussette*, 86 Tex. 708, 24 L. R. A. 642; *Weick v. Lander*, 75 Ill. 98; *Bisford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508; *Murdock v. Walker*, 43 Ill. App. 590; *Wilder v. Stanley*, 65 Vt. 145, 20 L. R. A. 479; *Phillips v. Denald*, 79 Ga. 732; *Lake v. Milliken*, 62 Me. 240, 16 Am. Rep. 456; *Shearm. & Redf. Neg.* §§ 21, 29, 31, 84-88; *Beach, Contrib. Neg.* 2d ed. §§ 100-102, and 32, note 3; *Whittaker's Smith, Neg.* 2d ed. pp. 38, 39, note, p. 48, note; 2 *Thomp. Neg.* p. 1088, § 5, pp. 1089, 1090, § 6, pp. 1085, 1086, § 3; *Wharton, Neg.* §§ 90-92, 95, 144-146.

If the act of Casserly referred to, be regarded by the jury as negligent, and as intervening

between the negligence of the defendant and the injury to plaintiff, then it was no excuse for the defendant, provided the jury found that it was such an act as ought to have been provided against by the defendant.

Lane v. Atlantic Works, 111 Mass. 186; *McCauley v. Norcross*, 155 Mass. 584; *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 768; *Wright v. Chicago & N. W. R. Co.* 27 Ill. App. 200; *Derry v. Flitner*, 118 Mass. 181; *Simmons v. New Bedford, V. & N. S. B. Co.* 97 Mass. 361, 98 Am. Dec. 99; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 18 L. R. A. 215; *The Joseph B. Thomas*, 81 Fed. Rep. 578; *Banks v. Wabash Western R. Co.* 40 Mo. App. 458; *Johnson v. Northwestern Teleph. Exch. Co.* 48 Minn. 433; *Mexican Nat. R. Co. v. Mussette*, 86 Tex. 708, 24 L. R. A. 642; *Bisford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508; *Murdock v. Walker*, 43 Ill. App. 590; *Lake v. Milliken*, 62 Me. 240, 16 Am. Rep. 456.

If the act of Casserly, referred to, should be regarded as negligent and concurrent with the negligence of defendant, defendant could not escape liability. His act must be regarded as concurrent with the negligence of the defendant, since, if defendant was negligent, its negligence still existed when Casserly threw down the match.

Eaton v. Boston & L. R. Co. 11 Allen, 500, 87 Am. Dec. 730; *Griffin v. Boston & A. R. Co.* 148 Mass. 143, 1 L. R. A. 698; *Cayzer v. Taylor*, 10 Gray, 274, 69 Am. Dec. 317; *Elmer v. Locke*, 185 Mass. 575; *Koelsch v. Philadelphia Co.* 152 Pa. 855, 18 L. R. A. 759; *Chicago, R. I. & P. R. Co. v. Sutton*, 27 U. S. App. 310, 63 Fed. Rep. 394, 11 C. C. A. 251; *Chicago, St. P. & K. C. R. Co. v. Chambers*, 32 U. S. App. 253, 68 Fed. Rep. 148, 15 C. C. A. 327; *St. Louis, I. M. & S. R. Co. v. Needham*, 32 U. S. App. 635, 69 Fed. Rep. 823, 16 C. C. A. 457; *Wilder v. Stanley*, 65 Vt. 145, 20 L. R. A. 479.

If the act of Casserly be not regarded as negligent, but merely as an entirely innocent act, the defendant is liable.

Hayes v. Hyde Park, 153 Mass. 514, 12 L. R. A. 249; *Salisbury v. Herchenroder*, 106 Mass. 458, 3 Am. Rep. 354; *Kuhn v. Jewett*, 32 N. J. Eq. 647; *Shearm. & Redf. Neg.* §§ 80, 83, 36, 38, 39; *Whittaker's Smith, Neg.* p. 48, note, pp. 41, 42, note; 2 *Thomp. Neg.* p. 1087, § 4, pp. 1085, 1086, § 3; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64; *Boston & A. R. Co. v. Shanly*, 107 Mass. 568; *Carter v. Towne*, 98 Mass. 567, 96 Am. Dec. 682; *Wharton, Neg.* §§ 90-92, 95, 146.

The case at bar falls under the rule of—

Fletcher v. Rylands. L. R. 3 H. L. 330, L. R. 1 Exch. 265; Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 224; *Mears v. Dole*, 185 Mass. 508.

This violation of the provisions of the Public Statutes was some evidence of negligence in itself.

Lane v. Atlantic Works, 111 Mass. 186; *Hanlon v. South Boston Horse R. Co.* 129 Mass. 310; *Salisbury v. Herchenroder*, 106 Mass. 458, 3 Am. Rep. 354; *Bradley v. Boston & M. R. Co.* 2 Cush. 539; *Clark v. Boston & M. R. Co.* 64 N. H. 828; *Wright v. Chicago & N. W. R. Co.*

27 Ill. App. 200; *Laflin & R. Powder Co. v. Tearney*, 181 Ill. 822, 7 L. R. A. 262; *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508.

The fact that the fire spread to other property of plaintiff does not make the damage to such last-named property any the less the proximate consequence of the fire and of the defendant's negligence.

Perley v. Eastern R. Co. 98 Mass. 414, 96 Am. Dec. 645; *Kuhn v. Jewett*, 32 N. J. Eq. 647; *Martin v. New York, & N. E. R. Co.* 63 Conn. 331; *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 68.

Messrs. Frank P. Goulding and William C. Mellish, for defendant:

There is no evidence showing negligence of the defendant, in respect to the condition of the platform.

Oil is an article of merchandise, which the defendant as a common carrier was bound to receive, transport, and deliver, and, as incident to that duty, to hold as a warehouseman until taken away by the consignees.

Willett v. Rich, 142 Mass. 856, 56 Am. Rep. 684.

If there was any violation of the statute it was by the owners of the oil who suffered it to remain.

Denny v. New York C. R. Co. 13 Gray, 481, 74 Am. Dec. 645; *Hynds v. Schenectady County Mut. Ins. Co.* 11 N. Y. 554.

The statute is merely penal. It did not add to, or diminish, the duties owed by the defendant to the plaintiff. It is not enacted for the benefit of the plaintiff in particular, or for the benefit of any class to which the plaintiff specially belongs, and he cannot found any right of action by it.

Knapp v. Knickerbocker Ice Co. 84 N. Y. 489; *Gibson v. Leonard*, 143 Ill. 182, 17 L. R. A. 588; *Toutloff v. Green Bay*, 91 Wis. 490; *Laflin & R. Powder Co. v. Tearney*, 181 Ill. 822, 7 L. R. A. 262; *Selbeck v. Lake Shore & M. S. R. Co.* 58 Mich. 195; 2 Jaggard, Torts, 918.

A condition harmless in itself is not made wrongful because a third person may by an independent tortious act work an injury through it.

Hoadley v. Northern Transp. Co. 115 Mass. 804, 15 Am. Rep. 106.

No case is found in the commonwealth where the owner of premises has been held liable for fire originating thereon without his negligence in kindling or guarding his fires.

Lothrop v. Thayer, 188 Mass. 466, 52 Am. Rep. 286.

It can make no difference whether the person kindling the fire was rightfully or wrongfully on the premises. The owner would be no more or less bound to anticipate a negligent or wilful kindling of a fire by a licensee than by a trespasser.

Laflin & R. Powder Co. v. Tearney, 181 Ill. 822, 7 L. R. A. 262; Rolle, Abr. *Actions upon the Case*, B.

In an action for negligently keeping a fire the defendant may plead that an unknown person set fire to his house *per quod*, and traverse the negligence.

6 Comyns' Digest, *Pleader*, pp. 2, 8; Beven, Neg. 2d ed. 590; *Carstairs v. Taylor*, L. R. 6 Exch. 217; *Ross v. Fedden*, L. R. 7 Q. B. 661; 41 L. R. A.

Read v. Nichols, 118 N. Y. 224, 7 L. R. A. 130; *Dubuque Wood & C. Association v. Dubuque*, 80 Iowa, 176; *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607; *Fairbanks v. Kerr*, 70 Pa. 90, 10 Am. Rep. 664; *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55, 52 Am. Rep. 790; *Brooks v. Old Colony R. Co.* 168 Mass. 164; *Mars v. Delaware & H. Canal Co.* 54 Hun, 625; *Leavitt v. Bangor & A. R. Co.* 89 Me. 509, 36 L. R. A. 382.

Allen, J., delivered the opinion of the court:

This is an action of tort to recover for the loss of the plaintiff's buildings and other property by fire, under the following circumstances: The defendant owned and operated a branch railroad extending from its main line at South Spencer to the village of Spencer, and had at the Spencer terminus a passenger station, a freight house, and a freight yard, all adjoining a public street. On the side of the freight house, and extending beyond it about 75 feet, was a wooden platform about 8 feet wide and 4 feet high, placed upon posts set in the ground, the underside being left open and exposed. The main tracks ran along on the front side of this platform and freight house, and on the rear of the platform there was a freight track, so near as to be convenient to load and unload cars from and upon it. The plaintiff was engaged in the lumber business, buying at wholesale and selling at wholesale and retail, manufacturing boxes, etc. His place of business comprised several buildings, some of which were across the street from the defendant's buildings, and his principal buildings were about 75 feet from the point on the defendant's premises, beneath the platform, where the fire originated. The evidence tended to show that the platform was mostly used for the storing of oil which had been brought upon the railroad, until it was taken away by the consignees; and that the platform had become thoroughly saturated with oil, which had leaked from the barrels, and which not only saturated the platform, but dripped to the ground beneath. More or less rubbish accumulated from time to time under the platform, and was occasionally carried away. The evidence tended to show that this space below had been cleaned out two or three weeks before the fire. On the day of the fire, September 18, 1893, from 25 to 30 barrels of oil and oil barrels were upon the platform. Some were nearly or quite empty, some were partly full, but the most of them were probably full and nearly full. The only evidence to show how the fire originated tended to prove that one Casserly, a teamster, brought a load of boots to be shipped upon a car which was standing upon the track on the rear side of the platform; that he was smoking a pipe; that he stepped into the car, to wait for the defendant's foreman of the yard, who was to help him unload the boots; that, in stepping in, he stubbed his toe, and knocked some of the ashes and tobacco out of his pipe; that he relighted the pipe with a match, and threw the match down; that at this time he was standing in the door of the car, facing the platform. It must be assumed upon the evidence that the fire caught upon the ground underneath the platform from

the match thrown down by Casserly. All efforts to extinguish the fire failed. It spread fast, and was almost immediately upon the top of the platform,—running up a post, according to one of the witnesses,—and very soon it reached the barrels of oil, which began to explode, and the fire communicated to the plaintiff's buildings, and they were burned. There was evidence tending to show that all of the oil had been upon the platform for a longer time than forty-eight hours. According to the testimony of the plaintiff, the platform was never, to his knowledge, empty of oil or oil barrels. It was completely saturated with oil, and that general condition of things, so far as the platform was concerned, had existed for eight years,—ever since he himself had been there. Upon the evidence introduced by the plaintiff, the court directed a verdict for the defendant.

The plaintiff, in substance, contends before us that the defendant was negligent in storing oil upon the platform, taking into consideration the condition of the platform, and of the ground and material under it, and the length of time during which the oil had been allowed to remain there; that, irrespectively of the question of negligence, the platform with the oil upon it constituted a public nuisance, especially in view of Pub. Stat. chap. 103, § 74, providing that the oil composed wholly or in part of any of the products of petroleum shall not be allowed to remain on the grounds of a railroad corporation in a town for a longer time than forty-eight hours without a special permit from the selectmen; that the defendant is responsible for the damage resulting from the public nuisance, whether the act of starting the fire was due to a third person or not; and that the question should have been submitted to the jury whether the damage to the plaintiff's property was the natural and proximate consequence of the defendant's tort. Upon the evidence, the supposed tort of the defendant, whether it be called "negligence" or "nuisance," appears to have been limited to the keeping of oil too long upon the platform. Assuming this oil to have been a product of petroleum, and so within the statute cited, nevertheless the defendant, as a common carrier, was bound to transport it and deliver it to the consignees. The oil, as is well known, was an article of commerce, and in extensive use, and the defendant was bound to transport it, and keep it for a reasonable time, after its arrival in Spencer, in readiness for delivery. There was no evidence that the oil was liable to spontaneous ignition, or that the platform was an unsuitable place for its temporary storage till it could be removed, or that the defendant could have prevented the escape of oil upon the platform from leaky barrels. But we may assume without discussion that the defendant was in fault in keeping the oil there so long, and that, if the oil had been removed within forty eight hours after its arrival, the fire would probably not have been attended with such disastrous consequences.

Nevertheless, the question remains—and, in our view, this becomes the important and decisive question of the case—whether, assuming that the defendant was thus in fault, the

plaintiff introduced any evidence which would warrant any finding by the jury that the damage to his property was a consequence for which the defendant is responsible; or, in other words, whether the act of Casserly in starting the fire was such a consequence of the defendant's original wrong, in allowing the oil to remain upon the platform that the defendant is responsible to the plaintiff for it. In approaching this question, it must be borne in mind that Casserly was in no sense a servant, agent, or guest of the defendant. He brought a load of goods to the defendant's station, to be carried upon the defendant's railroad. The defendant was bound by law to accept and carry them. It could not lawfully exclude Casserly from its ground. By Pub. Stat. chap. 112, § 188, it was bound to give all persons reasonable and equal terms, facilities, and accommodations for the transportation of merchandise upon its railroad, and for the use of its depot and other buildings and ground. Casserly came there in his own right, and the defendant is not responsible for him in the same way that perhaps it might be responsible for a servant, agent, or (according to some statements of the law) guest. *Lothrop v. Thayer*, 138 Mass. 466, 53 Am. Rep. 286. It is also to be borne in mind that this was not a case of spontaneous ignition of a substance liable to ignite spontaneously, as was the case in *Vaughan v. Menlove*, 3 Bing. N. C. 468. Nor did the defendant owe to the plaintiff the duties of a carrier of passengers or freight towards its customers, or any other duties growing out of a contract with the plaintiff. There was no contract of any kind between the plaintiff and the defendant.

The rule is very often stated that, in law, the proximate, and not the remote, cause is to be regarded; and, in applying this rule, it is sometimes said that the law will not look back from the injurious consequence beyond the last sufficient cause, and especially that, where an intelligent and responsible human being has intervened between the original cause and the resulting damage, the law will not look back beyond him. This ground of exonerating an original wrongdoer may be found discussed or suggested in the following decisions and text-books, among others: *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47; *Elmer v. Feasenden*, 151 Mass. 359, 5 L. R. A. 724; *Hayes v. Hyde Park*, 153 Mass. 514, 12 L. R. A. 249; *Freeman v. Mercantile Mut. Acci. Asso.* 156 Mass. 851, 17 L. R. A. 753; *Lynn Gas & Electric Co. v. Meriden F. Ins. Co.* 158 Mass. 570, 20 L. R. A. 297; *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 44, 19 L. ed. 65; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Washington & G. R. Co. v. Hickey*, 166 U. S. 521, 41 L. ed. 1101; *Reiper v. Nichols*, 31 Hun, 491; *Read v. Nichols*, 118 N. Y. 224, 7 L. R. A. 130; *Mars v. Delaware & H. Canal Co.* 54 Hun, 625; *Leavitt v. Bangor & A. R. Co.* 89 Me. 509, 36 L. R. A. 382; *Cuff v. Newark & N. Y. R. Co.* 35 N. J. L. 17, 10 Am. Rep. 205; *Curtin v. Somerset*, 140 Pa. 70, 12 L. R. A. 322; *Delaware, L. & W. R. Co. v. Salmon*, 89 N. J. L. 299, 23 Am. Rep. 214; *Pennsylvania Co. v. Whitlock*, 99 Ind. 16, 50 Am. Rep. 71; *Goodlander Mill Co. v. Standard Oil Co.* 24 U. S.

App. 7, 63 Fed. Rep. 400, 405, 27 L. R. A. 583, 11 C. C. A. 253; Shearm. & Redf. Neg. §§ 38, 666; Wharton, Neg. §§ 184 *et seq.*

It cannot, however, be considered that in all cases the intervention even of a responsible and intelligent human being will absolutely exonerate a preceding wrongdoer. Many instances to the contrary have occurred, and these are usually cases where it has been found that it was the duty of the original wrongdoer to anticipate and provide against such intervention, because such intervention was a thing likely to happen in the ordinary course of events. Such was the case of *Lane v. Atlantic Works*, 111 Mass. 186, where it was found by the jury that the meddling of young boys with a loaded truck left in a public street was an act which the defendants ought to have apprehended and provided against, and the verdict for the plaintiff was allowed to stand. In the carefully expressed opinion by Mr. Justice Colt the court says: "In actions of this description the defendant is liable for the natural and probable consequences of his negligent act or omission. The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended. The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise." According to this statement of the law, the questions in the present case are: Was the starting of the fire by Casserly the natural and probable consequence of the defendant's negligent act in leaving the oil upon the platform? According to the usual experience of mankind, ought this result to have been apprehended? The question is not whether it was a possible consequence, but whether it was probable; that is, likely to occur, according to the usual experience of mankind. That this is the true test of responsibility, applicable to a case like this, has been held in very many cases, according to which a wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience. One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable. A high degree of caution might, and perhaps would, guard against injurious consequences which are merely possible; but it is not negligence, in a legal sense, to omit to do so. There may not always have been entire consistency in the application of this doctrine; but, in addition to cases of boys meddling with things left in a public street, courts have also held it competent for a juror

articles left near an opening in the floor of an unfinished building, or in the deck of a vessel, were accidentally jostled so that they fell upon persons below (*McCauley v. Norcross*, 155 Mass. 584; *The Joseph B. Thomas*, 81 Fed. Rep. 578); when sheep, allowed to escape from a pasture, and stray away in a region frequented by bears, were killed by the bears (*Gilman v. Noyes*, 57 N. H. 627); and when a candle or match was lighted by a person in search of a gas leak, with a view to stop the escape of gas (*Koelsch v. Philadelphia Co.* 152 Pa. 855, 18 L. R. A. 759), and in other cases not necessary to be specially referred to. In all of these cases the real ground of decision has been that the result was or might be found to be probable, according to common experience. Without dwelling upon other authorities in detail, we will mention some of those in which substantially this view of the law has been stated: *Davidson v. Nichols*, 11 Allen, 514; *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 768; *Tutein v. Hurley*, 98 Mass. 211, 98 Am. Dec. 154; *Hoadley v. Northern Transp. Co.* 115 Mass. 304, 15 Am. Rep. 106; *Hill v. Winsor*, 118 Mass. 251; *Derry v. Flitner*, 118 Mass. 181; *Freeman v. Mercantile Mut. Acci. Assn.* 156 Mass. 351, 17 L. R. A. 753; *Spade v. Lynn & B. R. Co.* 168 Mass. 285, and cases there cited; *Cosulich v. Standard Oil Co.* 122 N. Y. 118; *Rhodes v. Dunbar*, 57 Pa. 274, 98 Am. Dec. 231; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 298, 27 Am. Rep. 653; *Behling v. Southwest Pennsylvania Pipe Lines*, 160 Pa. 359; *Goodlander Mill Co. v. Standard Oil Co.* 24 U. S. App. 7, 63 Fed. Rep. 400, 405, 406, 27 L. R. A. 583, 11 C. C. A. 253; *Hail v. Texas & P. R. Co.* 23 U. S. App. 80, 60 Fed. Rep. 557, 23 L. R. A. 774, 9 C. C. A. 184; *Clark v. Chambers*, L. R. 8 Q. B. Div. 327; Wharton, Neg. 2d ed. §§ 74, 76, 78, 188-145, 155, 955; Cooley, Torts, *69, *70; Addison, Torts, *40; Pollock, Torts, *388; Mayne, Damages, *89, *47, *48. For a recent English case involving a case of remoteness, see *Engelhart v. Farrant* [1897] 1 Q. B. 240. The rule exempting a slanderer from damages caused by repetition of his words rests on the same ground. *Hastings v. Stetson*, 126 Mass. 329, 30 Am. Rep. 683; *Shurtleff v. Parker*, 130 Mass. 293, 39 Am. Rep. 454; *Elmer v. Fessenden*, 151 Mass. 359, 5 L. R. A. 724.

Tried by this test, the defendant is not responsible for the consequences of Casserly's act. There was no close connection between it and the defendant's negligence. There was nothing to show that such a consequence had ever happened before, during the eight years covered by the plaintiff's testimony, or that there were any exciting circumstances which made it probable that it would happen. It was, of course, possible that some careless person might come along, and throw down a lighted match, where a fire would be started by it. This might, indeed, have happened upon the plaintiff's own premises, or in any other place where inflammable materials were gathered. But it was not according to the usual and ordinary course of events. In failing to anticipate and guard against such an occurrence or accident, the defendant violated no legal duty which it owed to the plaintiff. What qualification if any of

dynamite, we do not now consider. See *Rudder v. Koopmann* (Ala.) 37 L. R. A. 489; *Kinney v. Koopman* (Ala.) 37 L. R. A. 497, and cases there cited; *Rhodes v. Dunbar*, 57 Pa. 274, 290, 98 Am. Dec. 221.

The plaintiff, however, contends that this question should have been submitted to the jury. This course would have been necessary if material facts had been in dispute. But where, upon all the evidence, the court is able to see that the resulting injury was not probable, but remote, the plaintiff fails to make out his case, and the court should so rule, the same as in cases where there is no sufficient proof of negligence. *McDonald v. Snelling*, 14 Allen, 290, 299, 93 Am. Dec. 768. In *Hobbs v. London & S. W. R. Co.* L. R. 10 Q. B. 111, 122, Blackburn, J., said: "I do not think that the question of remoteness ought ever to be left to a jury. That would be, in effect, to say that there shall be no such rule as to damages being too remote." It is common practice to withdraw cases from the jury on the ground that the damages are too remote. *Hammond v. Bussey*, L. R. 20 Q. B. Div. 79, 89; *Read v. Nichols*, 118 N. Y. 224, 7 L. R. A. 130; *Cuff v. Newark & N. Y. R. Co.* 85 N. J. L. 17, 10 Am. Rep. 205; *Behling v. Southwest Pennsylvania Pipe Lines*, 160 Pa. 359; *Goodlander Mill Co. v. Standard Oil Co.* 24 U. S. App. 7, 63 Fed. Rep. 400, 405, 406, 27 L. R. A. 558, 11 C. C. A. 258; *Pennsylvania Co. v. Whitlock*, 99 Ind. 16, 50 Am. Rep. 71; *Carter v. Towne*, 103 Mass. 507; *Hoadley v. Northern Transp. Co.* 115 Mass. 804, 15 Am. Rep. 106; *Hutchinson v. Boston Gaslight Co.* 123 Mass. 219; *Elmer v. Fessenden*, 151 Mass. 359, 5 L. R. A. 724.

The plaintiff further contends that the negligence of the defendant in keeping the oil upon the platform was concurrent with the careless act of Casserly, and that, therefore, it was a case where two wrongdoers, acting at the same time, contributed to the injurious result. But this is not a just view of the matter. The negligence of the defendant preceded that of Casserly, and was an existing fact when he intervened, just as in *Lane v. Atlantic Works*, 111 Mass. 136, the negligence of the defendants in leaving their loaded truck in the street preceded that of the boys who meddled with it.

The fact, if established, that the defendant's platform, with the oil upon it, constituted a public nuisance, is immaterial, under the circumstances of the present case. If the plaintiff proved a nuisance, he need not go further and show that it was negligently maintained. But we have assumed the existence of negligence on the part of the defendant. Illegality on the part of a defendant does not of itself create a liability for remote consequences, and illegality on the part of a plaintiff does not of itself defeat his right to recover damages. The causal connection between the two still remains to be established. *Hanlon v. South Boston Horse R. Co.* 129 Mass. 810; *Hyde Park v. Gay*, 120 Mass. 589; *Hall v. Ripley*, 119 Mass. 135; *Damon v. Scituate*, 119 Mass. 66, 20 Am. Rep. 815; *Kidder v. Dunstable*, 11 Gray, 842; *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 241, 28 L. ed. 410, 415. In order to maintain a per-

sonal action to recover damages for a public nuisance, the plaintiff must show that his particular loss or damage was caused by the nuisance, just as in case of any other tort. *Wesson v. Washburn Iron Co.* 13 Allen, 101, 108, 90 Am. Dec. 181; *Stetson v. Faxon*, 19 Pick. 147, 154, 31 Am. Dec. 123. And, in considering the question of remoteness, it makes no difference what form of wrongdoing the action rests upon. *Sherman v. Fall River Iron Works Co.* 2 Allen, 524, 79 Am. Dec. 799; *The Notting Hill*, L. R. 9 Prob. Div. 105, 113; Mayne, Damages, *48, note.

Without considering other grounds urged by the defendant, a majority of the court is of opinion that, upon the evidence, the defendant was not bound, as a matter of legal duty, to anticipate and guard against an act like that of Casserly, he being a stranger coming upon the defendant's premises for his own purposes and in his own right.

Exceptions overruled.

Knowlton, J., dissenting:

I agree to nearly all of the propositions of law in the opinions of the majority, but I do not agree that the case presents no question of fact for the consideration of a jury. It seems to me that the principal question is whether there was evidence of negligence on the part of the defendant in reference to the risk of such an accident as happened. I think that there was such evidence. To say nothing of the particulars testified to, the fact that one is acting in violation of a criminal statute is always evidence of negligence. See Pub. Stat. chap. 102, § 74. The opinion assumes that there was evidence of negligence on the part of the defendant in keeping so large a quantity of oil for so long a time in such a place. It seems to me that, if the defendant's conduct was negligent, it was in reference to the risk of just such an accident as happened. I do not know that any other kind of negligence is charged. It was to diminish the liability to such accidents that the statute was enacted. If there was negligence in violating the statute, it was because, from the storage of large quantities of kerosene oil for a long time in such an inflammable place, there was serious danger of a great and uncontrollable conflagration in connection with some accident which ought to have been contemplated, and which, in the absence of the oil, would be likely to cause little or no damage. I do not see what negligence on the part of the defendant could have been found from the evidence except its failure to anticipate and guard against such a danger. To constitute negligence creating a liability for the damages to the plaintiff, it is not necessary that the defendant should have contemplated the particular event which occurred. It is enough if it should have contemplated the probable happening of some accident of this kind, which involves danger to the property of others, that ought to be guarded against. I think the jury well might have found that the burning of the plaintiff's property was a direct result of the defendant's conduct in keeping this oil on the platform.

SMITH

v.

SMITH

(.....Mass.....)

The annulment of a marriage because the husband is constitutionally afflicted with syphilis and in a state in which his chances of cure are very remote and doubtful may be granted, under Pub. Stat. chap. 145, § 11, on the ground of fraud, where, with knowledge of his condition, he did not inform his wife in regard to it, and she, learning of it on the day of the marriage soon after the ceremony, refused to live with him as his wife, and filed the libel for annulling the marriage before its consummation.

(June 22, 1898.)

REPORT by the Superior Court for Middlesex County for the opinion of the Supreme Judicial Court of a libel brought to annul a marriage. *Decree for libellant.*

The facts are stated in the opinion.

Messrs. Burke, Marshall, & Corbett for petitioner.

Knowlton, J., delivered the opinion of the court:

This libel is brought under Pub. Stat. chap. 145, § 11, the first part of which is as follows: "When the validity of a marriage is doubted, either party may file a libel for annulling such marriage, or, when the validity of a marriage is denied or doubted by either party, the other party may file a libel for affirming the same." The omission of the words "for fraud or other cause," contained in Gen. Stat. chap. 107, § 4, and in Stat. 1855, chap. 27, does not change the meaning of the provision. The statute assumes that there may be marriages which are legal in form, but invalid in fact. In terms, it confers jurisdiction upon the court, but, in reference to the law of marriage, it is merely declaratory.

The facts of the present case are peculiar. On the day of the marriage, soon after the ceremony, the libellant received information that the respondent was afflicted with a venereal disease called "syphilis." She communicated the information to her mother, who immediately charged him with being so afflicted. He denied the charge, but consented to an examination by a physician. An examination was made that disclosed the fact, which the presiding justice has found, that he was constitutionally afflicted with syphilis, a contagious disease, with which the libellant would become infected in case of cohabitation, "thus seriously impairing her health, and involving consequences of the most grievous character." The judge also found "that the disease would be transmitted to any offspring which they might have; that, while it was not absolutely incurable, the chances of a cure being effected in the state in which the respondent was were very remote and doubtful." The libellant, on learning the libelee's condition, refused to live with him as his wife, and

there has been no consummation of the marriage. The libelee, knowing his diseased condition, induced the libellant to contract the marriage without informing her in regard to it. She supposed him to be a man in good health and of good habits, and, if she had known that he was suffering from such a disease, she would not have contracted the marriage.

The statute to which we have referred has several times been considered by this court. *Reynolds v. Reynolds*, 3 Allen, 605; *Donovan v. Donovan*, 9 Allen, 140; *Foss v. Foss*, 12 Allen, 26; *Crehore v. Crehore*, 97 Mass. 330, 98 Am. Dec. 98. The fullest discussion of the law applicable to a case like this of which we have knowledge is in *Reynolds v. Reynolds*, 3 Allen, 605. In that case a marriage was declared void into which a man was induced to enter by confiding in the representations of the woman whom he took for his wife that she was chaste, when in fact she was with child by another man. It has since been held that, to maintain a petition in such a case, it is not necessary to introduce evidence of express representations, and that a petition cannot be granted if it appears that the petitioner had himself been guilty of criminal intercourse with the woman before the marriage. The precise point decided in *Reynolds v. Reynolds* has been adjudicated in other states, and in this country seems to be generally accepted law. *Baker v. Baker*, 13 Cal. 87; *Curris v. Carris*, 24 N. J. Eq. 516. See also *Morris v. Morris*, Wright (Ohio) 630; *Ritter v. Ritter*, 5 Blackf. 81; *Scott v. Schufeldt*, 5 Paige, 43. The law in England is held otherwise. *Moss v. Moss* [1897] P. 268. The opinion of the learned chief justice to which we have referred treats of the law in reference to ordinary contracts procured by fraud, and points out the distinction between contracts to marry or executory contracts of marriage and executed contracts of marriage. There is no reason why executory contracts of marriage should not be treated, in reference to the fraud of either party, like any other contracts. We think it is well settled that fraud of such a kind, in its essential elements, as would invalidate an ordinary contract, is a good defense to an action upon a contract to marry. *Van Houten v. Moree*, 162 Mass. 414, 26 L. R. A. 430. But, after a contract to marry has ripened into a marriage, different considerations affect the case. On grounds of public policy, the law seeks to make the marriage relation in every case as nearly permanent as possible without doing injustice. The difference between the relation of a man and woman affianced and their relation after marriage is more than the difference between those who have made an ordinary executory contract and the same persons after the contract is executed. At marriage there is a change of status which affects them and their posterity and the whole community. It is a change which, for important reasons, the law recognizes, and it inaugurates conditions and relations which the law takes under its protection. It is of such a nature that it cannot lightly be disregarded. The contracting parties take each other for better or for worse, and agree to abide the consequences of misinformation or mistake in regard

NOTE.—For disease as defense for breach of promise to marry, see *Shackleford v. Hamilton* (Ky.) 15 L. R. A. 631. See also the following case of *McMahon v. McMahon* (Pa.) post, 802.

41 L. R. A.

to each other. Says Chief Justice Bigelow in *Reynolds v. Reynolds*: "In the absence of force or duress, and where there is no mistake as to the identity of the person, any error or misapprehension as to personal traits or attributes, or concerning the position or circumstances in life of a party, is deemed wholly immaterial, and furnishes no good cause for divorce. Therefore no misconception as to the character, fortune, health, or temper, however brought about, will support an allegation of fraud on which a dissolution of the marriage contract, when once executed, can be obtained in a court of justice. These are accidental qualities, which do not constitute the essential and material elements on which the marriage relation rests." The decree of nullity was entered in that case, not merely because the libellant was deceived in regard to the supposed chastity of the libelee, for it is generally accepted law that unchastity of either party before marriage will not warrant a decree of divorce or nullity,—but because, besides the unchastity, the woman was in such a condition that she could not properly assume the duties of wifehood. More than that, she was in a condition to introduce into the husband's family spurious offspring, of which he would be presumed in law, if not in fact, to be the father. The deception, viewed in its different aspects, was in regard to facts essential to the very existence of the marriage relation. Her condition in reference to the objects of marriage was somewhat analogous to impotence, which without reference to fraud, is always held to be a ground for a decree of nullity. So far as we are aware, this is the only particular in which mistake or fraud in regard to the condition, character, or experience of one of the parties to a marriage has been held to be a ground for a decree of nullity or of divorce in favor of the other in this commonwealth. Most courts in other jurisdictions have gone no further in favor of libellants. But in *Cumington v. Belchertown*, 149 Mass 223, 4 L. R. A. 131, it appeared that a marriage was set aside for fraud by a court in New York, on the ground that the libelee had been afflicted with insanity before the marriage, and had concealed the fact, and not long afterwards again became insane. It was held by this court that the marriage could not have been declared invalid for this cause in this commonwealth.

The case at bar rests solely upon fraud in regard to the bodily condition of the libelee. As we have already seen, the previous unchastity of the libelee is not enough to entitle the libellant to relief. Indeed, we are not quite certain from the report that the libelee might not have been constitutionally affected with the disease from his birth. But in the findings of the judge his concealed disease was such as would leave with him no foundation on which the marriage relation could properly rest. It had advanced to such a stage as probably to be incurable. The libellant could not live with him as his wife without making herself a victim for life, and giving to her offspring, if she had any, an inheritance of disease and suffering. While this case lacks the element of introducing a bastard child into the husband's family, which existed in *Reynolds*

v. *Reynolds*, it has the element of a loathsome, incurable, contagious disease to be communicated to the wife, which the other had not. Few, if any, would be bold enough to say that it was the duty of the libellant, on discovery of the fraud before consummation of the marriage, to give herself up as a sacrifice, and to become a party to the transmission of such a disease to her posterity.

It may be said that this cause for a decree of nullity is not different in kind, but only in degree, from other bodily or mental conditions which the law does not recognize as a good ground for a separation. There are many peculiarities of body or mind, natural or acquired or contracted, which may render one, in a broad sense, unfit for matrimony, and of which, if concealed until after marriage, the law can take no cognizance in a suit for separation. In proceedings in court it is more difficult to deal with conditions like these in the case before us than with that in *Reynolds v. Reynolds*, because they are obscure, and it is hard to ascertain the truth. For this reason there is more danger in opening the door to libellants in such cases. Yet there may be circumstances in which justice requires that relief should be given. In *Reynolds v. Reynolds* much stress was laid upon the difference between an executory and an executed contract of marriage. But, for fraud in procuring ordinary contracts, the law gives a remedy as well after the contract is executed as before. The learned chief justice did not say exactly at what stage a contract of marriage should be deemed to be executed. Clearly, it is executory up to the time of the ceremony. Viewed in its legal aspect, it becomes a binding marriage as soon as the ceremony is performed; but the full execution of the contract contemplated by the parties in their original agreement is then just beginning, and is to continue during their joint lives. Their status up to the time of the ceremony is that of parties to an executory contract. Their status as soon as the ceremony is performed, is that of persons legally married, who, with the sanction and under the forms of the law, have assumed new relations to each other and to the state. But these new relations are then rather inchoate than complete, and they do not assume their perfected form so as to have their full possible effect upon the parties and the community until consummation of the marriage. There are therefore reasons why a fraud like that in the present case, discovered before consummation of the marriage, and at once made a ground for a separation, should move the court more strongly in favor of the libellant than if the discovery had come later. 1 Bishop, Mar. Div. & Sep. §§ 456, 461, 462. The reluctance of the court to recognize such frauds as a ground for legal proceedings is founded on considerations of public policy. These considerations are much less weighty in a case like the present than if the parties had cohabited for a considerable time before the proceedings were commenced. Although in many cases the distinction between consummated and unconsummated marriages in proceedings for separation has been overlooked, it is distinctly recognized in *Lyndon v. Lyndon*, 69 Ill. 43, and *Robertson v. Coile*, 12 Tex.

856, in each of which cases a decree of nullity was entered when the court said that the ground would have been insufficient if the marriage had been consummated. We do not intimate that the concealed existence of venereal disease in one of the parties to a marriage will ordinarily be a sufficient ground for a decree of

nullity. In most cases, presumably, the disease is curable. But, confining our decision to the facts before us, we are of opinion that it was in the power of the judge of the superior court to enter a decree for the libellant.

Decree for the libellant.

PENNSYLVANIA SUPREME COURT.

Margaret M. McMAHEN

v.

William H. McMAHEN, *Appt.*

(186 Pa. 485.)

The communication of syphilis to a wife by her husband, who has the disease in the tertiary stage and is probably incurable, whereby she is kept in a constant state of suffering, is a ground for a divorce under 1 Pepper & L. Dig. p. 1633, pl. 11, allowing a divorce for cruel and barbarous treatment endangering the wife's life or rendering her condition intolerable and life burdensome.

(July 21, 1898.)

A PPEAL by defendant from a decree of the Court of Common Pleas, No. 1, for Philadelphia County granting a divorce. *Affirmed.*

The facts are stated in the opinion.

Messrs. W. Horace Hepburn and Joseph A. Robbins for appellant.

Mr. A. S. L. Shields, for appellee:

The cruelty within our statute which entitles a wife to a divorce from her husband is actual personal violence or the reasonable apprehension of it; or such a course of treatment as endangers her life or health, and makes cohabitation unsafe.

Butler v. Butler, 1 Pars. Sel. Eq. Cas. 329.

The respondent's answer to the libel and bill of particulars is alone sufficient to support a decree on this ground.

Hollister v. Hollister, 6 Pa. 449; *Popkin v. Popkin*, 1 Hagg. Eccl. Rep. 765, note; *Mack v. Handy*, 39 La. Ann. 491; *Tackaberry v. Tackaberry*, 101 Mich. 102; *Ryder v. Ryder*, 66 Vt. 158.

It is not necessary to prove actual brutality on the part of the husband with respect to conjugal embraces. The only safety for the wife must be a separation. She is entitled to protection under the circumstances, even against herself, and if she asks it the law will mercifully extend it, and will as well prevent her being led into temptation as delivered from evil.

Burton v. Burton, 52 N. J. Eq. 215; *Grant v. Grant*, 53 Minn. 181; *Mayhew v. Mayhew*, 61 Conn. 233; *Robinson v. Robinson*, 66 N. H. 600, 15 L. R. A. 121; *Walsh v. Walsh*, 61 Mich. 554; *English v. English*, 27 N. J. Eq. 71.

Green, J., delivered the opinion of the court:

While it is to be much regretted that the

NOTE.—See preceding case of *Smith v. Smith* (Mass.) ante, 800.

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learned court below filed no opinion in this case setting forth their reasons for disagreeing with the master as to his conclusions the view we take of the testimony and its legal effect renders the solution of the controversy a comparatively easy task. As to the acts of cruelty complained of by the wife, there is no very serious difference between her testimony and her husband's. She specifies them all in detail, and includes personal violence on his part in every instance. He admits them all, including the personal violence, and differs from her only as to the degree and frequency of the acts of violence. As admitted by himself, they would be quite sufficient to sustain a decree of divorce *a mensa et thoro*, or *a vinculo*; but it is not necessary to rest the decision on that branch of the case, because there is another branch, of a much more serious character, as to which there is scarcely any, and no serious, contradiction. The respondent himself testifies that he was affected with syphilis for a number of years before his marriage with libellant, and that he continued to be so affected until within a very few months before his marriage, when he alleges that he was cured. The medical testimony, however, and indeed all the other testimony, including his own admissions, are decidedly against him on this subject. He admitted that he had been under treatment for this loathsome disease during practically the whole of his married life, until his wife left him. He was asked:

Q. How long had you been under treatment for it?

A. I had been under treatment with Dr. Hickman, off and on, all during marriage; that is, after the three months after my marriage until she left.

And he also admitted that he was suffering from this disease at the very time his wife left him. He was asked:

Q. So that, at the time she left you, you knew and she knew that you were suffering from this disorder?

A. We both knew that we were suffering.

Q. But you did know that you had the disease?

A. Yes, sir.

It was also admitted by the defendant that his wife innocently became infected by him with the disease before their marriage; she claiming that it resulted from his kissing her, and all the physicians concurring in saying that it could easily be communicated in that way. It was fully shown by the testimony of

the wife and her husband, and by the physicians who attended her, that she was continually affected by the disease during all her married life; and it was testified by the physicians that so long as cohabitation continued the disease would continue, and that she had already reached the secondary stage, and was on the verge of the tertiary, at the time she left her husband. So far as the husband is concerned, his own medical witness, Dr. Hickman, testified that he was in the tertiary stage. After saying that the defendant told him he had been treated for the disease for a number of years, he was asked:

Q. Do you believe it was syphilis?

A. From what he told me, I certainly do.

Q. Did you treat him for tertiary or secondary?

A. Tertiary.

Q. So you believe he had tertiary?

A. Yes, sir.

Q. And so treated him?

A. Yes, sir.

Q. Can tertiary, in your opinion, be cured?

A. It apparently can be, but in my opinion it cannot altogether be cured.

As to its effect upon the wife, he was asked:

Q. How would it affect her in respect to her having children?

A. She could conceive, go through gestation, and have a child.

Q. And the child would be poisoned?

A. Naturally so.

Q. Would you not, then, regard the marital relations between two such persons as dangerous to both?

A. As to the child and mother and father?

Q. To all.

A. Yes, sir; the father and mother could have syphilis, and a child could be born to that mother, and do no harm to the mother. Still, the child can have infantile syphilis, and still a mother not be harmed.

Q. Would it not make pregnancy dangerous?

A. It would.

Dr. Hickman further testified that he had also treated the respondent for syphilis since his separation from his wife, so that it appears from the testimony of his own witness that he continued to have the disease after his wife left him. The doctor further testified that he considered the disease incurable. Dr. Bernardy testified that the respondent, prior to his marriage, told him he had syphilis, and showed him his mouth, and it was full of sores; that he had also attended the libellant at the same time, and found a syphilitic sore on her lip. He also said the disease could be quite innocently communicated in several ways; that he told them both before marriage that they each had the disease; that after marriage, if pregnancy ensued, the disease was unsafe for the wife. As all imputations of unchastity on the part of the libellant were expressly disavowed on the hearing before the master by the counsel for the respondent, and as the respondent took upon himself all the responsibility of having communicated the disease to his wife, it

must be assumed that he alone was to blame for the original contraction of the disease by her, and for its incessant continuance upon her person at all times after the marriage. In addition to the foregoing, Dr. Lorman, another medical witness, who treated the libellant for this disease from November 20, 1893, to January 25, 1894, testified that on one occasion, on January 1, 1894, he was present with both the parties, and that respondent told him that he (the respondent) "was the cause of it originally"; and he added: We had a consultation about it, and I told Mrs. McMahan, in the presence of her husband, that this thing was liable to reappear, even though she got better, as long as she continued to cohabit with her husband. At a subsequent period she had a gummy tumor. This belongs to the tertiary stage, but I don't think she was quite that bad.

Q. As a matter of fact, and as a medical fact, would it or would it not have been safe for her to have lived and cohabited with her husband?

A. She would have had this thing reoccur. We are taught that at no time is it well, and it would become more apparent if she became pregnant.

After having testified that in his opinion the disease was positively incurable, he was asked:

Q. Please explain for what reason it was dangerous for Mrs. McMahan to cohabit with her husband.

A. On account of contamination.

Q. Mr. McMahan had the disease?

A. I recommended a medicine for Mr. McMahan that very day. I have the original label in my pocket.

Q. And Mrs. McMahan had the same malady at that time?

A. She was improving then. She asked whether, in her condition, it would be safe to cohabit. I said that if she cohabited, and had children, she would again become in the same condition. Mr. McMahan was present.

Q. Doctor, did Mrs. McMahan ask you the question whether it would be safe for her to live with her husband?

A. My impression is that she did. Mr. McMahan broached the subject.

Q. What did he say?

A. The substance was that he blamed himself. He felt very penitent.

Q. Did he assent to that proposition?

A. I cannot remember. I know that he was penitent. On another occasion, in my store, I told him that, if a child was born, that child would be sick; and he said, "If my child dies, my wife will blame me, for I am to blame."

Q. Are you quite sure that Mr. McMahan said that he gave her the disease in the first instance?

A. Yes, sir; I will swear to that.

Q. So you advised Mrs. McMahan to leave her husband?

A. No, sir; I told her the plain facts, and told her to use her own judgment. She said she would have left him before, but Dr. Hickman told her she was pregnant, and then she would not leave.

Q. Doctor, would Mrs. McMahan's life have been in danger had she continued to live with her husband?

A. Yes, sir.

Q. Just explain.

A. Her condition would have become tertiary. It would naturally affect the brain, the lungs, and everything else. It is worse than leprosy, and should be so regarded.

Q. Would continued cohabitation intensify the malady?

A. We are taught so, and I believe so.

Although the respondent was subsequently examined, he did not deny any part of the statements made by Dr. Lorman, nor of the statements made by his wife of the same conversation, which was in direct corroboration of Dr. Lorman's testimony.

This rather extended review of the testimony has been rendered necessary because the master refused a decree of divorce, and the court filed no opinion in support of the decree granting a divorce. Upon the whole of the testimony, which was really uncontradicted as to its most important features, we have a case in which a young woman, whose innocence is not at all impeached, having been contaminated with a foul and disgusting disease by her lover (who subsequently became her husband) during the period of his courtship, probably by kissing her frequently, and after marriage having been kept constantly in a diseased condition from the same cause until she had passed into the secondary condition of the disease, and had approached to the verge of the tertiary and most dangerous stage of the disease, had been advised by her husband's physician that the disease would be continuous while cohabitation continued, and that her children, if she had any, would be poisoned by the disease, and that pregnancy would be dangerous and perilous to her health, and had been advised by another physician that her life would be in danger if she continued to live with her husband, and that her condition would become tertiary,—her brain, lungs, and other vital organs becoming affected; having endured for upwards of five years the constant presence of one of the vilest, most shocking, and dangerous diseases with which the human body can be afflicted; and being still only about thirty years of age; and the question is whether such a person is legally bound to remain in such relation with her husband during the whole of her subsequent life, and has no redress whatever in the way of a divorce. In our opinion, to state this question is to answer it. We do not see how it is possible to imagine a more direct and palpable case of cruelty to a wife by a husband than this. It comes within, not only the spirit, but the very letter, of our statute, which allows divorce "where any husband shall have, by cruel and barbarous treatment, endangered his wife's life, or offered such indignities to her person as to render her condition intolerable and life burdensome, and thereby force her to withdraw from his house and family." 1 Pepper & Lewis, Dig. p. 1638, pl. 11. That the libellant in this case was kept in a constant state of suffering from a malignant venereal disease was proved without contradiction. It was equally

well established that so long as cohabitation continued the disease would continue, and that this condition was always dangerous, especially during pregnancy, and in the case of childbirth might prove fatal. In Bishop on Marriage and Divorce (§ 717) it is said: "Cruelty, therefore, is such conduct in one of the married parties as renders further cohabitation dangerous to the physical safety of the other, or creates in the other such reasonable apprehension of bodily harm as materially to interfere with the discharge of marital duty." This definition was taken from the leading case of *Evans v. Evans*, 1 Hagg. Consist. Rep. 85, and has been approved in numerous cases cited in the footnotes to Bishop. In our own celebrated case of *Butler v. Butler*, 1 Para. Sel. Eq. Cas. 329, tried by Judge King, it was held that the cruelty which entitles a wife to a divorce is "actual personal violence or the reasonable apprehension of it; or such a course of treatment as endangers her life or health, and renders cohabitation unsafe." This has been followed ever since. Thus, in *Gordon v. Gordon*, 48 Pa. 226, Mr. Justice Strong, delivering the opinion, and quoting the above definition, said: "This definition accords with the present doctrine of the English ecclesiastical courts. It gives the extremest possible liberal construction to our act of assembly." In *May v. May*, 62 Pa. 206, we said: "It is not every act of cruelty, on the part of the husband, that will entitle the wife to a divorce,—this ill treatment may or may not endanger her life. But to entitle her to a divorce for the cause first specified, there must be actual personal violence, or the reasonable apprehension of it; or such a course of treatment as endangers life or health, and renders cohabitation unsafe." In 5 Am. & Eng. Enc. Law, p. 790, it is said: "Cruelty, as a cause of divorce, is the wilful and persistent causing of unnecessary suffering, whether in realization or in apprehension, whether of body or of mind, in such a way as to render cohabitation dangerous or unendurable." On page 794 the same work further says: "But excessive intercourse may be cruelty, or intercourse when the wife's health is delicate, or where the husband has venereal disease;" citing for the last cause *Popkin v. Popkin*, 1 Hagg. Ecc. Rep. 733, note; *Holthofer v. Holthofer*, 47 Mich. 260; *Canfield v. Canfield*, 34 Mich. 519. In *English v. English*, 27 N. J. Eq. 71, a decree of divorce from bed and board was made on the ground of extreme cruelty, consisting mainly in gross abuse by the husband of his marital rights. The chancellor said: "There can be no doubt that she was so diseased that connubial intercourse inflicted great and distressing pain upon her; nor can there be any doubt that her condition was known to him. . . . He has been guilty of extreme cruelty towards her, so as to render it unsafe for her, under existing circumstances, to cohabit with him or to be under his dominion or control." To the same effect are the cases of *Grant v. Grant*, 53 Minn. 181; and *Mayhew v. Mayhew*, 61 Conn. 233. We are clearly of opinion that the conduct of the respondent towards his wife was of such a character as to render her condition intolerable, and life burdensome, so that she was forced thereby to withdraw from his house and family.

and also that her health was thereby greatly impaired, and her life endangered. It is of no consequence that inoculation occurred before marriage. It is the continuation and constant presence of the disease after marriage, making her condition intolerable, and endangering her health and life, that entitles her to a divorce.

The decree of the court below is affirmed, and appeal dismissed, at the cost of the appellant.

Anthony J. McHUGH

v.

Bridget McHUGH, Exrx., etc., of Richard McHugh, Deceased, Appt.

(186 Pa. 197.)

1. An attempt to procure false testimony, or to corrupt jurors, may be proved for the purpose of raising a presumption against the party who is guilty of it.
2. The representative character of an executrix will not prevent evidence that she has attempted to procure false testimony,—especially when she is personally interested in the litigation.

(May 16, 1898.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Lackawanna County to review a judgment in favor of plaintiff in an action brought to revive a judgment. *Affirmed.*

In 1867 a judgment was obtained against Richard McHugh which in 1870 was assigned to John J. Ward. In 1872 the judgment was revived and the following year assigned to John T. Fitzpatrick. In 1877 it was again revived and by a paper filed March 13, 1891, but dated December 19, 1879, Fitzpatrick assigned the judgment to Mary McHugh, a sister of Richard. On the same day an assignment was filed without date transferring the judgment to Anthony J. McHugh. Richard McHugh died March 27, 1891. On March 28, 1891, an exemplification of this judgment was filed in the court. The claim was made by defendant that the judgment had been satisfied in the lifetime of Richard.

Further facts appear in the opinion.

Messrs. F. J. Fitzsimmons, John F. Scragg, and Willard, Warren, & Knapp, for appellant:

This judgment is surrounded on all sides with the circumstances and indicia of payment and satisfaction.

The executrix was not a party except in a representative capacity, and the dead man's estate ought not to be prejudiced before the jury by proof of any such alleged conduct on her part.

The evidence offered on the trial of a case must be confined to the point in issue.

The court erred in refusing to allow us the opening and closing to the jury.

NOTE.—As to presumption against the destroyer of evidence, see *Hay v. Peterson* (Wyo.) 84 L. R. A. 561, and note.

For presumption from failure to put witness on stand, see *Western & A. R. Co. v. Morrison* (Ga.) 40 L. R. A. 84.

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Smith v. Frazier, 53 Pa. 226; *Richards v. Nixon*, 20 Pa. 19; *Huntington v. Conkey*, 83 Barb. 220.

Claims which on their face have been accruing for years, but which are delayed in their presentation as legal demands, shall, after the death of the alleged debtor, come before the court discredited by the claimant's own acts, and every fair intendment will be and ought to be made against them.

Pickens's Estate, 14 W. N. C. 407; *Keyser's Appeal*, 124 Pa. 80, 2 L. R. A. 159; *Hess v. Frankenfeld*, 106 Pa. 448.

Messrs. John R. Edwards and O'Brien & Kelly for appellee.

Fell, J., delivered the opinion of the court:

Three of the specifications of error relate to the admission of testimony to show that the defendant, before a former trial of the same issue, had attempted to procure false testimony and corruptly to influence the jurors. The action was to revive a judgment obtained against the defendant's deceased husband, of whose will she was the executrix. The defense was accord and satisfaction. In rebuttal the plaintiff offered to prove by two witnesses that, before the first trial, the defendant had attempted to induce them to appear as witnesses for her, and to testify falsely, and to prove by a third witness that the defendant had attempted to induce him to corrupt the jurors. These offers were sustained, and the witnesses were allowed to testify. The defendant had not testified at either trial.

The spoliation of papers and the destruction or withholding of evidence which a party ought to produce gives rise to a presumption unfavorable to him, as his conduct may properly be attributed to his supposed knowledge that the truth would operate against him. This principle has been applied in a great variety of cases, and it is now so well established that it is unnecessary to do more than state it. A somewhat extreme illustration of its application is found in *Brown v. Schock*, 77 Pa. 471, where the failure of a party to an action to appear at the trial, when he had a strong motive to appear, was said to be evidence against him. Those who have had experience in the trial of causes will assent to the statement of Thompson, Ch. J., in the opinion in *Frick v. Barbours*, 64 Pa. 120: "The testimony [of a case] often consists in what is not proved as well as in what is proved." A like presumption arises where, in connection with the trial, testimony has been fabricated or witnesses suborned, or a jury corruptly influenced, or where an attempt has been made to do any of these things. The conduct of the party may then be attributed to his knowledge that his cause was an unjust one. This rule is suggested in 2 Taylor, Ev. § 116, and in 1 Greenl. Ev. 15th ed. §§ 87, 196, and thus stated in 2 Wharton, Ev. 3d ed. § 1265: "Proof of the forgery of false testimony is admissible against the party by whom the fabrication is made. The same presumption . . . is drawn . . . against all forms of attempted suppression of or tampering with evidence" or subornation of witnesses. And in 2 Best, Ev. § 411: "If it be shown that a plaintiff has been suborning false testimony, and has en-

deavored to have recourse to perjury, it is strong evidence that he knew perfectly well that his cause was an unrighteous one."

It is surprising that there are so few cases upon the subject, but there are some of very high authority upon the exact point raised. *Moriarty v. London, O. & D. R. Co.* L. R. 5 Q. B. 814, was an action by a husband and wife against a railroad company for personal injuries to the wife, caused by negligence. Evidence was admitted that the husband, who was not a witness, had offered to share with witnesses the compensation in the event of a recovery of damages. A rule for a new trial was made absolute on the ground of surprise, but it was held that the testimony was properly admitted. It was said by Cockburn, Ch. J.: "I think this rule ought to be discharged, so far as the ground taken that the evidence was improperly admitted. . . . The conduct of a party to a cause may be of the highest importance in determining whether the cause of action in which he is plaintiff, or the ground of defense if he is defendant, is honest and just; just as it is evidence against a prisoner that he has said one thing at one time, and another at another, as showing that the recourse to falsehood leads fairly to an inference of guilt. Anything from which such an inference can be drawn is cogent and important evidence, with a view to the issue. So, if you can show that a plaintiff has been suborning false testimony, and has endeavored to have recourse to perjury, it is strong evidence that he knew perfectly well his cause was an unrighteous one." In *Egan v. Bowker*, 5 Allen, 449, it was held that it was competent to prove that a party to an action had suborned a witness to swear falsely in a deposition taken in relation to the case, although the deposition had not been put in evidence by either party at the trial. The decision rests on the ground that a party would not support a fair claim by falsehood, and that, when he has been guilty of fraud in the maintenance of the action, proof of the fraud is competent as an admission of the fraudulent nature of the claim. This case was approved in *Hastings v. Stetson*, 180 Mass. 76, in which testimony was admitted to show that the adverse party had attempted to bribe a juror at a former trial of the cause. In *Chicago City R. Co. v. McMahon*, 103 Ill. 485, 42 Am. Rep. 29, an action for injuries resulting from negligence, a witness in the case was allowed to testify that he had been offered money by a clerk in the employ of the corporation defendant not to appear or to influence his testimony. In *Snell v. Bray*, 56 Wis. 156, letters written by a party to third persons warning them not to aid the other

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party by testifying or otherwise, and urging them to testify to a particular state of facts, were admitted; and it was said to be immaterial that they had been written before the action was commenced, if written after the controversy had arisen. To the same effect is the case of *Winchell v. Edwards*, 57 Ill. 41. In *Heslop v. Heslop*, 82 Pa. 587, it was held not to be error to receive testimony to show the participation of the defendant in an attempt to corrupt the plaintiff's witnesses; but it was said that the presumption arising from the misconduct of the party would not justify the jury in utterly disregarding the testimony which he had produced in support of this defense, although it should admonish them carefully to scrutinize it. In some of these cases the reason given for the admission of the testimony is that it is an admission by contract, and in others that it gives rise to a presumption; but the decisions all rest on the ground that evidence of the misconduct of a party in connection with the trial is admissible as tending to show that the party guilty of the misconduct is unwilling to rely on the truth of his cause, or is conscious that it is an unjust one. The effect of such testimony may be to impeach witnesses by proof of misconduct with which they have had no connection, but the testimony of a witness is never exempt from scrutiny. The cause may be discredited while the witness is not, for an entirely honest piece of testimony may be part of a dishonest claim or defense.

It did not help the defendant's position in objection to the testimony that she was defending as executrix, and acting in a representative capacity. As a beneficiary under her husband's will, she was in fact largely interested in the result of the litigation. But the effect of her conduct was the same whether she was acting for herself or for another. The same ground of objection to the admission of testimony to show an attempt to corrupt witnesses was taken in *Moriarty v. London, O. & D. R. Co.* L. R. 5 Q. B. 814, and it was said by Lush, J.: "I also think that no distinction can be made with reference to the character of the party suing; whether it is a representative character, or he is suing to enforce some right of his own. Either way the inference which the evidence tends to raise is the same, that the case is not a true one, and on that ground the evidence is receivable."

There is nothing in the other assignments which need be considered. If there was any defect in the manner in which the defendant was brought upon the record, her voluntary appearance cured it.

The judgment is affirmed.

TEXAS SUPREME COURT.

**GULF, COLORADO, & SANTA FÉ RAIL-
WAY COMPANY, Appt.,**

v.

W. T. BEALL and Wife.

(.....Tex.....)

The loss of services of a minor child
killed by the fault of another does not give the
parents any common-law right of action against
the party in fault.

(December 6, 1897.)

QUESTIONS certified by the Court of Civil
Appeals for the Third Supreme Judicial
District for the opinion of the Supreme Court
which arose upon an appeal by defendant

NOTE.—Common-law right of action of parent
for loss of services of child killed.

I. Rule that no action will lie.

- a. *Different theories as to.*
- b. *Doctrine that private injury is merged
in public wrong.*
- c. *Doctrine that human life is not a sub-
ject of civil damages.*
- d. *Effect when death is not instantane-
ous.*

II. The contrary rule.

III. The true rule.

**IV. Rule when injury consists of a breach of
contract.**

I. Rule that no action will lie.

a. Different theories as to.

The general rule that no action would lie at
common law for causing the death of a human
being, though it has been repeatedly and vig-
orously attacked (see *infra*, II.), is supported
by a decided preponderance of authority. But
while all the cases holding this rule, in which
the killing was instant, arrive at the same re-
sult, two different theories have been acted
upon in reaching it, the first and older theory
being, the merger of the private right in the
public wrong, and the second and younger being
that the death of a human being cannot be
complained of as a civil injury.

**b. Doctrine that private injury is merged in
public wrong.**

This is the doctrine upon which the rule that
the action would not lie at common law was
originally based, and the early English cases an-
nouncing it, though not cases of action by a
parent for the death or loss of services of a
child, and consequently not strictly within the
subject of the note, are here included because
they are repeatedly cited in subsequent parent
and child cases as furnishing the rule applied
in cases of that class.

Thus, in *Higgins v. Butcher*, *Yelv. 89*, 1
Brownl. 205, Noy, 18, the first case on the sub-
ject, which was an action by a husband for
damages against one who assaulted and beat
his wife so that she died upon the following
day, it was held that the right of action for
the assault, being a personal tort to the wife,
died with her, and it was said that if a man
beats a servant of another so that he dies of
the battery, the master thereof shall not have
an action against the other for the battery and
loss of services, because the servant dying of
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from a judgment of the District Court for
Bell County in favor of plaintiffs in an ac-
tion brought to recover damages for the al-
leged negligent killing of plaintiff's minor son.
Answers favorable to appellant returned.

The facts are stated in the opinion.

**Messrs. J. W. Terry and Charles K.
Lee**, for appellant:

At common law there is no action for in-
juries resulting in death. *Actio personalis
moritur cum persona*. And this action, if
maintainable at all, is only maintainable by vir-
tue of title 52 of the Revised Statutes.

McGown v. International & G. N. R. Co.,
85 Tex. 289; *Yoakum v. Selph*, 83 Tex. 607;
Nelson v. Galveston, H. & S. A. R. Co. 78 Tex.
621, 11 L. R. A. 391; *Sabine & E. T. R. Co. v.*
Hanks, 73 Tex. 323; *Hendrick v. Walton*, 69

the extremity of the battery, it then becomes
an offense to the Crown, being converted into
felony, and that drowns the particular offense
and private wrong suffered by the master, and
his action is thereby lost.

And in *Smith v. Sykes*, *Freem. C. L. 224*, it
was held that no action will lie on the part
of a husband against one who beats his wife
so that she dies, as the matter is criminal and
of a higher nature.

And in *Cooper v. Witham*, 1 *Lev. 247*, which
was an action against a husband, alleging that
the wife, affirming herself to be sole, procured
the plaintiff to marry her with intent to deceive
him, whereby he was disturbed in conscience
and put to great charge by the husband, hold-
ing that this was a felony in the wife, and that
an action would not lie, the court said, quoting
Higgins v. Butcher, *Yelv. 89*, 1 *Brownl. 205*,
Noy, 18, that an action did not lie for the mas-
ter, for the beating of his servant to death or for
the loss of his services, for the party ought to be
indicted for it.

So, in *Bacon's Abr. title Master and Servant*,
it is said that if a man beats another's servant
to that degree that he dies thereof, the master
loses his action and must proceed by indict-
ment, for the private injury to him is drowned
in the general injury to the public; *Citing 2*
Rolle, Abr. 568.

And in *Bulter, N. P. 78*, it was said, that
while an action on the case will lie in favor
of a master for loss of services of a servant
against a third person who beats the servant
thereby causing such loss, if the servant died
of the battery the master cannot have an ac-
tion for his services, for the private offense is
drowned in the felony; *Citing Osborn's Case*, 10
Coke, 133; *Higgins v. Butcher*, *Yelv. 89*,
1 *Brownl. 205*, Noy, 18.

So, this doctrine has been adopted in *Ken-
tucky*.

Thus, in *Eden v. Lexington & F. R. Co.* 14
B. Mon. 204, in which the question was whether
a husband whose wife had been killed on a rail-
road by a collision produced by the careles-
ness and misconduct of the persons running the
locomotives and cars at the time can maintain
an action against the company for the injury
sustained by him in consequence of the death of
his wife, it was held that according to the prin-
ciples of the common law injuries affecting life
cannot in general be the subject of a civil ac-
tion; that for injuries to life the civil remedy
is considered as being entirely merged in the
public offense. But in other inferior felonies
the civil remedy is merely suspended until aft-

Tex. 192; 5 Am. & Eng. Enc. Law, p. 125; 2 Thomp. Neg. p. 1272, and cases cited; 1 Shearm. & Redf. Neg. § 124, and cases cited; *Higgins v. Butcher*, Yelv. 89; *Carey v. Berkshire R. Co.* 1 Cush. 475, 48 Am. Dec. 616; *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117, 7 L. R. A. 283.

Even if this action could be maintained in-

ter the conviction or acquittal of the supposed felon.

Elsewhere, however, it would seem to have been repudiated. See *Shields v. Yonge*, 15 Ga. 349, 60 Am. Dec. 698, *Sullivan v. Union P. R. Co.* 3 Dill. 334, *infra*, II, and *Plummer v. Webb*, 1 Ware, 75, and cases *infra*, I. c.

c. *Doctrine that human life is not a subject of civil damages.*

Subsequent cases establishing the prevailing rule arrive at the same results reasoning from a different standpoint, holding that the action would not lie at common law on the ground that human life is not a subject of civil damages.

Thus, in *Baker v. Bolton*, 1 Campb. 493, which was the first case adopting this doctrine, and which though an action by a husband against the proprietor of a stage coach for the death of his wife, from which she was thrown and so injured that she died about a month afterwards, and not a parent and child case, has been repeatedly cited as the foundation of the doctrine as applied to cases of that class, it was held that in a civil court the death of a human being could not be complained of as an injury, and that he was not entitled to any damages for the loss of her society, or for his mental suffering on her account after the moment of her death.

So, in *Worley v. Cincinnati, H. & D. R. Co.* 1 Handy (Ohio) 481, which was an action by a husband against a railroad company for a personal injury to his wife whereby she was immediately killed, the rule was laid down that an action cannot be maintained by a husband to recover damages for the loss of his wife, or by a father for the loss of the services of his child, in consequence of the death of the wife or child by the carelessness or fault of the agents or servants of a railroad company, placing the decision upon the ground that the death of a human being cannot be made the subject of damages in a civil action. This followed *Baker v. Bolton*, 1 Campb. 493, and it was said that the reasoning in *Higgins v. Butcher*, Yelv. 89, 1 Brownl. 205, Noy, 18, *supra*, I. b, could not be adopted as it is inapplicable to the judicial proceedings in that state, because they have no felonies as at common law, and the commission of crime there works no corruption of blood or attainder of estate, and the individual doing the wrong, though punishable to the extremity of the law, is still liable for the personal injury he inflicts, and his estate may be legally subjected by way of indemnity to the injured party.

Under this rule it has been repeatedly held that a civil action by a parent for the death of his minor child cannot be maintained at common law. *Kramer v. San Francisco Market Street R. Co.* 25 Cal. 434; *Jackson v. Pittsburgh, C. & St. L. R. Co.* 140 Ind. 241; *Wilson v. Bumstead*, 12 Neb. 1; *Sullivan v. Union P. R. Co.* 1 McCrary, 301, 2 Fed. Rep. 447; *Osborn v. Gillett*, L. R. 8 Exch. 88, 42 L. J. Exch. N. S. 53, 28 L. T. N. S. 197, 21 Week. Rep. 409; *Weems v. Mathieson*, 4 Macq. H. L. Cas. 215; *GULF, C. & S. F. R. Co. v. BEALL*.

And that no action can be maintained by a father whose child has been killed by the negli-

gent or unlawful act of another, for the loss of services of such child, in the absence of a statute giving the right of action. *Gann v. Worman*, 69 Ind. 458; *Carey v. Berkshire R. Co.* 1 Cush. 475, 48 Am. Dec. 616.

In *Carey v. Berkshire R. Co.* 1 Cush. 475, 49 Am. Dec. 616, *supra*, Ford v. Monroe, 20 Wend. 210, *infra*, II, was criticised and explained, the court saying that the case went before the court on a motion for a new trial, but no question was there raised concerning the legal right of the plaintiff to recover damages caused by the killing of his son. For aught that appears in the report that point was assumed and passed *sub silentio*.

Under the common law an action would not lie after the death of a child against the person inflicting the injuries which caused the death, either for the injury to the person of the child or for the loss of its services. *Gann v. Worman*, 69 Ind. 458.

And in case of injuries to a child if either the party who had caused them or one who received them died, the action of the parent for damages therefor abated, the maxim being *Actio personalis moritur cum persona*. *Covington Street R. Co. v. Packer*, 9 Bush, 455, 15 Am. Rep. 725.

Where death resulted instantaneously, or practically so, from a wrongful injury to a child, and no incidental expenses accrued, no action whatever was maintainable by the parent thereafter for the death of the child. *Mayhew v. Burns*, 103 Ind. 328.

And a father had no cause of action at common law for the instant killing of his son who was a passenger on a railroad train which collided with another through the negligence of the persons in charge, causing his death. *Thomas v. Union P. R. Co.* 1 Utah, 232.

In this case it was said that Ford v. Monroe, 20 Wend. 210, *infra*, II., holding to the contrary, was subsequently disapproved by the court of appeals in *Pack v. New York*, 3 N. Y. 493.

While a parent as master may recover for the injury to his child as his servant where the service is simply interrupted by accident resulting from negligence, he cannot do so where the service is determined altogether by the servant's immediate death. *Osborn v. Gillett*, L. R. 8 Exch. 88, 42 L. J. Exch. N. S. 53, 28 L. T. N. S. 197, 21 Week. Rep. 409.

And an action to recover for the damages the parents sustained through the killing of their child by reason of the loss of anticipated services that might have been rendered to them by the deceased up to his majority cannot be maintained. *Eureka v. Merrifield*, 53 Kan. 794.

The death of a human being, though clearly involving pecuniary losses, affords no ground for an action for damages at common law, and an instruction in an action by a father for an assault and battery upon his minor son from which his death resulted, that the plaintiff might recover for loss of services of his son until he would have been of age, is error. *Sherman v. Johnson*, 58 Vt. 40.

And as a father has no action at common law against one causing the death of his son by negligence, and cannot recover in such an action for the services of his child up to the time he would be twenty-one years of age had he lived,

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brought under the statute, recovery can only be had where the wrongful act, negligence, carelessness, unskillfulness, or default made the basis of the action, is of such character that if death had not ensued it would have entitled the deceased to maintain an action.

Texas & P. R. Co. v. Carlton, 60 Tex. 397;
Texas & N. O. R. Co. v. Crowder, 61 Tex. 263.

It is not error to allow the plaintiff in an action for a personal injury to a child causing death brought by an administrator to recover damages for such period. *Lake Shore & M. S. R. Co. v. Orvis*, 12 Ohio C. C. 710.

So, the father of a minor killed by the wrongful act of another is not entitled to the earnings and services of such son until he is twenty-one years of age to be recovered by him in an action as such father so as to render it improper for the jury in an action by the administrator of such child, for negligently causing his death, to allow any damages for any loss of services or earnings during the period of his minority. *Illinois C. R. Co. v. Slater*, 129 Ill. 91, 6 L. R. A. 418.

And an action brought by a parent against another for negligently killing his child, which act was done in another state, will not lie in the absence of an averment in the complaint that the common law of that state had been changed, or that any statute was in force there which authorized the father to maintain an action for damages for the death of his child, as the court will presume, in the absence of such allegation, that the common law prevails in that state. *Jackson v. Pittsburgh, C. C. & St. L. R. Co.* 140 Ind. 241.

So, Minn. Gen. Stat. 1878, chap. 77, § 1, providing that a cause of action arising out of the injury to the person dies with the person of either party, is only declaratory of the common-law rule, and an action cannot be maintained thereunder by a father to recover for the negligent killing of his minor son whereby he will be deprived of his services. *Scheffer v. Minnesota & St. L. R. Co.* 32 Minn. 125.

And California act of April 26, 1862, p. 447, providing that the father, or, in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child, does not create a right of action where none existed before, and does not change the common-law rule that a parent cannot maintain a civil action for the death of his child, but merely designates the person by whom an action for the costs therein mentioned should be brought, and does not authorize an action by the father as father and sole heir, the action being maintainable only by the administrator or executor of the deceased. *Kramer v. San Francisco Market Street R. Co.* 25 Cal. 434.

So, besides the direct holdings above set forth, there are numerous *dicta* in other cases to the same effect.

Thus, in *Cleveland & P. R. Co. v. Rowan*, 66 Pa. 393, which was an action by a father for damages for the death of a son occasioned by the alleged negligence of the defendants, it was said that the right of action for damages for death is exclusively statutory.

And in *Oldfield v. New York & H. R. R. Co.* 14 N. Y. 310, which was an action under the statute by a parent for damages inflicted upon his seven-year-old daughter by a street-railway company by negligently running a car over her and causing her death, it was said that at common law the right to maintain an action for personal injuries died with the person.

And in *Telfer v. Northern R. Co.* 30 N. J. L. 100, which was an action by a father under the

A minor is not incapacitated to make a contract for employment, even to enter a dangerous business; and in any action that would accrue to such minor his minority is only material on an issue as to whether the defendant was guilty of negligence in employing in a dangerous business one of such youth and inexperience that he had not the capacity suffi-

statute for the recovery of damages sustained by the death of his son, occasioned by the alleged wrongful act, neglect, or default of the defendant, it was said that the common law gives no action to a father sustaining such an injury.

So, in *Lehigh Iron Co. v. Rupp*, 100 Pa. 98, which was an action by a father to recover damages for the alleged negligent killing of his son, it was said that in such cases as these there was no right of action at common law. The right is purely statutory.

And in *Little Rock & Ft. S. R. Co. v. Baker*, 33 Ark. 350, which was an action under the statute by a mother for the negligent killing by a railway train of her infant child, it was said that by the common law the death of a human being could not be made the subject of a civil action.

And in *Morgan v. Southern Pac. Co.* 95 Cal. 510, 17 L. R. A. 71, which was a similar action, it was said that an action to recover damages for the death of a relative was not known to common law. It is of recent legislative origin.

And in *Pennsylvania R. Co. v. Adams*, 55 Pa. 499, which was an action under the statute relating to actions for personal injuries for negligence, by parents for the negligence of a railroad company resulting in the death of their son, it was said that at common law no private action lay to compensate anyone, parent or child, husband or wife, brother or sister, for a loss occasioned by the negligence or violent destruction of life. The right is altogether of statutory origin.

So, in *Safford v. Drew*, 3 Duer, 627, which was an action by the father, as administrator, of a person killed in a collision between two vessels, holding that an action in such case is properly brought in the name of the executor or administrator, but that the complaint must aver that the deceased left a widow or next of kin, who sustained a pecuniary loss, it was said that by the rules of the common law no action could be maintained by the personal representatives of a deceased person for loss or damage resulting from his death.

And in *Murphy v. New York & N. H. R. Co.* 30 Conn. 184, in which the question was whether a cause of action for the wrongful killing of a child which was instantaneous would survive under a statute providing that actions for injuries to the person shall survive to the executor or administrator, it was said that if death ensued immediately or before suit brought or judgment recovered at common law the cause of action is gone, for the maxim is *Actio personæ moritur cum persona*.

And in *Hyatt v. Adams*, 16 Mich. 183, which was an action by a husband for damages to his wife from which death resulted, it was said that at common law no civil action could be maintained for the death of a human being caused by the wrongful act or negligence of another, or for any damages suffered by any person in consequence of such death.

So, in *Osborn v. Gillett*, L. R. 8 Exch. 88, 42 L. J. Exch. N. S. 53, 28 L. T. N. S. 197, 21 Week. Rep. 409, it was said that in addition to the fact that no case can be found in the books where an action by a master for loss of

cient to understand the dangers incident to the business, and to guard against the same.

Texas & N. O. R. Co. v. Crowder, 70 Tex. 222, 41 Tex. 262; *Houston & G. N. R. Co. v. Miller*, 51 Tex. 270; *Hamilton v. Galveston, H. & S. A. R. Co.* 54 Tex. 556; *Texas & N. O. R. Co. v. Crowder*, 63 Tex. 502; *Gulf, C. & S. F. R. Co. v. Jones*, 78 Tex. 232; *Texas & P. R. Co.*

v. Carlton, 80 Tex. 397; *Bailey, Master's Liability for Injuries to Servant*, pp. 180, 181; *Gulf, C. & S. F. R. Co. v. Schwabbe*, 1 Tex. Civ. App. 573.

Although the deceased was a minor, if he had sufficient intelligence to appreciate the dangers incident to the employment of a switchman, or knew of the use of the switch

services of his servant from a personal injury resulting in immediate death has been maintained, and the general acquiescence in it for so many years, there is a clear parliamentary recognition and statement that such was the law to be found in the preamble to Lord Campbell's act, 9 & 10 Vict. chap. 93, reciting that "whereas no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person," etc.

d. Effect when death is not instantaneous.

At common law a plaintiff might, and still may, without any statute, recover for loss of services resulting from a wrongful injury to his child during the period of disability occasioned by such injury, and, if death resulted, for the loss of services during the time between the injury and death, and for incidental damages, such as for medical attendance, care, and nursing up to the time of death, upon the theory that the parent was entitled to the services of the child at the time the injury was inflicted, and owed the child the corresponding obligation of care, nursing, and medical attendance, but when the right to the child's services or the duty of care and maintenance was at an end, then no right of action for the injury existed in favor of the parent. *Mayhew v. Burns*, 103 Ind. 328; *Jackson v. Pittsburgh, C. C. & St. L. R. Co.* 140 Ind. 241.

And while at common law a civil action cannot be prosecuted to recover damages for an injury resulting in the death of a human being, in an action by a mother, who is the surviving parent, based upon the killing of her child where death did not result instantaneously, as she is entitled to the services of her child without reference to the statute, she may recover at least the value of his services from the date of the injuries received by him up to the time of his death, and any incidental expenses she may have incurred for medical attendance, care, and nursing up to that time, the common-law remedy being, not for the death of the child, or for the injuries suffered by him, but for the loss of his services and incidental expenses. *Natchez, J. & C. R. Co. v. Cook*, 63 Miss. 38.

And the parent would be entitled to recover his reasonable costs and expenses incurred during the sickness of his children. *Wilson v. Bumstead*, 12 Neb. 1.

So, in *Long v. Morrison*, 14 Ind. 595, 77 Am. Dec. 72, which was an action against a physician for alleged malpractice which caused the death of the plaintiff's wife, it was said that at common law an action for personal injuries to married women, infants, and servants would lie by the husband, father, or master for the loss of services, etc.

And in *Louisville, N. A. & C. R. Co. v. Goodykoontz*, 119 Ind. 111, which was an action by a guardian for damages for negligence, causing the death of his ward, it was said that while it was a settled rule of the common law that no one could maintain a civil action for damages on account of the death of a human being, all claims for injuries to the person being extinguished by the death of the person injured,

if a child was wrongfully injured the father or person lawfully entitled to the child's services might recover for loss of services during the period of disability up to the time of death if death resulted, and for incidental damages for nursing, surgical and medical attendance, including proper funeral expenses.

While the cause of action for injuries to the person dies with the person injured, and the cause of action having itself abated no separate action can be maintained for such damages as are exclusively consequential for aggravated injuries to the person of the wife or child, a husband or parent has an independent or separate cause of action for the loss of the society of the wife or the services of the child as the case may be, which does not abate by the subsequent death of the wife or child, though the death of either affects the extent of the recovery, as by that event all further claim to the society of the one or the services of the other ceases and terminates. *Eden v. Lexington & F. R. Co.* 14 B. Mon. 204.

And the common-law right of action of a father for loss of the services of his minor child who is killed by the wrongful act of another is not taken away by Arkansas act of 1883, Mansf. Dig. §§ 5225, 5226, embodying the provisions of Lord Campbell's act in regard to suits to recover damages for death resulting from the wrongful act, neglect, or default of another. *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117, 7 L. R. A. 283.

The exception to the rule that at common law the death of a human being is not a ground for an action for damages, however, allowing the father in his character as master to bring an action for the injury causing the death of his child, proceeds upon the ground that such action, if sustainable at all, is for the loss of the services of the child as a servant, and does not permit an action by the father for damages for the immediate death of his child. *Edgar v. Castello*, 14 S. C. 20, 37 Am. Rep. 714.

In this case *Plummer v. Webb*, 1 Ware, 80, *infra*, II., was explained and distinguished upon the ground that in that case the right of action against another by a parent for wrongfully causing the death of his child is placed upon the ground of the loss of service.

The right of action of a parent for the wrongful killing of his minor child fell at common law with the life of the minor, upon the theory that no civil action would lie springing from the death of a human being, and that when such an injury resulted in death the father's right of recovery was limited to the interim between the disabling injury to the child and its death, and his right of recovery was restricted to the value of the minor's services and the cost of medical attendance and nursing to the time of death. *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117, 7 L. R. A. 283.

And the damages recoverable by a parent as master for a negligent injury to his child as servant by which its death was caused were strictly limited to an amount fairly compensatory for the consequent loss of services up to the time of death and the expenses which the parent has incurred in consequence of the injury, such as for surgical attendance. *Covington*

engine, if alive, he could not have recovered for any injuries the result of such dangers, and under the statute the plaintiffs are not entitled to recover unless he could have recovered.

Texas & N. O. R. Co. v. Crowder, 61 Tex. 262; *Texas & P. R. Co. v. Carlton*, 60 Tex. 397; *Texas & P. R. Co. v. French*, 86 Tex. 96;

ton Street R. Co. v. Packer, 9 Bush, 455, 15 Am. Rep. 725.

Where the father of a child is seeking to recover for an injury which caused its death upon the alleged ground that he was entitled to its services, the foundation of the action is the relation of master and servant, and it is not maintained at common law because the plaintiff is the father of the child, but upon the ground alone that he is entitled to the child's services, and no damages can be awarded him because of his injured feelings as a parent. *Covington Street R. Co. v. Packer*, 9 Bush, 455, 15 Am. Rep. 725.

And in such case the father could not recover the necessary expenses incurred and paid in the burial of his child. *Jackson v. Pittsburgh, C. C. & St. L. R. Co.* 140 Ind. 241.

So, in *Pack v. New York*, 3 N. Y. 489, which was an action by a parent for the injury and death of his eight-year-old son caused by fragments of rock being thrown into his house from blasting in an excavation made by the city, where the child died within an hour and a half after the injury, the court said that it had a strong impression that the father could recover nothing on account of the injury to the child, beyond the physician's bill and funeral expenses; but as it was doubtful how the charge ought to be understood, the question was not determined.

And in *Whitford v. Panama R. Co.* 23 N. Y. 478, it was said that the question whether a father, who has been deprived of the services of his child by a personal injury from which death ensued, may maintain an action against the wrongdoer to recover damages for such injury, is in no way involved in an action under the statute by an administrator for damages for such wrongful act.

But in *Connor v. Paul*, 12 Bush, 144, which was an action by a mother as administratrix of her child for damages for the death of the latter caused by the negligence or wrongful act of the defendant, it was held that the acts causing the death of a party constitute but one cause of action, whether the measure of recovery sought is for the suffering of the intestate during his life or for the wilful negligence causing his death, and that the party entitled to bring the action either at common law or under the statute must make his election, the acts constituting the wrong being inseparable though the recovery is different, and a recovery by the administrator for mental and bodily suffering of the intestate is a bar to any proceeding under the statute, either by the personal representatives or the next of kin.

As to whether the one action will bar the other, see also *McGovern v. New York C. & H. R. Co.* 67 N. Y. 417, *infra*, II.

II. The contrary rule.

The contrary rule that at common law a parent might maintain a civil action for loss of services caused by an injury to his minor child from which death resulted, recovered from the time of the injury to the time the minor would have arrived at the age of twenty-one had he lived, has been adopted in some of the cases, and strenuously urged by some of the courts.

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Gulf, C. & S. F. R. Co. v. Schwabbe, 1 Tex. Civ. App. 578.

Although deceased was a minor he was not exempt on that account from a charge of contributory negligence.

The only difference between a minor and an adult turns upon the question of whether the minor was of sufficient age and discretion to

Thus, in *Ford v. Monroe*, 20 Wend. 210, which was an action by a father for damages for a personal injury to his child resulting in death, it was held that the father was entitled to recover for the loss of services of the child from the time he was killed until he would have arrived at his majority had he lived.

And in *Sullivan v. Union P. R. Co.* 3 Dill. 334, it was held that a parent entitled to the services of his son may recover, from one by whose wrongful act he is killed, the value of his services from the date of his death until he would have become of age, and for medical services, and for nursing and burial expenses; and he is not limited in the estimate of his damages to the period between the injury and the death.

In this case *Eden v. Lexington & F. R. Co.* 14 B. Mon. 204, *supra*, I. b, was distinguished and dissented from, upon the ground that the opinion therein was based on the untenable ground that the public wrong merges in the private injury.

And *Carey v. Berkshire R. Co.* 1 Cush. 475, 48 Am. Dec. 616, *supra*, I. c, was distinguished upon the ground that it was an action by a wife for the killing of her husband, instead of by a parent for the death of his child, and that the wife has no legal right to the services of her husband, or common-law right to recover for his death.

And *Osborn v. Gillett*, L. R. 8 Exch. 88, 42 L. J. Exch. N. S. 53, 28 L. T. N. S. 197, 21 Week. Rep. 409, *supra*, I. c, was explained and doubted, the court saying that the dissenting opinion seems to contain the better reasons, and the majority felt bound by *Baker v. Bolton*, 1 Campb. 493; but that it is noticeable that no attempt was made by the majority to vindicate the doctrine they felt bound to follow.

And *Baker v. Bolton*, 1 Campb. 493, *supra*, I. c, was explained and distinguished upon the theory that strictly the complaint of the plaintiff in the case at bar is not for the death of his son, but for the wrongful act which by producing the death was the cause of his pecuniary damage; and it was said that that case, which was claimed to be the origin of the doctrine contended for, was determined in 1808, which was at so late a period as not to be binding upon the courts of this country as a part of the common law.

So, in *Comyns' Dig. title Trespass*, d, 5, it is said that trespass lies by a master for the battery of a servant, after the death of the servant.

The prevailing rule in England, that if a tort committed against a child results in its immediate death there can be no right of action for lost services, has been entirely ignored by the courts of Georgia on account of its alleged absurdity, and it is held that an action for lost services in such case can be maintained by the parent although death results therefrom. *Amos v. Atlanta R. Co.* (Ga.) 31 S. E. 42.

Thus, in *Shields v. Yonge*, 15 Ga. 349, 60 Am. Dec. 698, which was an action by a father against the superintendent of a railroad company for damages to his minor son resulting in death caused by the negligence of the employees of the railroad, it was held that the son, being eighteen years of age, was old enough to render

have guarded himself against danger, and to be reasonably expected to take the same measures and means for his protection as an ordinarily prudent adult would have done.

Texas & N. O. R. Co. v. Crowder, 70 Tex. 222, 61 Tex. 262; *Houston & G. N. R. Co. v. Miller*, 51 Tex. 270; *Hamilton v. Galveston, H. & S. A. R. Co.* 54 Tex. 556; *Texas & N. O.*

services, and that it follows that the father had the right to treat the son as his servant and sue for the injury to him as for an injury to the servant.

And under the rule adopted in that state a tortious act which deprives a minor of his ability to render valuable service will give his parents a right of action against the wrongdoer, although such tort may result in his death, and although at the time of the injury he was serving a term in the chain gang for a violation of a penal law, which term would expire in a short time and before his majority, and such action may be maintained by the mother where the father had deserted the family long before. *Amos v. Atlanta R. Co.* (Ga.) 31 S. E. 42.

That court holds to the rule that when the parents have not lost dominion or control over the child, but still have the power to claim its services during minority, they can recover for lost services resulting therefrom, when the child at the time had the ability or capacity to render services.

In that case *Allen v. Atlanta Street R. Co.* 54 Ga. 503, *infra*, was distinguished upon the ground that in that case the decision was based upon the idea that the child, on account of its infancy, was at the time incapable of rendering any service, and that it would be a matter of mere speculation as to when, if ever, he would reach an age when he could render services.

So, in *Shields v. Yonge*, 15 Ga. 349, 60 Am. Dec. 698, which was an action by a father against a railroad company for the negligent killing of his son, the homicide being alleged to have been occasioned by the negligence of the superintendent while conveying the son over the railroad, it was held that as the superintendent was engaged in the performance of a lawful act, he was guilty of involuntary manslaughter and not of a felony, and that therefore the private injury which resulted from the homicide was not merged in the public injury or suspended until after that had been avenged, and that therefore an action would lie by the father for such killing of his son.

And in that case it was said that the rule of the common law is no broader than that in a civil court. The death of a human being cannot be complained of as a private injury until that death has been complained of in a criminal court as a public injury. Every death of a human being that amounts to an injury at all, however, amounts by the common law to a felony, and in every felony the private injury is suspended until after the death has been avenged.

And the ruling in *Shields v. Yonge*, 15 Ga. 349, 60 Am. Dec. 698, was affirmed and approved in *Chick v. Southwestern R. Co.* 57 Ga. 357, and *McDowell v. Georgia R. Co.* 60 Ga. 320.

So, Georgia Code, § 2980, providing that every person may recover for torts committed to himself, his wife, his child, his ward, or his servant is held to be but declaratory of the common law, but it must be averred that such torts resulted in loss to the plaintiff of the services of such wife, child, ward, or servant. *Bell v. Central R. Co.* 73 Ga. 520.

And that statute is to be considered in the 41 L. R. A.

R. Co. v. Crowder, 63 Tex. 502; *Gulf, C. & S. F. R. Co. v. Jones*, 73 Tex. 232; *Texas & P. R. Co. v. Carlton*, 60 Tex. 397.

At common law no action lay for an injury that resulted in the instantaneous death of a human being.

8 *Rapalje & Mack's Digest of Railway Law*, pp. 742, 743; 5 *Am. & Eng. Enc. Law*, p. 125;

light of the common law, and a person may recover damages for a tort resulting in the killing of his child as he was authorized to do by the common law, but when the tort consists in any violent injury or attempt to commit a physical injury illegally upon the person amounting to a felony as defined by the Code, the person must either simultaneously or concurrently prosecute for the same or allege a good excuse for the failure to so prosecute. *Allen v. Atlanta Street R. Co.* 54 Ga. 503.

The fact that the declaration in an action for tort alleges the death of the child upon which the tort was committed in consequence thereof does not make it an action to recover for the death of the child. *Chick v. Southwestern R. Co.* 57 Ga. 357.

So, in *Hiner v. The Sea Gull* (U. S. C. C. D. C. Md.) 2 Am. L. T. Rep. 15, which was a libel in admiralty by a husband for injuries to his wife terminating in her death, it was said that the rule that personal actions die with the person does not seem to apply to a case not prosecuted by an administrator, but prosecuted by the husband of the deceased, in which redress is sought for damages to him through injuries to her.

And in *Plummer v. Webb*, 1 Ware, 75, involving the right of a father to maintain a libel in admiralty for consequential damages resulting from an assault and battery on his minor child on the high seas, from which assault the child died, it was said that the doctrine of the merger of the civil remedy in the public crime, which is a natural and logical consequence of the fundamental and organic principles of feudal society, is entirely in opposition to the system of civil polity established in this country, and has not been adopted in the state of Maine.

So, in *Cutting v. Seabury*, 1 Sprague, 522, it was said that a father may maintain an action for the violation of his parental rights if the son survives the injury, although the wrong would not have been a felony if he had died, and surely there is no reason why an action for the same act should not be maintained when to the injury is added the calamity of death of the son: and that the question is not one of local law, but of general jurisprudence, and that the court cannot consider it as settled that no action can be maintained for the death of a human being.

But in that case it was held that a father whose minor son leaves his father's services and goes to a port and ships as of full age for a whaling voyage, during which he perishes, cannot maintain an action for the loss of the services and society of the son arising from his death, where it does not appear that the person with whom he shipped knew that he was a minor when he took him.

So, in *Pennsylvania R. Co. v. Zebe*, 33 Pa. 318, which was an action by parents against a railroad company to recover compensation for the negligent killing of their son, it was said that the act of April 26, 1855, changed the law so far as the personal representatives were concerned, and conferred the right of recovery only upon parents for the loss of children, and upon children for the loss of parents, and respectively upon husband and wife, and that it conferred no rights unknown to the common law.

3 *Thomp. Neg.* pp. 1272, 1273; *Tiffany, Death by Wrongful Act*, chap. 1; *McGowan v. International & G. N. R. Co.* 85 Tex. 298; *Nelson v. Galveston, H. & S. A. R. Co.* 78 Tex. 621, 11 L. R. A. 891; *Hendrick v. Walton*, 69 Tex. 192; *Yoakum v. Selph*, 88 Tex. 607.

Exactly the same view has been taken by the court in actions by parents.

And in *McGovern v. New York C. & H. R. R. Co.* 67 N. Y. 417, it was said that, assuming, as seems to have been held in *Ford v. Monroe*, 20 Wend. 210, that a father can recover damages for the loss of services of his minor son against a person who negligently caused his death, to be computed and ascertained from the time of his death until the time when the son, if living, would have attained his majority, in such case damages for the loss of services may be included in the recovery as a part of the pecuniary loss to the next of kin of the deceased, resulting from his death, and where the father elects to proceed for and claim his whole damages in a statutory action, the recovery is for his exclusive benefit, and such a recovery will bar another action for the same damages by the father as such.

And in *Texas & P. R. Co. v. Carlton*, 60 Tex. 397, which was an action by a father under the statute for injuries resulting in the death of his son in which it was claimed that the son was employed by the defendant against the father's wishes, it was said that if the action was based upon the father's common-law right for loss of services of his son it may be true, although the injuries which the son received resulted in his death, that he could maintain his action if the son was employed without his consent and was thus withdrawn from his services, or if employed with his consent to perform certain labor, and he was afterwards placed without his consent at labor more hazardous, through which he was injured.

So, in *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508, which was an action by a father for damages for the death of his minor son against a dealer in cartridges which he sold to such minor, after which another boy took up a toy pistol containing one of them and killed him, it was held that a man who places in the hands of a child an article of a dangerous character, and one likely to cause injury to the child itself or to others, is guilty of an actionable wrong; but it does not appear whether the action was at common law or under the statute.

A parent cannot recover for an injury to his child resulting in death at common law, however, where the child was incapable of rendering him any services at the time of the alleged injury. *Allen v. Atlanta Street R. Co.* 54 Ga. 503.

So, by the early English law compensation in some shape was usually allowed for causing the death of a human being. Thus:

In 5 Case and Comment, 15, in an article entitled "Paying for a Life" it was said: "A curious fact in English law is the loss for centuries of the right to claim damages for the death of a kinsman. That right, recreated by modern statutes, seems to have been one of the most fully established of all rights in early English law, when civil and criminal procedure were not clearly distinguished. A schedule of prices to be paid for lives of men, as Professor Maitland shows in his 'Domesday Book and Beyond,' was well established. The wergild of a villein or ceorl was 200 saxon shillings to be paid to his kinsfolk as compensation for his life, while a further sum of 30 shillings called a man-bot was to be paid to his lord. But for killing a

Sabine & E. T. R. Co. v. Hanks, 78 Tex. 323; *Turner v. Cross*, 88 Tex. 218, 15 L. R. A. 262.

Even if there ever existed at common law an action for injuries resulting in death that action is merged in and done away with by the act of 1860 and its amendments, being title 57 of the Revised Statutes.

serf his kinsfolk received a wergild of 40 shillings only, while his lord received a man-bot of 20 shillings. A thegn, on the other hand, was a twelve hundred man whose wergild was equal to that of six villeins or ceorls."

So, in 12 Cent. L. J. 465, it was said in an article entitled "Was death by wrongful act, default, or negligence actionable at common law?"—that in "Sullivan's Lectures on the English Law," vol. 1, p. 117, we find this statement: "Murder, therefore, like other lesser crimes, was atoned among those people, as it was among the ancient Greeks,—namely, by a satisfaction of cattle, corn, or money, to the persons injured—that is, to the next of kin to the deceased, with a fine to the King or lord as an acknowledgment of his offense, and to engage the society to protect him against the future attempts of the party offended. These satisfactions were not regulated originally, nor fixed at any certain rate, but were left to the discretion of the injured or next of kin, limited only by his inability to refuse a reasonable one."

And in *Crabb's English Law*, 1st Am. ed. pp. 37-39, it was said that the Saxons "adopted the principle of compensation, for every personal injury whatever, even to the taking away of life. In the Code of Ethelbert, the first Saxon legislator, there appears to be hardly any other penalty attached to any offense, however heinous. If a man killed another, the slayer was to compensate his death by the payment of a certain sum, greater or less, according to the circumstances of the case. If a man killed his chief guest, his death was to be compensated with eighty shillings, and that of his other guests according to their rank. By the laws of Athelstan, the life of every man, not excepting that of the King himself, was estimated at a certain price, which was called the 'were' or *ættimatto capitis*. The 'were' for the life of the King was 30,000 krymmas, or about 300 pounds of our [English] money; that for a prince, 15,000; that for a bishop or alderman, 8,000; that for a sheriff 4,000; that for a thane, or priest, 2,000; that for a ceorl, 260. . . . Also,

if a man killed the slave of another, he was obliged to pay the price of a slave, which was called 'man-bot,' that is, the man's price or value. If a master . . . killed . . . [his slave], he paid a fine to the King. If a slave killed a freeman, the owner of the slave was to make amends. On this principle of compensation it appears that if a man in hewing a tree happened to kill another, the relations were entitled to the tree. . . . Subsequent legislators . . . added other penalties, and punished crimes, not merely as private injuries, but as public offenses. Thus, in the time of Ina, half the were in the case of homicide was paid to the King in the name of frithbote, or compensation for a breach of the peace, and half to the family of the deceased, which was called 'mægbote,' that is, literally, a compensation to the kindred. By a law of Edmund, a homicide was to bear all the consequences of his offense, and his relations to be exempted from all charge, provided they afforded him no protection or sustenance, otherwise they were to be treated as accessories."

So, in 2 *Thompson on Negligence*, p. 1274, the

To allow, therefore, actions for injuries resulting in the death of any person in cases which do not come within the purview of the statute is to allow actions which the legislature did not contemplate, did not provide for, and would be to hold a defendant without warrant in law.

Messrs. Monteith & Furman for appellee.

Denman, J., delivered the opinion of the court:

In this cause the court of civil appeals has certified to this court the following questions and explanatory statement: "This is a suit by

W. T. Beall and wife against the appellant to recover damages resulting from the death of their minor son, W. C. Beall. W. C. Beall was instantaneously killed by being run over by one of the cars of appellant's road. At the time he was killed he was acting as a brakeman in the employ of the appellant, and was a minor, about nineteen years of age. He was on top of the car that was being switched, and, by reason of some movement or jar or jerk of the car, he fell from the top of the car to the track below, and was run over, crushed, and killed. Plaintiffs brought this suit to recover damages resulting from the death of their minor son; alleging that he was a minor at the

ancient custom of the Saxons of paying for life taken was described in practically the same terms, and it was said that "formerly at common law, in case of the death of anyone by accident, forfeitures were imposed, called 'deodands.' Lord Coke, in defining them, says, Deodands—when any movable thing inanimate, or beast animate, do move to or cause the untimely death of any reasonable creature by mischance, in any county of the realm (and not upon the sea, or upon any salt water), without the will, offense, or fault of himself, or of any person." But no deodand accrued in the case of felonious killing. Just before the enactment of Lord Campbell's act a statute was passed abolishing deodands."

In *Sullivan v. Union P. R. Co.* 3 Dill. 334, 337, it was said that the civil law and the French and Scotch law recognized the right to maintain actions for injuries resulting in death.

III. The true rule.

While the Georgia rule as shown by the Georgia cases set forth *supra*, II. would seem to be firmly fixed and well settled, it would appear that outside of that state the rule that there is no common-law right of action by a parent for loss of services of his child killed by the wrongful act of another must be regarded as the true doctrine.

Thus, in *Mobile L. Ins. Co. v. Brame*, 95 U. S. 754, 24 L. ed. 580, which was an action by a life insurance company against a person who had killed another to recover the amount the company was compelled to pay under a policy upon the life of the person killed, it was said that the authorities are so numerous and so uniform to the proposition that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts, and in many of the state courts, and no deliberate and well-considered decision to the contrary is to be found.

So, in *The Harrisburg*, 119 U. S. 199, 30 L. ed. 358, in which the rule was probably settled that a suit in admiralty cannot be maintained in the courts of the United States to recover damages for the death of a human being caused by negligence, in the absence of statutory authority, the cases laying down the contrary rule at common law were criticised and explained, and said not to hold the correct rule.

And in *The Garland*, 5 Fed. Rep. 924, which was a proceeding in admiralty for damages for the loss of the services of two minor sons of the libellant killed in a collision between two steamers, involving the question of the power of an admiralty court to grant a recovery therefor, it was said that although the rule of the common law that the death of a human being cannot be complained of as an injury in any 41 L. R. A.

court of civil jurisdiction seems to be based upon technical ground, and does not commend itself to one's sense of natural justice, it is too firmly established to be shaken by judicial opinion.

So, in *Cutting v. Seabury*, 1 Sprague, 522, it was said that the weight of authority in the common-law courts seems to favor the doctrine that a suit for damages cannot be maintained for the death of a child, and that natural equity and the general principles of law are in favor of it.

And in *Holmes v. Oregon & C. R. Co.* 6 Sawy. 262, 5 Fed. Rep. 75, involving the question whether an action for damages for the death of a person will lie in admiralty, it was said that it is admitted to be the rule at common law that an action will not lie to recover damages for the death of a human being, but it is not admitted that the rule is founded in reason or is consonant with justice.

And in *Monaghan v. Horn*, 7 Can. S. C. 409, which was also an action in admiralty for the killing of a minor child, it was also said that no civil action can be maintained at common law for an injury which results in death.

So, in *Green v. Hudson River R. Co.* 2 Keyes, 204, involving the question whether an action can be maintained by a husband for damages arising from the instantaneous killing of his wife by the negligence of the defendants, it was said that *Ford v. Monroe*, 20 Wend. 210, *supra*, II., and *Lynch v. Davis*, 12 How. Pr. 323, *infra*, IV., were the only two cases found in the reports of decisions in New York giving the slightest authority for bringing such an action, and that these are at variance with the former current of authority and will be found to be remarks not called for by the case then before the court, and that in *Ford v. Monroe*, 20 Wend. 210, there appears to have been no question raised or considered in respect to the cause of action except only as to the proof of the relation of master and servant existing at the time and the allegation of special damage in the declaration and the proof of the direct consequential relation of the damage to the act complained of, and that the small amount of the recovery might lead to the inference that the recovery was for the expenses of interment, or that some care and expense were bestowed in an attempt to recover the child; and it does not appear that any exception was taken to the charge, or that it was made the ground of the application for a new trial, and the subject is not referred to in the opinion of the court in the most distinct manner. The whole authority of *Lynch v. Davis*, 12 How. Pr. 323, is that the statute does not give an action to the personal representatives of a married woman against any person for wrongfully causing her death, and that no authority for the rule stated *obiter* that the common law gave the husband and father a right to recover of the wrongdoer

time, and that that fact was known to the appellant, and that he was employed by the appellant without their consent, and that the business of brakeman, in which he was engaged, was dangerous. There is evidence which tends to establish these facts. The jury found that he was a minor when so employed, and was wrongfully employed by the defendant, and assessed the damages at \$1,500. There is an assignment of error in which appellant complains of the following charge: 'If you find that the son was a minor, and employed, without the consent and acquiescence of the father, in a dangerous employment, and that defendant's servants knew he was a minor, or

ought to have known it from his youthful appearance, then plaintiffs would be entitled to recover, whether the son was guilty of contributory negligence or not, or whether the engine and appliance were sound and suitable for the business or not, or whether said employees were skilled and competent or not. The wrong, if any, consists, under such supposed state of facts, if you find them proved, in the unauthorized employment of a minor, if you find from the testimony that there was such unauthorized employment of plaintiff's minor son.' In this connection it is well to say that there is some evidence in the record which tends to show that the deceased was guilty of

the pecuniary injury he had sustained by reason of the killing of his wife or child, and that it is thought that the court would be unable to find it laid down to that extent.

And in *Covington Street R. Co. v. Packer*, 9 Bush, 455, 15 Am. Rep. 725, it was said that *Ford v. Monroe*, 20 Wend. 210, *supra*, II., is regarded by the courts of the state of New York in recent decisions as questionable, and was reviewed in *Eden v. Lexington & F. R. Co.* 14 B. Mon. 205, and considered as a departure from the well-recognized rules of law applicable to such case.

And in *Edgar v. Castello*, 14 S. C. 20, 37 Am. Rep. 714, *Ford v. Monroe*, 20 Wend. 210, *supra*, was explained and criticised, the court saying that the points in question received but little attention at the hands of the court, the principal question considered being in relation to another matter, and that it is difficult to understand how the charge in question could be sustained in any view of the case.

So, in *Edgar v. Castello*, 14 S. C. 20, 37 Am. Rep. 714, *Cutting v. Seabury*, 1 Sprague, 522, *supra*, II., was explained and distinguished, the court saying that that case does not decide that a father may recover damages for an injury to his child resulting in death, but that on the contrary Mr. Justice Sprague, though expressing his own opinion in favor of such a doctrine, admits that the weight of authority in the common-law courts seems to be against the action, and claims that equity and the general principles of law are in favor of it.

See also criticisms on *Ford v. Monroe*, 20 Wend. 210, *supra*, in *Carey v. Berkshire R. Co.* 1 Cush. 475, 48 Am. Dec. 616, and *Thomas v. Union P. R. Co.* 1 Utah, 282, *supra*, I. c, and particularly contrary *dictum* in *Oldfield v. New York & H. R. Co.* 14 N. Y. 310, *supra*, I. c.

IV. Rule when injury consists of a breach of contract.

The sparsity of authority on this subject is such that the husband and wife and master and servant cases, and others which are governed by the same principle, are included for the purpose of more clearly showing the rules controlling it.

In cases of this class an entirely different rule seems to have prevailed when the action was brought by the person with whom the contract was made.

Thus, a libel for the death of a child poisoned by carelessness on the part of the officers of a vessel on which he was a passenger, from which he died, is one for breach of contract which survives to the administrator after the death of the child, and may be sued for *in rem* in like manner as if the deceased had sustained an injury short of death. *The City of Brussels*, 6 Ben. 370.

And an action may be maintained by the executor of an estate, independent of the statute, for damages caused to the estate by a personal injury arising from the breach of a contract made with the testator in his lifetime, though the injury caused his death. *Bradshaw v. Lancashire & Y. R. Co.* L. R. 10 C. P. 189, 44 L. J. C. P. N. S. 148, 31 L. T. N. S. 847.

So, in *Lynch v. Davis*, 12 How. Pr. 323, holding that the right of action for alleged malpractice and injuries received by a woman from a physician from which she dies, is vested in the husband as such under the Laws of 1847, p. 575, and not as administrator, it was said that in such a case where the contract to perform his professional duty in a skillful manner was made with the husband or father, the common law gave the husband or father a right to recover of the wrongdoer the pecuniary penalty he had sustained by the reason of the killing of his wife or child.

And in *Fairmount & A. Street Pass. R. Co. v. Stutler*, 54 Pa. 374, 93 Am. Dec. 714, it was said that torts that spring from contract, that consist in mere omissions of a contract duty, are strongly distinguished from wrongs which are willful trespasses upon the rights of the master in the person of the servant. For these no remedy exists except by action on the case, and in this class of cases the action must be by the party injured, and cannot be brought by the master or mistress.

And in *Potter v. Metropolitan District R. Co.* 30 L. T. N. S. 765, in which a wife took a ticket for a journey on a railway and during such journey received an injury from the negligence of the railroad company in consequence of which her husband incurred expenses and suffered losses after which he died and she sued the defendants in her representative capacity as his executrix to recover compensation to the testator's estate for such expenses and loss, it was held that the action was in substance one on contract, and that it was maintainable.

So, where a passenger on a railroad train received injuries caused by the negligence of the railroad company, whereof he died about six months afterwards, and which so disabled him in the meantime as to prevent him from attending personally to his business, which fell off and became of less value in consequence, his executor may maintain an action against the company upon the contract of carriage, such damages being the natural result thereof, on the ground that owing to the breach of the contract his estate was injured in two respects: First, by the payment of his doctor bill; and second by the loss occasioned to his business by his inability to attend to it. *Bradshaw v. Lancashire & Y. R. Co.* L. R. 10 C. P. 189, 44 L. J. C. P. N. S. 148, 31 L. T. N. S. 847.

The maxim *Actio personalis moritur cum persona* does not apply to an action for such an injury. *Bradshaw v. Lancashire & Y. R. Co.* L.

negligence of such a character as may have contributed to his injuries, and of such force as would have authorized the court below to have submitted to the jury the issue of contributory negligence. It further appears from the record that the jury, in making up their verdict, considered the value of the services of the deceased minor son. Now, in view of this statement, the court of civil appeals for the third supreme judicial district certifies to the supreme court of Texas the following questions: First. The deceased being instantaneously killed, could the parents, at common law, recover for the value of the services of the minor child, after his death? Second. Was it error, in view of the instantaneous death of the minor, and under the facts as stated, for the court to give the charge quoted?"

In *Baker v. Bolton* (decided in 1908) 1 Campb. 493, Lord Ellenborough said that "in a civil court the death of a human being could not be complained of as an injury." In adhering to the broad principle thus announced, Pigott, B., in *Osborn v. Gillett* (1873) L. R. 8 Exch. 88, which was a suit brought by the father to recover for the loss of services of his daughter, whose death had been occasioned by the negligence of defendant's servant, said: "By the third plea the defendant says that she was killed on the spot, and the first question is whether this plea affords a good defense in law to an action by a master for damage sustained by reason of the death of his servant. It may seem a shadowy distinction to hold that when the service is simply interrupted by accident resulting from negligence the master may recover damages, while in the case of its being determined altogether by the servant's death

from the same cause no action can be sustained. Still I am of opinion that the law has been so understood up to the present time, and, if it is to be changed, it rests with the legislature, and not with the courts, to make the change. It is admitted that no case can be found in the books where such an action as the present has been maintained, although similar facts must have been a matter of very frequent occurrence. This alone is strong to show that the general understanding had been to the effect laid down by Lord Ellenborough, in 1803, in *Baker v. Bolton*." This rule has been generally followed by the American courts, though some vigorous protests have been made against it, and none of the various reasons assigned therefor seem entirely satisfactory. No useful purpose would be subserved by an attempt to add anything to what has been said in the well-considered opinions cited and commented upon by Mr. Tiffany in his work entitled *Death by Wrongful Act* (§§ 1-18), where an interesting and exhaustive discussion of the question will be found.

After a careful examination, we are of opinion that, though the reason for the original adoption of the rule announced by Lord Ellenborough is involved in doubt and obscurity, still the rule itself is a well-established principle of the common law of England, adopted in this state by act approved January 20, 1840, and we feel bound thereby. We therefore answer the first question certified in the negative, and, since the father's right to recover depends upon the statute which imputes to him the deceased son's contributory negligence, the second question certified must be answered in the affirmative.

R. 10 C. P. 189, 44 L. J. C. P. N. S. 148, 81 L. T. N. S. 847.

And the fact that a remedy is given by statute for a personal injury causing death does not affect or take away a right of action for breach of the contract, consisting of the inflicting of a personal injury causing death upon a passenger upon a railroad train. *Bradshaw v. Lancashire & Y. R. Co.* L. R. 10 C. P. 189, 44 L. J. C. P. N. S. 148, 81 L. T. N. S. 847.

The mother of a minor having no father but living with her and contributing to her support, who becomes a passenger in a railway car and pays his own fare, however, and is injured by the negligence of the railroad company's servants, the mother providing him with medical attendance, nursing and support, cannot recover against the railroad company for the loss of his services or for the expense of such medical attendance, nursing, and support, where the contract to carry safely was made with the minor, and the mother was a stranger to it. *Fairmount & A. Street Pass. R. Co. v. Stutler*, 54 Pa. 374, 93 Am. Dec. 714.

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So, in *Alton v. Midland R. Co.* 19 C. B. N. S. 213, 84 L. J. C. P. N. S. 292, 11 Jur. N. S. 672, 12 L. T. N. S. 703, 18 Week. Rep. 918, which was an action against a railroad company for the loss of the services of a traveler in the employ of the plaintiff through the defendant's negligence, it was held that an action will not lie at the suit of a master for a personal injury caused by negligence to his servant whereby the master lost the benefit of the services of the servant, when the contract out of which the duty arose in the performance of which the negligence occurred was between the defendant and the servant, and the plaintiff was a stranger to it.

In *Fairmount & A. Street Pass. R. Co. v. Stutler*, 54 Pa. 374, 93 Am. Dec. 714, *supra*, it was said that the only ground upon which this case could be distinguished from *Alton v. Midland R. Co.* 19 C. B. N. S. 213, 84 L. J. C. P. N. S. 292, 11 Jur. N. S. 672, 12 L. T. N. S. 703, 18 Week. Rep. 918, *supra*, was that of the infancy of the servant. It not appearing that the servant in that case was an infant. F. H. B.

MICHIGAN SUPREME COURT.

George B. MORLEY *et al.*, Receivers, etc., of
Union Street Railway Company,

v.

Byron A. SNOW.

(.....Mich.....)

The adoption by receivers of a street-railway company of the use of metal safes for receiving fares, into which the passengers are required to put their fare while the conductor presses a button which rings a bell and registers the fare, is a detail in the management of the road which is within the discretion of the receivers, and will not be controlled by the court.

(May 24, 1898.)

PETITION for a writ of mandamus to require defendant to vacate an order which directed petitioners as receivers to discontinue the use of the Mehling fare box system on the road in their care. *Granted.*

The facts are stated in the opinion.

A. Benton Hanchett, with **Messrs. Humphrey & Grant**, for relators.

Mr. E. L. Beach, for respondent:

A receiver is the agent of the court which appointed him.

The receivers were the mere agents of the court. The trust they hold is the court's business, not their business; its management is simply intrusted to them, subject to the orders of the court.

20 Am. & Eng. Enc. Law, p. 369, note 1.

The receiver being the mere officer of the court, the control of the court over him is plenary—at least in any controversy which may arise between him and the court touching the propriety of an order of the court made upon him.

5 Thomp. Corp. § 6941; *How v. Jones*, 60 Iowa, 70; *The La Crosse Railroad Bridge*, 2 Dill. 465; 2 Enc. Pl. & Pr. p. 160; *McKinnon v. Wolfenden*, 78 Wis. 237; *Waterhouse v. Comer*, 55 Fed. Rep. 153, 19 L. R. A. 408, 5 Inters. Com. Rep. 564; *People, Shimer, v. Branch County Circuit Judge*, 17 Mich. 67; *People, Aetna Live Stock, Fire & Tornado Ins. Co., v. Wayne Circuit Ct. Judge*, 20 Mich. 220; *Chicago & G. T. R. Co. v. Newton*, 89 Mich. 551.

Judicial discretion is not reviewable upon mandamus.

Michigan Mandamus Cases, No. 333; *People, Mabley, v. Detroit Super. Ct. Judge*, 41 Mich. 31; *Detroit Tug & Wrecking Co. v. Gartner*, 75 Mich. 860.

Mandamus lies only to enforce strict legal rights, and will not be granted to enforce the doings of an act which by law lies in the discretion of the officer refusing to do it.

People, Houghton County, v. Auditor General, 86 Mich. 271; *People, Sweet, v. Adam*, 3 Mich. 427; *People, Brown, v. Wayne County Ct. Judge*, 1 Mich. 359; *People, Atty. Gen., v. Monroe County Judge of Probate*, 16 Mich. 204;

NOTE.—As to discretion of receivers in management of business, see also *Waterhouse v. Comer* (C. C. S. D. Ga.) 19 L. R. A. 404.

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People, Evans, v. Saginaw Circuit Judge, 89 Mich. 123; *People, Mabley, v. Detroit Super. Ct. Judge*, 41 Mich. 31; *Mercantile Trust Co. v. Farmers' Loan & T. Co.* 49 U. S. App. 462, 81 Fed. Rep. 254, 26 C. C. A. 883; *People, Ampe, v. Wayne County Circuit Judge*, 14 Mich. 33.

Moore, J., delivered the opinion of the court:

This is a petition for a mandamus to require the relator to vacate an order made by him. The petitioners were appointed by the circuit court for the county of Saginaw, in chancery, receivers of the Union Street-Railway Company of Saginaw, Michigan, upon the application of the Boston Safe Deposit & Trust Company, complainants in a cross bill in a case which is reported in 78 N. W. 243. The receivers were directed to take control of the road, and operate the same. At this time there was in the employ of the road, as a street-car conductor, John C. Smith, and he continued to act in that capacity after the appointment of the receivers. About April 1 the receivers adopted the Mehling box system of collecting car fares from passengers. This box is a metal safe, of convenient size, carried by the conductor, into which the passenger is required to deposit his fare, at which time the conductor presses a button which rings a bell and registers the fare. At the end of the day the box, with the transfer tickets, is handed by the conductor into the office, and becomes his settlement with the company. The use of this box was distasteful to the conductor John C. Smith, who filed a petition in which he represented his long employment upon the road; the fact that he was required to carry one of these boxes; that he had no means of knowing they were accurate; that their use made him responsible to the company for plugged or counterfeit coins; that passengers objected to their use, and when the conductors, following the rules adopted by the company, required the passengers to deposit their fares in the boxes or leave the car, it gave rise to controversies which resulted in injury to the conductors; and that he had been injured by a passenger who objected to paying his fare. He also represented that when attempting to use the boxes of the company in good faith, according to the rules, he had been laid off from work for a number of days; and he asked for an order that the receivers might be required to pay him for the time so lost, and the use of the boxes be discontinued. The receivers answered the petition, and claimed the use of the boxes was a reasonable and proper regulation, and claimed that Mr. Smith persistently and purposely refused to properly use them,—and that after being warned that, if he did not properly use the boxes as directed, he would be laid off. Proof was offered before the court from which it pretty clearly appears that there would be no difficulty in operating the boxes if the conductors were so inclined, and that there was no practical difficulty in the way of their use, either on the part of the passengers or the con-

ductors. The court made an order granting the prayer of the petition, not for the reasons set up therein, but, to state it in his own language, used at the time he granted the order: "It seems to me, in this matter, that the fact of the receivers publishing notices in the car that no conductor shall handle money, connecting that with the fact that he shall be liable and responsible for any plugged money or counterfeit money that is placed in these boxes; compelling the public to place the fares in these boxes, and for the further reason that it is objectionable to the public to be compelled to put the money in the boxes. For these reasons it seems to me that, coupling the advertisement with the request to the public, it means that the conductors are not to be trusted; that they are not to handle the money; that there is some honest person somewhere who can handle the money, and count it correctly, but that these men are liable not to do so. It is an insinuation of dishonesty. In my opinion, it is saying to the public, 'We have men in our employ whom we cannot trust, whom we are unable to trust, and I warn you that here is a man who is liable to appropriate to his own use money that he may collect that belongs to this railroad.' It tends to ostracize from society people who are so engaged,—so employed. Children talk of it on the street. People discuss it,—that they are not proper persons to associate with; they cannot be trusted in handling five-cent pieces. I think this box is not a proper regulation; that it is not a thing to be used in the manner in which it is used; and an order may be made discontinuing the use of it."

We think the conclusion reached by the learned judge is wholly unwarranted by the facts. Conductors of street cars deal with a great number of persons, some of whom are entering and leaving the cars frequently. It often happens that change must be made, and there are opportunities for mistakes. It is not unreasonable to assume that like persons in all callings, some of the employees of street-car companies will yield to temptation, when presented. Everyone at all familiar with business upon a large scale knows that it is desirable to have it so systematized that mistakes or fraud in its conduct shall not occur. Officials, both of the state and nation, and officers charged with the management of banks, railroads, and other corporations, are surrounded by checks and safeguards calculated to do away with the possibilities of frauds or mistakes. The cash register is to be found in most places of business. Upon the elevated roads in the large cities, the passenger pays his fare before he enters upon the platform, over which he must pass to get admission to his train. Everyone recognizes the checks and safeguards, as proper to be used, and no one has a right to regard them as an imputation upon the honesty of any individual using them. Their use is simply a recognition of what we all know to be a fact, with humanity constituted as it is,—that, in the conduct of a large business by many persons, there is a liability to make mistakes, and a possibility of the commission of frauds. The Great Teacher, in that prayer which is the model of all prayers, prayed, "Lead us not into temptation, but deliver us from evil." It can

readily be seen how the unintelligent or dishonest might object to these checks and safeguards, but it is difficult to understand how the honest and intelligent should object to any practical method which would reduce the probability of mistakes, or the opportunities for the commission of fraud, to the minimum.

It is urged on the part of the relator that, as the receiver is an officer of the court, the control of the court over him is plenary, that whatever he does is done under the direction of the court, and that he is bound to observe the order of the court; citing 5 Thomp. Corp. § 6941. It is true that receivers are officers of court. It is also true that less discretion is given to passive receivers, whose duty consists simply of taking possession of property, and converting it into money, and distributing it, than is allowed to an active receiver, who is required to manage a going concern like a system of street railways or a railroad. Such an officer, to be successful, must possess large executive ability, and must be clothed with considerable discretion. High, Receivers, § 392. He may do such things, in the ordinary course of business, as to him, in good faith, seem necessary to render the business of the road profitable and successful. He is not only the arm of the court, but he represents, in a sense, the creditors and the stockholders of the road. If they had the time to do so, very few courts possess the necessary knowledge to enable them to successfully manage a system of street railways. It is said in *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 59 Fed. Rep. 514: "The receiver is chosen, on account of his experience and sound judgment, to operate the road for the benefit of the creditors and all concerned. While he is the officer of the court, and subject to the orders and directions of the latter, yet his instructions are always general in their character. He is expected to look after the details of the business, and to apply to the court from time to time, when special instructions seem necessary. The very nature of his relations to the court, and his duties to the creditors, entitle him to the largest degree of discretion possible in the discharge of his duties. The court is constituted of several judges, and the railroad being operated extends through several judicial districts, so that it is difficult to secure uniformity in the administration of the property when an attempt is made to retain control of the details of the management in the court. It is therefore the settled practice, both as a matter of comity between the judges, and as a matter of necessity to the proper and safe administration of the trust, to impose, as far as possible, the management of the property upon the receiver, and to remit the supervision of his management to the court in which he was appointed, and in which the primary jurisdiction attached. In view of this well-defined policy, it must be apparent that in the operation of a railroad extending from Toledo to St. Louis the court must necessarily rely upon the receiver, and hold him responsible for details. His discretion in such management will not be interfered with, except where some abuse and wrong is manifest. In *Taylor v. Sweet*, 40 Mich. 786, Judge Cooley, speaking for the supreme court of Michigan, in reference to the

employment of help in the management of business confided to a receiver in that case, said: 'The receiver, however, has ample power to employ them, and any other persons whose services he may need; and we think a court, which can know much less about the needs of the business than the receiver, ought not to interfere with his discretion unless some abuse is alleged and shown.' In *Kerr on Receivers* the following principle is given in paragraph 175: 'If he is empowered by the court to continue the management of the business over which he is appointed, he may employ such persons as may be necessary for the purpose, and the court will not interfere with his discretion as regards such employment, unless some abuse is shown.' These principles of law were declared in a case where a receiver was managing the business of a partnership. With how much greater force and pertinence do they apply to a receiver charged with looking after the intricate business of a great railroad 450 miles in length, requiring familiarity with detail and expert knowledge which can only be acquired through long training and experience! A controversy recently arose between the engineers, firemen, and trainmen on the East Tennessee, Virginia, & Georgia Railroad, and the receivers in charge of that extended system, running through several states, as to an order of the latter concerning the wages of employees. The receivers were appointed in the circuit court of the United States for the eastern district of Tennessee. During the controversy, and while the chiefs of the organization of engineers and firemen were in Knoxville, negotiating with Receiver Fink on the subject, the former made representations as to the nature of the contention between them to Circuit Judge Lurton, then in Knoxville. The latter declined to entertain jurisdiction of the controversy, and remitted the question to the receivers; saying their decision would be final, unless palpable wrong and injustice were done. This is the only proper practice to pursue in these controversies. Courts are not constituted to manage and operate railroads. The judges, learned in the law though they may be, are not experienced in large business undertakings. They are not trained in those departments of railroad management which relate to the wages of employees, to the numbers necessary for the maintenance of the roadbed, and for the safe operation of trains, to the tariffs for freight, and the purchases of supplies. Even if capable of mastering such details, their time will not permit. They are occupied in determining the legal rights of parties in litigated cases, and though in these days of large ventures and improvident railroad enterprises the courts are called upon, through receivers, to temporarily manage them pending litigation necessary to a foreclosure sale, yet, as before stated, they assume this burden because it cannot be evaded; but they manage them through receivers selected for their experience and demonstrated ability, and they rely upon their experience and judgment to wisely and economically administer the trust." See also 20 Am. & Eng. Enc. Law, p. 870; *Cordrey v. Galveston, H. & H. R. Co.* 1 Woods, at page 386; *Sloan v. Central Iowa R. Co.* 62 Iowa, 728.

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Applying these principles to the case in hand, what is the situation, and what should be the result? The receivers are in the management of a great property. They adopted a device which in their judgment is calculated to help make the management of the road successful and profitable. Their judgment is challenged by one of their employees. He appeals to the court. The receivers are supposedly appointed because of their responsibility and ability. The act of the receivers is a detail in the management of the road. The act done is not shown to be an abuse of discretion on the part of the receivers. If the court is to substitute its judgment for the judgment of the receiver in a detail of management like this, where will its duty end? Shall the court enter into the consideration of the entire organization of the road, and determine whether one man shall be discharged, and another employed? Will it enter into the inquiry as to the quality of the coal used in the power house, or the brand of oil used as a lubricator? Will it entertain a complaint of an employee that he should be furnished with a pointed shovel in his work, instead of the one he is now required to use? We think the learned judge entered upon an inquiry that properly belongs with the receivers, and not with the court. If they are not competent to deal with such a detail of the management of the road, they should be removed, and someone appointed who is competent.

The writ should issue as prayed.

The other Justices concur in the opinion of Moore, J.

Grant, Ch. J., concurring:

I fully concur in the opinion of my brother Moore. I desire to say, in addition, that I do not think Judge Snow had any authority to pass upon the question, for the reason that the identical question had before been passed upon by Judge Wilbur, in the case of *Kitchen v. Wilbur*. Mr. Kitchen was a passenger, refused to put his fare in the box, was removed from the car, and applied to Judge Wilbur for leave to sue the receivers. Judge Wilbur refused, and his order thereon was affirmed by this court. By act No. 75, Pub. Acts 1889, an additional circuit judge was provided for the Saginaw circuit. Section 8 of that act provides: "No order shall be stayed, nor shall any stay of proceedings or injunction be had or set aside or modified or dissolved, except by the judge trying the case or making the order, or granting the injunction, except that in case of the absence from the county, sickness or other cause disabling such judge to act, the other circuit judge shall have power to stay, modify, set aside, or dissolve such order or injunction. Neither judges shall grant any application which shall have been denied by the other." The sole question in that case, or in this, was the reasonableness of the regulation. I think that the order of Judge Wilbur under this statute was conclusive upon Judge Snow, and that he should for this reason have denied the order.

Long, J., concurs in the opinion of Grant, Ch. J.

Hooker, J., concurring:

I concur in the result reached by my brother

Moore in this case, for the reasons stated in his opinion, and for the further reason that the relation of the petitioner to this proceeding is not such as to give him a right to intervene for the purpose mentioned in his petition. He is an employee, merely; and if he was not satisfied to perform such labor as the receiver had to do, in such a manner as the receiver wanted it done, he was under no obligation to continue in his employ. The proceeding is one brought to enable the creditors of the street-railway company to realize from its assets, which may be supposed to be inadequate to pay its debts. If every man in the employ of the receiver who chanced to differ with him about the method of conducting the business may ask the intervention of the court to compel such changes as he may think advisable, the delay and expense to the receiver would be likely to exhaust the patience of creditors, and the property would be absorbed, to their exclusion. This petitioner is not a party to the record, nor is he a party in interest, in any sense which should permit him to intervene. The only ground upon which his intervention might be justified is the claim to compensation during the time he was laid off. As to that, we find nothing in the case which would justify the court in ordering the receiver to pay him for time that he was not at work, especially as his own conduct was just cause for his discharge, if any cause was necessary.

Grant, Ch. J., and Long, J., concur in the opinion of **Hooker, J.**

William L. CARPENTER, Exr., etc., of
Herbert M. Snow, Deceased, Appt.,

Mary L. SNOW, Appellee,
and

Clara L. SNOW *et al.*, by Guardian, Appts.

(.....Mich.....)

1. The intention to make no provision for a child already born need not be shown by the will itself, under How. Ann. Stat. § 5810, giving such child the right to share as in case of intestacy, if "it shall appear that such omission was not intentional, but was made by mistake or accident."
2. The intention of a testator that no provision should be made for a child afterwards born, which must "be apparent from the will," under How. Ann. Stat. § 5809, in order to prevent such child from taking as in case of intestacy, is not shown by a provision which gives all property of every kind and nature to testator's wife.

(July 12, 1898.)

CROSS-APPEALS by plaintiff and by the infant defendant from a decree of the Circuit Court for Wayne County construing the will of Herbert M. Snow, deceased, in favor of his widow to the exclusion of his children. *Reversed.*

The facts are stated in the opinion.

NOTE.—As to effect of omission to provide for children in will, see *Smith v. Olmstead* (Cal.) 12 L. R. A. 46; *Re Callaghan* (Cal.) 39 L. R. A. 689. 41 L. R. A.

Mr. Whitney C. Beckwith for appellant Carpenter.

Messrs. William H. Hockaday and Matthew Finn, for infant appellants:

The question whether or not Clara was intentionally omitted, or omitted by accident or mistake, is clearly one of fact which she is entitled to have submitted to a jury.

Re Subbina, 94 Mich. 304.

The after-born children, Harry and Gertrude, take as heirs at law unless it be apparent from the will that it was the intention of the testator that no provision should be made for them.

Breece v. Stiles, 22 Wis. 120; *Wasserman v. Chicago, R. & A. R. Co.* 22 Fed. Rep. 874; *Lurie v. Radnitzer*, 166 Ill. 609.

A presumption of an intention to disinherit after-born children does not arise from the disinheriting of those born prior to the making of the will.

Negus v. Negus, 46 Iowa, 490, 26 Am. Rep. 157.

There is no ambiguity on the face of this instrument, and in such case extrinsic evidence is not admissible to show an intent other than that expressed.

Kinney v. Kinney, 34 Mich. 250; *Waldron v. Waldron*, 45 Mich. 353; *Forbes v. Darling*, 94 Mich. 622; *Wigram, Wills*, intro. p. 9; *Walston v. White*, 5 Md. 297; *Hawman v. Thomas*, 44 Md. 80; *Hammond v. Hammond*, 55 Md. 575; *Funk v. Davis*, 103 Ind. 231; *McCauley v. Buckner*, 87 Ky. 191.

If the ambiguity occurs in the wording of a will, producing a palpable uncertainty on the face of the instrument, extrinsic evidence cannot remove the difficulty without putting new words in the mouth of the testator and in effect making a new will for him.

Senger v. Senger, 81 Va. 687.

When the provisions of a will are not ambiguous, parol testimony as to the understanding in which words were used by the person who drew the will is not admissible.

Defreese v. Lake, 109 Mich. 415, 32 L. R. A. 744.

In case of a supposed ambiguity appearing upon the face of the will, parol evidence is not admissible to supply, contradict, enlarge, or vary, the words of the will or to explain the intention of the testator.

Dickison v. Dickison, 86 Ill. App. 507; *Blatchford v. Newberry*, 99 Ill. 11; *Kirkland v. Conway*, 116 Ill. 438; *Pennsylvania Co. for Insurance on Lives & Granting Annuities v. Bowerle*, 143 Ill. 459; *Hayward v. Loper*, 147 Ill. 41.

Infant children, most of all, deserve a court's solicitude, for those of tender years at least can hardly be thought to have incurred the parent's just resentment, or to deservedly forfeit what naturally belongs to them; and being themselves unable to protect their own inheritance, the tribunal of justice should secure those rights for them where the rules of interpretation permit it.

Schouler, Wills, pp. 487, 488.

Our statute was undoubtedly designed to prevent a child from being a public charge, where the father by accident or mistake unintentionally or otherwise omits to make any provision whatever for such child.

Forbes v. Darling, 94 Mich. 621; 1 Bl. Com. p. 450; *Fitch v. Weber*, 6 Hare, 145; *Maugham v.*

Mason, 1 Ves. & B. 410; 8 Lewin, Tr. 5th Eng. ed. 1221; 1 Jarman, Wills, Bigelow's ed. p. 565; 1 Perry, Tr. §§ 157, 161.

Messrs. Walker & Spalding, for Mary L. Snow, appellee:

At the common law the disposition of property made by will was controlling except only that if after the making of a will the testator married and a child was born the will was thereby revoked absolutely. But neither marriage alone nor the birth of issue alone after the making of a will revoked it.

1 Jarman, Wills, Bigelow's ed. pp. 110, 111.

The statutes are of the following general classes:

1. Those enacting that after-born issue unprovided for by will or otherwise take as in case of intestacy, without reference to the intent of the testator, however expressed or evidenced.

Pennsylvania. See *Walker v. Hall*, 34 Pa. 483; Ala. Code 1886, § 1955. Texas. Sayler's Stat. § 4868.

2. Statutes providing that such issue so take if not provided for by will or otherwise and not mentioned in the will.

Ark. Digest 1884, § 6499; Mo. Stat. 1889, § 8887; 2 N. Y. Stat. 9th ed. 1879, § 49; N. H. Stat. § 10, p. 455.

If not provided for by settlement nor disinherited.

3 N. J. Stat. 1895, § 19, p. 3760.

3. Statutes providing that children unprovided for by will shall so take unless it appears that the omission was intentional and not by mistake or accident.

Mass. Pub. Stat. 1882, § 21, p. 750; Me. Laws 1888, p. 608; R. I. Stat. § 22, pp. 666; Cal. Civil Code, § 1306.

4. Statutes providing that after-born children unprovided for take as in case of intestacy, unless it is apparent from the will that the testator intended that no provision should be made for them.

2 How. Anno. Stat. § 5809; Starr & C. Ill. Stat. § 10, p. 189; Wis. Rev. Stat. 1858, chap. 97, § 26; Neb. Stat. 1895, § 2662.

The provision of our statute being that the after-born children unprovided for in the will do not take any share in the estate where it appears from the will that the testator intended that no provision should be made for them, the question is whether, under this will, the intention not to provide so appears. The language of the will itself, without reference to any extrinsic fact, gives evidence of such intent.

The circumstances under which the will was made may be considered by the court in determining whether the intent to exclude the after-born is to be inferred from the language used in the will.

The will shows that the testator was married, and the presumption of the common law, which is unchanged by statute, is that a married testator makes his will in contemplation of the birth of children.

1 Jarman, Wills, p. 111.

This being the presumption, this absolute disposition of the property in favor of the wife to the exclusion of all others shows an intent to exclude the after-born.

Loring v. Marsh, 6 Wall. 337, 18 L. ed. 802; *Heeb v. Heeb*, 93 Iowa, 416.

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This is not a case of an ambiguity patent upon the face of the will. The uncertainty arises only in view of a fact not disclosed by the will itself, viz.: the birth of children after the will was made. A doubt raised by an extrinsic fact can unquestionably be dispelled by a consideration of those facts surrounding the execution of the will and effective in determining its provisions.

1 Jarman, Wills, pp. 400, 401; Wigram, Wills, p. 143; *Smith v. Bell*, 6 Pet. 68, 8 L. ed. 323.

The cases directly bearing upon the question here involved are three in number, one supporting my position, two opposed to it. Each case arose upon a statute identical with our own.

Hawhe v. Chicago & W. I. R. Co. 165 Ill. 561; *Breese v. Stilke*, 22 Wis. 120; *Chicago, B. & Q. R. Co. v. Wasserman*, 22 Fed. Rep. 872.

In each of the two following cases under a will and on a state of facts very similar to that at bar, it was held that the language of the will taken together with the circumstances of its execution showed an intention to disinherit the children.

Buckley v. Gerrard, 123 Mass. 8; *Peters v. Siders*, 126 Mass. 135, 30 Am. Rep. 671.

The question whether the language meant the bequest to be in lieu of the right of dower or in lieu of all interests in the estate must be determined by the testator's intent, and the circumstances under which the will was made, were admissible upon that question.

Dakin v. Dakin, 97 Mich. 284; *Reed v. Merchants' Mut. Ins. Co.* 95 U. S. 23, 24 L. ed. 348.

Moore, J., delivered the opinion of the court:

This is a proceeding to construe a will made by Herbert M. Snow, who was married in 1883. July 8, 1884, Clara L. Snow was born. The will in question was made April 20, 1888. Harry A. Snow was born May 7, 1889, and Gertrude E. Snow was born April 28, 1892. All of these children were living when the death of Mr. Snow occurred, in October, 1897. Mr. Carpenter was named as executor in the will. Omitting the formal parts of the instrument, it reads as follows: "Second. After the payment of my debts and the expenses of administering my estate, I give, devise, and bequeath all my property, real and personal, and all the property of every kind and nature whatsoever, of which I may die possessed to my beloved wife, Mary L. Snow." As no provision was made in the will for Clara, who was born before the will was made, or for the two children born afterwards, the bill is filed to determine the respective rights of the widow and children. In the court below a decree was made holding the after-born children took no portion of the estate, and provided: "This decree is made without prejudice to the rights of the defendant Clara L. Snow to take proceedings at law to determine whether the omission to provide for her in said will was made intentionally, or by mistake, or by accident." Extraneous testimony was taken, which, if competent, shows that Mr. Snow intended to give all his property to his wife to the exclusion of his children, having confidence in her management of the

property, and her sharing it with the children. While this testimony may be competent to show that the omission to provide for Clara was not intentional, we do not think it competent to show the testator did not intend to provide for his unborn children.

The provisions of the statute applying to the facts disclosed by this record, are as follows: How. Anno. Stat. § 5809, provides: "When any child shall be born after the making of his father's will, and no provision shall be made therein for him, such child shall have the same share in the estate of the testator as if he had died intestate, and the share of such child shall be assigned to him as provided by law in case of intestate estates, unless it shall be apparent from the will that it was the intention of the testator that no provision should be made for such child." Section 5810 provides: "When any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, and it shall appear that such omission was not intentional, but was made by mistake or accident, such child, or the issue of such child, shall have the same share in the estate of the testator as if he had died intestate, to be assigned as provided in the preceding section." It will be noticed the language in the two sections with reference to showing the intention of the testator is not at all alike. In the last-named section it is not required the omission to provide must be shown by the will itself to be intentional. This section has been construed by this court in *Re Slebbins*, 94 Mich. 804, where it is held the question as to whether the omission to provide for a child in the will was intentional or otherwise is a question of fact which may be submitted to a jury. Section 5809 has never been construed by this court. The decisions of other courts cannot be harmonized. The case of *Hawhe v. Chicago & W. I. R. Co.* 185 Ill. 561, is in harmony with the decree made by the trial judge. The language of the statute would seem to be very plain. At the common law, marriage and the birth of children after the will was made would revoke the will. The legislature evidently had in mind that, if the father failed to make provision in his will for the unborn child, the law should make provision for it, unless the parent made it clear in the will itself that the omission to provide was intentional. How can it be said from the language used in this will that the father intended to cut off from inheriting his property two children who afterwards came to him, when no reference is made to them in the will, and neither of them was at that time conceived? A similar statute to this was construed in *Bressee v. Stiles*, 22 Wis. 120, where it was held the unborn children were to take the same share in the estate as if the parent had died intestate. A like statute was construed in *Wasserman v. Chicago, B. & A. R. Co.* 22 Fed. Rep. 872. We cannot do better than to quote from the opinion of Justice Brewer: "In this case the primary question I am reluctantly compelled to decide in favor of the complainant, Wasserman. I say reluctantly, for when a man on the eve of death, having a child five years of age, and living with the wife to be delivered of a second child within twenty days, makes a will giving all his prop-

erty to his wife, I think the common voice will say that he intended no wrong to either the born or unborn child, but trusted to his wife—their mother—to do justice by each, and believed that she, with the property in her hands, could handle it more advantageously for herself and children than if the interests in it were distributed. As a question of fact independent of statute, I have no doubt that Mr. Wasserman had no feeling either against the born or unborn child, but, having implicit faith in his wife, meant that she should take the entire property, and believed that out of that property and her future labors she would take care of his children. But the legal difficulty is this: The statute says that it must be 'apparent from the will' that the testator intended that the unborn child should not be specially provided for. How can any intention as to this child be gathered from the will alone? It simply gives everything to the wife; is silent as to children. If I could look beyond the will, my conclusion would be instant and unhesitating. Limited by the statute to the instrument itself, what can be gathered therefrom? It is simply a devise of all property to the wife. No reference is made to children, born or unborn. Can I infer from its silence an intention to disinherit? If so, the mere omission from a will would always stand as proof of an expressed intention. And whatever of apparent hardships there may be in the present case, a fixed and absolute rule prescribed by statute cannot, for such reason alone, be ignored. That the rule was intentionally thus prescribed is evident, not alone from the clear letter of the statute, but also from the history of this question at common law, and the various provisions of the statutes of other states. At common law the will of an unmarried man disposing of all his property was presumably revoked by his subsequent marriage and the birth of a child. This rule was borrowed from the civil law. Whether revocation would follow from subsequent marriage alone or birth of child alone was perhaps a doubtful question. In *Brush v. Wilkins*, 4 Johns. Ch. 506, it was held that both must concur, while in *McCullum v. McKenzie*, 26 Iowa, 510, the birth of a child alone was adjudged sufficient. See, generally, upon this question, 1 Redf. Wills, chap. 7; 1 Wms. Exrs. chaps. 8, 5; 4 Kent, Com. pp. 421-426. It was also, for a while, at least, disputed whether such revocation followed absolutely from subsequent marriage and birth of child, or was only to be presumed, and the presumption subject to be overthrown by evidence of the testator's intention. Lord Mansfield, in *Brady v. Cubitt*, 1 Dougl. 39, ruled that the presumption of revocation from the marriage and birth of issue, like all other presumptions, may be rebutted by every sort of evidence. See also [*Johnston v. Johnston*], 1 Phillim. Eccl. Rep. 473. Such seems to have been generally the ruling of the ecclesiastical court. On the other hand, in *Goodtitle v. Otway*, 2 H. Bl. 522, Chief Justice Eyre held that 'in case of revocation by operation of law the law pronounces upon the ground of a *presumptio juris et de jure* that the party did intend to revoke, and that *presumptio juris* is so violent that it does not admit of circumstances to be set up

in evidence to repel it.' And in the leading case of *Marston v. Roe*, *Foz*, 8 Ad. & El. 14, by all the judges in the exchequer chamber, it was finally decided that the revocation of the will took place in consequence of a rule or principle of law, independently altogether of any question of intention of the party himself. Such being the final solution of the question in the English courts it cannot be that the purpose of the statute in question was to open the door to any other evidence of intention than those expressly named. On this side of the waters the matter has generally been regulated by statute, with a prevailing tendency to declare that the after-born child takes the same share that it would have done if the father had died intestate; or, in other words that the will is absolutely revoked *pro tanto*, unless there is some provision made for such child, or an express intention that it should receive nothing. The statute of Wisconsin is identical with that of Nebraska, and in *Breese v. Stiles*, 22 Wis. 120, the inquiry as to the testator's intentions was declared to be limited to the language of the will, and, the will being silent, the after-born child inherited. See, among many cases, the following, which show how carefully the courts have enforced the rule of revocation *pro tanto* in the interest of the child: *Waterman v. Hawkins*, 63 Me. 156; *Walker v. Hall*, 34 Pa. 483; *Hollingsworth's Appeal*, 51 Pa. 518. In the first the testator left certain real and personal estate to his widow during her life and widowhood, to revert to his heirs upon her death or marriage, and gave the rest to his father. A daughter born two months after his death was held unprovided for by the will, and recovered the share of the estate she would have taken if he had died intestate. In the second the testator gave his entire estate to his wife, saying in the will, 'Having the utmost confidence in her integrity, and believing that, should a child be born to us, she will do the

utmost to rear it to the honor and glory of its parents,' and the same ruling was made. In the last case the will in terms committed any after-born child to the guardianship of his wife, adding, 'Which guardianship I intend and consider a suitable and proper provision for such child;' and still a similar decision was pronounced. Further citations would seem unprofitable. To sum the matter up, the common law courts of England finally reached the conclusion that the revocation was absolute upon the happening of marriage and birth of issue, and not dependent upon evidence of testator's intention. The general tendency of statute law in this country is in the same direction, and courts, as a rule, have carefully protected the rights of the after-born children. The language of the statute is plain and unambiguous. The will makes no provision for this child, does not mention or refer to her, and on its face manifests no intention that she should be unprovided for. Hence it must be held that she takes the same share in the estate which she would have taken had her father died intestate, to wit, one half." In passing this statute, the legislature required, if the father intended to disinherit the unborn child, he should indicate it in his will, and that it should not be left to extraneous testimony to show his intent.

The decree of the court below as to Harry Snow and Gertrude Snow is reversed, and a decree will be entered here giving to them the same interest they would have in the property if the father had died intestate. As to Clara L. Snow, the decree will be without prejudice to take proceedings at law to decide whether the omission to make provision for her was intentional. As all the parties were interested in the construction of this will, the costs should be paid out of the estate.

The other Justices concur.

MISSOURI SUPREME COURT.

Julia G. HURT, *Resp't.*,

v.

George D. FORD *et al.*, *Appts.*

(142 Mo. 283.)

1. A motion for judgment non obstante veredicto cannot be made after the judgment is entered.
2. Judgment upon the pleadings may be entered after the verdict has been set aside on a motion for judgment non obstante veredicto, which makes the necessary averments, but which cannot be sustained as a motion of the latter kind because it was not made until after the judgment was entered.
3. A conditional delivery of a promissory note to the payee or the agent of the payee cannot be made so as to make the subse-

quent signature of another person essential to its validity.

4. An oral promise by the payee of a note to save certain makers harmless is within the statute of frauds, Rev. Stat. 1893, § 5186.

5. A general denial is sufficient to raise a defense of the statute of frauds.

6. Refusal of an instruction presenting a question raised by the pleadings and the evidence is sufficient ground for setting aside a verdict.

(Barclay, Ch. J., and Macfarlane, J., dissent.)

(January 18, 1898.)

APPEAL by defendants from a judgment of the Circuit Court for Jackson County in favor of plaintiff in an action brought to enforce payment of a promissory note. *Affirmed.*

NOTE.—As to liability for signing an instrument on an oral condition as to the procurement of other signatures, see also *Whitaker v. Richards* (Pa.) 7 L. R. A. 749; *State v. McGonigle* (Mo.) 8 L. R. A. 41 L. R. A.

A. 735; *Goodyear Dental Vulcanite Co. v. Bacon* (Mass.) 8 L. R. A. 486, and note; *King County v. Ferry* (Wash.) 19 L. R. A. 500; and *Carter v. Moulton* (Kan.) 20 L. R. A. 800.

The facts are stated in the opinions.

Messrs. John W. Beebe, I. N. Watson, and R. T. Railey, for appellants:

The court erred in rendering a judgment *non obstante veredicto* because the motion was filed out of time. It should have been made upon the rendition of the verdict and before the entry of judgment. At least it should have been made within four days after verdict.

2 Tidd, Pr. p. 920; 1 Freeman, Judgm. p. 7; *State v. Commercial Bank*, 6 Smedes & M. 218, 45 Am. Dec. 280; *Schermerhorn v. Schermerhorn*, 5 Wend. 514; *Harrison v. Great Northern R. Co.* 11 C. B. 541.

This motion is never resorted to in connection with a motion for a new trial.

2 Tidd, Pr. p. 920.

The theory for the motion for judgment, notwithstanding the verdict, was that upon the whole record the defendant never could make out a better case, either by replying or by new evidence, and so the court would let the verdict stand, and despite of it render judgment for plaintiff. Such judgment never was rendered, except in a very clear case; the court had to be satisfied that it was impossible for the defendant to make a better defense, either in respect of pleading or proof.

Pim v. Grazebrook, 3 Mann. & G. 863, 8 Dowl. & L. 454, 10 Jur. 250; *Atkinson v. Davies*, 11 Mees. & W. 236, 2 Dowl. N. S. 778, 12 L. J. Exch. N. S. 169; 2 Tidd, Pr. p. 922; *Schermerhorn v. Schermerhorn*, 5 Wend. 514; *Bellows v. Shannon*, 2 Hill, 86; 1 Bluck, Judgm. ed. 1891, § 16; Bouvier, Law Dict. Judgment.

The first count states an original promise.

Clark, Contr. 99; *Thomas v. Cook*, 8 Barn. & C. 728, Overruled by *Green v. Cresswell*, 10 Ad. & El. 453; *Wildes v. Dudlow*, L. R. 19 Eq. 198; *Mountstephen v. Lakeman*, L. R. 5 Q. B. 613; *Yorkshire R. Wagon Co. v. Maclure*, L. R. 19 Ch. Div. 478; *Guild v. Conrad* [1894] 2 Q. B. 885; *Browne*, Stat. Fr. §§ 161 et seq.; *George v. Hoskins*, 17 Ky. L. Rep. 63; *Winn v. Hill-ger*, 43 Mo. App. 143; *Culkins v. Chandler*, 36 Mich. 324, 24 Am. Rep. 593; *Clifford v. Lohring*, 69 Ill. 401; *Crawford v. Edison*, 45 Ohio St. 239; *Kilbride v. Moss*, 113 Cal. 432.

The second count states a good defense. A note may be placed in the hands of an agent or attorney as a technical escrow.

1 Shep. Touch. 59; *Watkins v. Nash*, L. R. 20 Eq. 262, 13 Moak, Eng. Rep. 781; *Cincinnati, W. & Z. R. Co. v. Iliff*, 18 Ohio St. 235; *Dietz v. Farish*, 12 Jones & S. 19; *Price v. Home Ins. Co.* 54 Mo. App. 119; *Bishop*, Contr. § 356; *Southern L. Ins. & T. Co. v. Cole*, 4 Fla. 359; *Bank of Healdsburg v. Bailhache*, 65 Cal. 327; *Friendly v. Lee*, 20 Or. 202; *Humphreys v. Richmond & M. R. Co.* 88 Va. 431; *McLaughlin v. Wheeler*, 1 S. D. 497.

Parol evidence is admissible to show the conditions on which the note was received.

Pym v. Campbell, 6 El. & Bl. 370; 6 English Ruling Cases, 168; *Guardhouse v. Blackburn*, L. R. 1 Prob. & Div. 115; *Clark*, Contr. p. 572; 1 Chitty, Contr. 11th Am. ed. p. 159; *Nash v. Fugate*, 32 Gratt. 595; *Be'l v. Ingestre*, 12 Q. B. 316; 2 Whart. Ev. § 927; *Lindsay v. Lacy*, 17 C. B. N. S. 578; *Wallis v. Littlell*, 11 C. B. N. S. 369, 81 L. J. C. P. N. S. 100; *McFarland v. Sikes*, 54 Conn. 250; *Juilliard v. Chaf-41 L. R. A.*

fee, 92 N. Y. 529; *Reynolds v. Robinson*, 110 N. Y. 654.

Suppose Major Towers had knowledge, will anyone claim that that knowledge should be imputed to defendants?

Marshall County Supers. v. Schenck, 5 Wall. 782, 18 L. ed. 559; *Creswell v. Lanahan*, 101 U. S. 847, 25 L. ed. 853; *Tiedeman*, Com. Paper, § 88; *Evans*, Principal & Agent, pp. 90 et seq.

The contention that Major Towers could ratify his own unauthorized act is fully met by the following authorities:

Mechem, Agency, § 123, p. 85; *Trudo v. Anderson*, 10 Mich. 357, 81 Am. Dec. 795; *Penn v. Evans*, 28 La. Ann. 576; *Mound City Mut. L. Ins. Co. v. Huth*, 49 Ala. 530; *Whitehead v. Wells*, 29 Ark. 99; *Dorsey v. Abrams*, 85 Pa. 299, 27 Am. Rep. 657; *Palmer v. Cheney*, 35 Iowa, 281; *Clark v. Clark*, 59 Mo. App. 532.

The burden of proving ratification is upon the party asserting it.

Mechem, Agency, § 132; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611.

On petition for rehearing.

If the attorney of the payee could receive the note in escrow, his reception thereof was not a reception by the payee, and his delivery to the payee unauthorized and void.

Massmann v. Holscher, 49 Mo. 89; *Millership v. Brookes*, 5 Hurlst. & N. 796; *Watkins v. Nash*, L. R. 20 Eq. 262; *Cincinnati, W. & Z. R. Co. v. Iliff*, 18 Ohio St. 235; *Bank of Healdsburg v. Bailhache*, 65 Cal. 327; *Dietz v. Farish*, 12 Jones & S. 220; *Friendly v. Lee*, 20 Or. 202; *Humphreys v. Richmond & M. R. Co.* 88 Va. 431; *McLaughlin v. Wheeler*, 1 S. D. 497; *Price v. Home Ins. Co.* 54 Mo. App. 119; *Bishop*, Contr. § 356; *Tyler v. Cate*, 29 Or. 515; *Hansford v. Freeman*, 99 Ga. 376.

When a surety signs a bond note, and leaves it in the hands of his principal therein to be delivered only on condition that it is to be signed by other sureties, and the principal delivers the bond or note, in violation of this agreement, to the obligee, and the obligee has no notice of such agreement, the surety will be bound.

North Atchison Bank v. Gay, 114 Mo. 208; *State, Bothrick, v. Potter*, 63 Mo. 212, 21 Am. Rep. 440; *State, Wight, v. Modrel*, 69 Mo. 152; *State, Brown, v. Baker*, 64 Mo. 167, 27 Am. Rep. 214; *State, Hewitt, v. Hewitt*, 72 Mo. 604; *Wolff v. Schaeffer*, 74 Mo. 158.

Messrs. Peak & Ball, for respondent:

The jury should have been instructed that if the defendants saw this note after it was delivered to Yeager, paid interest upon it, and had it extended from year to year, and had an opportunity to examine and read it, then they were absolutely bound by notice of its contents and of the signatures.

Ellison v. Weathers, 78 Mo. 115; *Snider v. Adams Exp. Co.* 63 Mo. 376; *Boatmen's Sav. Institute v. Forbes*, 52 Mo. 201; *Welsh v. Ferd Heim Brewing Co.* 47 Mo. App. 603.

The delivery of a promissory note to the authorized agent of the payee is an absolute and unqualified delivery.

Jones v. Shaw, 67 Mo. 670; *Henshaw v. Dutton*, 59 Mo. 139; *Massmann v. Holscher*, 49 Mo. 87; *Madison & I. Pl. Road Co. v. Stevens*, 10 Ind. 1; *Stewart v. Anderson*, 59 Ind. 375;

Wight v. Shelby R. Co. 16 B. Mon. 4, 63 Am. Dec. 523; *Clanin v. Esterly Harvesting Mach.* Co. 118 Ind. 372, 3 L. R. A. 863; *Duncan v. Pope*, 47 Ga. 445; *Scott v. State Bank*, 9 Ark. 36; *State, Bothrick, v. Potter*, 63 Mo. 212, 21 Am. Rep. 440.

Mr. C. O. Tichenor, also for respondent:

Defendants in effect are seeking by this defense to rescind the agreement by which they got the old note, and by which they got years of extension upon their debt to plaintiff.

Whittemore v. Obear, 58 Mo. 286; *Whittemore v. Nickerson*, 125 Mass. 498, 28 Am. Rep. 257; *Jarrett v. Morton*, 44 Mo. 277; *Clough v. Holden*, 115 Mo. 359.

They cannot rescind the contract without offering to restore whatever of advantage they have received under it.

Sanborn v. Batchelder, 51 N. H. 434; *Hunt v. Silk*, 5 East, 449; *Clarkson v. Mitchell*, 3 E. D. Smith, 272; *Burge v. Cedar Rapids & M. R. R. Co.* 32 Iowa, 105.

Being in default they are not in the position to defeat the contract by rescission.

Felix v. Bevington, 52 Mo. App. 406.

The exercise of the right to rescind must be promptly after the discovery of the fraud, or after a time when by reasonable diligence it might have been discovered.

Clough v. Holden, 115 Mo. 359; *Estes v. Reynolds*, 75 Mo. 565; *Montgomery County v. Auchley*, 103 Mo. 501; *Lewis v. Brookdale Land Co.* 124 Mo. 688; *Cummins v. Lods*, 1 McCrary, 338; *Kingsley v. Wallis*, 14 Me. 57.

If a note is procured by fraud there is no doubt such defense is available. If it is given upon contingencies not expressed in it, the failure of such contingencies cannot be set up as a defense to the note.

Henshaw v. Dutton, 59 Mo. 139; *Smith v. Thomas*, 29 Mo. 307; *Massmann v. Holscher*, 49 Mo. 87; *State, Bothrick, v. Potter*, 63 Mo. 212, 21 Am. Rep. 440; *State, Brown, v. Baker*, 64 Mo. 167, 27 Am. Rep. 214; *Rodney v. Wilson*, 67 Mo. 123, 29 Am. Rep. 499; *Jones v. Shaw*, 67 Mo. 667; *Gardner v. Mathews*, 81 Mo. 627; *State, Hewitt, v. Hewitt*, 72 Mo. 603; *State, Wight, v. Modrel*, 69 Mo. 152; *Whittemore v. Obear*, 58 Mo. 286; *Ayres v. Milroy*, 53 Mo. 516; *Smith v. Clark County*, 54 Mo. 77; *Wolff v. Schaeffer*, 74 Mo. 154; 1 Dan. Neg. Inst. 4th ed. § 81a; *Moss v. Riddle*, 5 Cranch, 351, 3 L. ed. 123; *Benton v. Martin*, 52 N. Y. 570; *Cocks v. Barker*, 49 N. Y. 110; *Renard v. Sampson*, 12 N. Y. 581; *Halliday v. Hart*, 30 N. Y. 474; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Gilbert v. North American F. Ins. Co.* 23 Wend. 43.

Yeager could not have acted as the attorney in this matter for defendants unless plaintiff consented.

Connor v. Black, 119 Mo. 134; *Robinson v. Jarvis*, 25 Mo. App. 426; *De Steiger v. Hollingman*, 17 Mo. App. 389, and cases cited.

Burgess, J., delivered the opinion of the court:

This is a suit upon a negotiable promissory note for the sum of \$8,500, dated on the 9th day of November, 1887, executed by defendants, and payable to the order of plaintiff on or before twelve months after its date. The material allegations of the petition upon which

the case was tried are as follows: "Plaintiff, for her amended petition (leave of court having first been obtained), states that the said defendant Geo. D. Ford and the said defendant John R. Towers, under and by the name of J. R. Towers, on November 9, 1887, made, executed, and delivered to the plaintiff herein their certain promissory note, wherein they promised, for value received, to pay to the order of Julia G. Hurt, the plaintiff herein, on or before twelve months after date, the sum of \$3,500, at the National Bank of Kansas City, with interest from date thereof at the rate of ten per cent per annum, which said note is herewith filed, and made a part of this petition. Plaintiff states that on November 14, 1888, the said defendants paid the sum of \$850 in full of interest to November 9, 1888, which said sum is credited upon the back of said note; that on November 9, 1889, the said defendants paid the interest in full on said note to said date, and the same is credited upon said note; that the plaintiff is now the owner and holder of said note." The answer, omitting the formal parts, is as follows: "Defendants, for their second amended answer to plaintiff's amended petition, admit they signed the note as set forth in plaintiff's petition; admit the same was delivered to plaintiff by one R. L. Yeager, as hereinafter set forth; admit defendants made payments as set forth in petition; and, for affirmative defenses to said note, defendants aver: First. That said note was signed by defendants solely for, and on account and in renewal of, a certain promissory note in words and figures following, viz.:

Kansas City, Mo., May 9th, 1883. No. 21,-950.

Six months after date, we promise to pay E. K. Thornton, cashier, or order, at the Bank of Kansas City, eight thousand and five hundred dollars, for value received, with interest from maturity at the rate of ten per cent per annum.

\$3,500.

M. R. Hightower,
T. R. Towers,
Geo. D. Ford.

"Defendants further aver that the said promissory note last mentioned was given under and by virtue of the following agreement and arrangement, to wit: The said M. R. Hightower, principal in said last-mentioned note, made application to the plaintiff in the spring of 1883 for a loan of \$3,500, to enable him to purchase a herd of cattle. Plaintiff, not then having the ready sum to make said loan, and being desirous to assist said Hightower, who was her brother-in-law, requested said Hightower to procure the defendants to sign a note, with said Hightower as principal, to the Bank of Kansas City, for \$3,500, and then and there requested, authorized, and empowered said Hightower to state to the defendants, in order to induce them to become signers on said note, that she would take up said note when it should become due, and save defendants harmless from its payment. Defendants aver that in pursuance thereof (said request and authority) said Hightower requested defendants to sign said note, stating to them that plaintiff had requested him to say for her that if they

would sign said note, and thus enable him to get the money from the bank, she would take up said note when due, and they should be held harmless from its payment. Defendants further aver that by reason of such statements and agreement, and relying on the same, they were induced to, and did, sign said note with said Hightower, and that plaintiff, in pursuance of said agreement above stated, and communicated to the defendants, came into possession of said note (the same being turned over to her as an asset of the estate of her deceased husband, and became her property), and by her act in that behalf defendants became and were released from all liability on said note, and the same became, as to them, null and void, and plaintiff is now estopped from maintaining any action upon the note given in renewal thereof. Wherefore defendants aver that the note described in plaintiff's petition was and is wholly without consideration, and plaintiff ought not to have and maintain her action upon the same. For a second defense, defendants aver that the note described in plaintiff's petition was not only without consideration, as alleged in this answer, but that it is and was of no validity in law, in that it was placed in the hands of one R. L. Yeager (who was at the time the duly authorized agent of the plaintiff), in escrow, with the direction that it was to be delivered by him to plaintiff, and have effect as a valid obligation only upon condition that one M. R. Hightower, for whose benefit the instrument was signed, should be procured, also, to sign the same, and said Yeager received said note charged with such directions and conditions. And defendants further aver that said Hightower was never procured to sign, and never did sign, said note, but without the knowledge of defendants, or either of them, the said Yeager delivered said note to the plaintiff; that, at the time the note in suit was placed in the hands of said Yeager, said Yeager turned over to one Towers the note first above described, and said Towers turned the same over to the defendants; that the knowledge that said Hightower had not signed said note came to the defendants since the commencement of this suit, and the payments thereon were made without the knowledge that the note had been delivered to said plaintiff by said Yeager contrary to said instructions given to him as aforesaid; and so defendants do herewith tender into court, for plaintiff, the promissory note first above described, and pray judgment. For a third defense, defendants aver that the note described in plaintiff's petition was and is not only without consideration, as first alleged in this answer, but that it was and is of no validity in law, for it was understood and agreed between defendants and one M. R. Hightower that said Hightower, for whose benefit the said notes were given, should also sign the note in suit, and in pursuance of said understanding said note, after it had been signed by the defendants, was handed by them to their agent, one Maj. Towers, with instructions for him to obtain said Hightower's signature upon the same before delivery thereof, but the said agent, not being able to find said Hightower, took the said note to the said R. L. Yeager, who at that

time was the attorney and duly-authorized agent of the plaintiff, and delivered the same to him, at the same time disclosing to said Yeager the instructions he had received from defendants as aforesaid; and the said Yeager, thus having notice of the instructions so given to defendant's agent, received said note charged with said notice, and without further authority from the defendants, or either of them, delivered said note to plaintiff without obtaining the said Hightower to sign the same. And defendants aver that said Hightower was never procured to sign, and never did sign, said note. Defendants further aver that, at the time the note in suit was placed in the hands of said Yeager, said Yeager turned over to said Maj. Towers the note first described, and said Towers turned over the same to the defendants, who herewith tender into court, for plaintiff, the same. They further aver that the knowledge that said Hightower had not signed the note came to defendants since the commencement of this suit, and the payments thereon were made without the knowledge that said note had been delivered to plaintiff by said Yeager contrary to the notice and instructions given him as aforesaid." Plaintiff replied, denying all allegations in the answer, except as to facts alleged in the petition.

Plaintiff asked, and the court refused, the following instructions: "(8) The jury are instructed that, although the witness Towers delivered the note in suit to witness Yeager in violation of the instructions of defendants, and although he communicated his instructions to witness Yeager at the time of such delivery, yet, if the jury find and believe from the evidence that after said delivery, and after having knowledge that Hightower had not signed said note, defendants approved, and adopted as their own, the act of said Towers in making said delivery to said Yeager, the verdict should be for the plaintiff." "(10) The court instructs the jury that if they find from the evidence that the note in suit was delivered by W. A. Towers, as agent for the defendants, to R. L. Yeager, without imparting to him notice that he had been instructed by the defendants not to deliver the note to him until he had secured the name of Hightower thereon, then such delivery was valid and binding, and you must find for the plaintiff in the sum of \$3,500, with interest thereon at the rate of 10 per cent per annum from November 9, 1839; and this you must do although you may believe that defendants may have instructed him not to deliver said note until he had secured the name of Hightower on said note." The cause was tried with the aid of a jury, which returned a verdict for defendants. In due time, to wit, January 25, 1893, the plaintiff filed her motion for a new trial and in arrest of judgment. Before that motion was disposed of, to wit, March 29, 1893, plaintiff filed her motion for judgment *non obstante veredicto*. On April 22, 1893, the court sustained the motion for a new trial upon the ground that it committed error in refusing instructions numbered 8 and 10 asked by plaintiff, and at the same time sustained her motion for a judgment on the pleadings, and rendered judgment in her favor for the amount due on the note, and interest. In due time, defendants filed their

motion for a new trial, which being overruled they saved their exceptions, and bring the case to this court by appeal.

M. R. Hightower, mentioned in the answer, is the brother-in-law of the plaintiff, Julia G. Hurt; he having married her sister some time prior to the transactions out of which this litigation arose. In 1888 it became necessary for Hightower to borrow \$8,500, and he applied to the plaintiff, who is the widow of James Hurt, deceased, and whose estate was then in process of settlement, for a loan of that sum. She did not have the money. She authorized him, however, to say to defendants that if they would become his sureties, so that he could borrow the money from some other source, she would take the note up at maturity. Upon this representation, defendants became Hightower's securities on a note to the Bank of Kansas City for the sum of \$8,500, upon which he procured the money. The note was dated May 9, 1888, due in six months after date. When the note became due, plaintiff applied to R. L. Yeager and James Lincoln, who were executors of the will of said James Hurt, to take up the note. The executors then paid the note, and indorsed it to her without recourse. During the early part of November, 1888, it became necessary for Hightower to borrow the further sum of \$8,000, which he obtained from the executors of the Hurt estate; giving as sureties George D. Ford, W. A. Towers, and Charles Gudgell. These two notes were turned over to the plaintiff by said executors as part of her distributive share of that estate. Interest was paid on both notes by Hightower until November 9, 1886, when he ceased to pay it any longer. Plaintiff then demanded the money on the notes, or the payment of the interest due, and new notes. One note for \$8,000, dated November 9, 1887, and payable to plaintiff on or before twelve months after date, was drawn up, and signed by George D. Ford, W. A. Towers, and Charles Gudgell, and delivered to R. L. Yeager, attorney for plaintiff. At the same time Yeager assigned and delivered to the makers of that note the old note for \$8,000, signed by Hightower, Ford, Gudgell, and W. A. Towers, dated November 11, 1893: At the same time the note in suit was drawn up, signed by the defendants, and delivered to R. L. Yeager, attorney for plaintiff, under the following circumstances: A note was executed by Hightower, Ford, and Towers. Immediately after the note was executed, Ford concluded that it would be preferable to have the note read "on or before;" and Maj. Towers was deputed to take the note, signed by Hightower and the defendants, to Mr. Yeager, plaintiff's attorney, and inquire if another signed, "on or before," would be accepted. Maj. Towers thereupon took the note, signed by Hightower and the defendants, to Yeager, and advised him of Ford's request that the note should be changed to "on or before." Yeager acceded to that request, and, returning the note to Maj. Towers, drew up another, reading "on or before," for the parties to execute. Maj. Towers then returned with the new note for execution. In the meantime Hightower had disappeared, and when Ford and Towers executed the note they turned it over to Maj. Towers, saying to him

to go out and find Hightower, and get him to sign it, and not to deliver it to Yeager until he had obtained Hightower's signature. Maj. Towers, accompanied by Charles Gudgell, started out in search of Hightower; and, being unable to find him, Maj. Towers went to Yeager's office, and stated to him that his instructions were to get Hightower's name on the note before delivery, and that he had been hunting him, and could not find him, and asked Yeager to take the note, and get Hightower's name on it before delivering it to Mrs. Hurt. Yeager replied that he did not see what advantage it would be to have Hightower's name on the note, as he was "busted;" but Maj. Towers replied that, however that might be, his instructions were to obtain Hightower's name before delivery. Yeager accepted the note, and turned over to Maj. Towers the first note. Yeager did not get Hightower to sign the note. He turned it over to Mrs. Hurt without his signature. Defendants testified that they did not know that Hightower's signature had not been obtained until after this suit had been brought, although they supposed it had been. Towers kept the old note, and paid interest on the note in suit up to November, 9, 1899. There was, however, evidence tending to show that in December, 1890, Towers knew that the name of Hightower was not on the note. Upon the execution and delivery of the notes, all the interest due on the old notes was paid to plaintiff, and the old note, of which the one in suit is a renewal, delivered to defendants.

The first question for consideration on this appeal is with respect to the action of the court in rendering judgment for plaintiff on what is called the "*motion non obstante veredicto*." Such a motion can only be sustained when it appears from the record that the allegations in the answer constitute no defense to the action. 2 Elliott, Gen. Pr. § 997; Broom, Com. 4th ed. *209; 2 Tidd, Pr. p. 920; [*Wilkes Broadbent*], 1 Wils. 65. And even then such a judgment can only be rendered in a clear case on the application of plaintiff made after the verdict, and before entry of judgment on the verdict. 1 Freeman, Judgm. 4th ed. § 7. Tidd, in stating the distinction between a judgment *non obstante veredicto* and a repleader, thus defines the former: "Where the plea is good in form, though not in fact, or, in other words, if it contain a defective title or ground of defense, by which it is apparent to the court upon the defendant's own showing, that, in any way of putting it, he can have no merits, and the issue joined thereon be found for him, there, as the awarding of a repleader could not mend the case, the court, for the sake of the plaintiff, will at once give judgment *non obstante veredicto*; but where the defect is not so much in the title as in the manner of stating it, and the issue joined thereon is immaterial, so that the court know not for whom to give judgment, whether for the plaintiff or defendant, there for their own sake, they will award a repleader. A judgment, therefore, *non obstante veredicto*, is always upon the merits, and never granted but in a very clear case." 2 Tidd, Pr. p. 922; *Lough v. Thornton*, 17 Minn. 258 (Gil. 230); *Bellows v. Shannon*, 2 Hill, 86; *Friendly v. Lee*, 20 Or. 202. In this case the verdict and

judgment thereon were rendered on the 21st day of January, 1893, while the motion for judgment notwithstanding the verdict was not filed until March 29, 1893. In *State v. Commercial Bank*, 6 Smedes & M. 218, 45 Am. Dec. 280, the verdict and judgment were rendered on the 21st of November, 1845. On the 26th of the same month the district attorney moved to set aside the judgment, and for judgment *non obstante veredicto*, which was overruled. It was objected that the motion came too late after judgment was entered. The court said "that, like a motion in arrest of judgment, it must precede the entry of judgment; it being too late to arrest that which is already entered. This objection is quite technical, and yet it is in strict accordance with law. The objection is made, and there seems to be but one rule on the subject; and that is that such a motion must be made immediately after the verdict, and before judgment is rendered on the verdict." Moreover, when the motion was ruled on by the court, and judgment *non obstante veredicto* rendered, the verdict has been set aside, so that it could not then have been maintained unless it be treated as a motion for judgment upon the pleadings, which, under our system of practice, may be made at any time after the pleadings are made up, and before verdict, and after verdict set aside. The motion contained all averments necessary in a motion for judgment on the pleadings, and treating it as a motion for that purpose, as we think it should be, the question arises as to the sufficiency of defendant's answer; and, in passing upon this question, we think the same rule should be applied as in the case of a motion *non obstante veredicto*. But the sufficiency of the answer must be determined by the record, and not by the evidence. The answer admits that the note was delivered to one R. L. Yeager, as thereafter stated, and that payments were made on the note as set forth in the petition. It alleges that Yeager was plaintiff's agent and attorney, and that the note was delivered to him with directions not to deliver it to plaintiff until Hightower's signature was obtained thereto, which was never done. It will thus be seen that the answer not only admits the delivery of the note, in express terms, but it also admits the payment of interest on the note after its delivery, which is inconsistent with the contention that the note was never delivered. The question then is, Could the note be conditionally delivered to the plaintiff, or to her agent, Yeager, for her? *Massmann v. Holscher*, 49 Mo. 87, was a suit upon two promissory notes. One of the defendants answered, admitting the signing of the notes, and their delivery to plaintiff, to whom they were payable, and then alleged, among other things, that he signed and delivered the notes to plaintiff under an agreement and verbal understanding with him that the notes should be signed by one Hase, and, if not so signed, that they should be considered as inoperative and void. Hase never signed the notes. The court held (we quote from syllabus): "A promissory note may be delivered to a stranger, to be held by him as an escrow, to take effect on the happening of a future contingent event. But where it is held by the payee the doctrine of escrow cannot arise, and,

no fraud being charged, proof of an oral agreement by which the note was to become legally binding, not from its delivery according to its tenor, but on the happening of a certain contingency, is inadmissible. Such testimony varies the effect of a written contract." So, in *Henshaw v. Dutton*, 59 Mo. 139, it was expressly held that a note given upon contingencies not expressed upon its face was no valid defense to the note; that it could not be given to the payee as an escrow; that such delivery must be made to a third person, not the payee; that parol evidence is not admissible to vary the meaning of a note. This case was before this court again in 1878, and the same doctrine announced. *Henshaw v. Dutton*, 67 Mo. 666. The same question was before this court in *Jones v. Shaw*, 67 Mo. 667; and it was again held that a note cannot be treated as an escrow after having been delivered to the payee, but, in order to have that effect, the delivery must be to a third person. See also the recent case of *Garvey v. Marks*, 134 Mo. 1. The same rule was announced in *Harwood v. Brown*, 23 Mo. App. 69, and in *Thompson v. Irwin*, 42 Mo. App. 403. The cases of *Carter v. McClintock*, 29 Mo. 464, and *State, Bothrick, v. Potter*, 63 Mo. 212, 21 Am. Rep. 440, are not, we think, in conflict with what has been said. In the *Carter Case* the note was obtained by fraud, and it was held that, as delivery is necessary to the complete execution of a promissory note, if the payee obtain possession of it by fraud he cannot maintain an action thereon,—a ruling the correctness of which was fully recognized in *Henshaw v. Dutton*, 67 Mo. 666. In speaking of the *Carter Case* in *State, Bothrick, v. Potter*, 63 Mo. 212, 21 Am. Rep. 440, all that is said is that that case "simply declares that no delivery of a note occurs where the payee surreptitiously obtains possession thereof, and that he cannot maintain an action thereon." There is no allegation in the answer in the case in hand that the note sued on was obtained by fraud; hence the *Carter Case* and the *Potter Case* have no bearing upon this case. The petition alleges that the defendants made, executed, and delivered the note to plaintiff, and its delivery is admitted by defendants in their answer; and, whatever the law may be elsewhere with respect to the delivery of such an instrument in escrow, it is well settled in this state that it cannot be done by delivery to the obligee, but may be to a third party. It follows that the second and third counts of defendants' answer set up no defense to plaintiff's cause of action.

In the first count of the answer it is alleged that plaintiff requested, authorized, and empowered Hightower to state to defendants, in order to induce them to become signers of the original note for \$8,500, that she would take it up when due, and save them harmless; that, in pursuance of said directions, Hightower made the statements to them as directed by her; and that, relying upon said statements, they were induced to, and did, sign said note as the securities of Hightower. These allegations are denied by plaintiff in her replication to the answer. That the promise to save defendants harmless was simply an oral promise appears from the answer, and is undis-

putable; and that such a promise is within the statute of frauds (Rev. Stat. 1889, § 5186) was ruled by this court in *Bissig v. Britton*, 59 Mo. 206, 21 Am. Rep. 379. While that case is severely criticised in 1 Reed, Stat. Fr. § 144, and note U to that section, it was concurred in by a full bench; and its correctness has never been questioned by this court, in so far as we are advised. The question then is, As it appears upon the face of the answer that the contract was merely oral, and within the statute, was it necessary, in order for plaintiff to avail herself of the statute of frauds, that she should plead it specially, or was it raised by the general denial in the replication? The rule seems to be that when the contract is denied it is not necessary to insist upon the statute as a bar; that it is as fully raised by a general denial as by special plea. In *Wildbahn v. Robidoux*, 11 Mo. 660, it was said: Where the defendant, in his answer, denies the contract, "it is not necessary for him to insist upon the statute as a bar." *Hook v. Turner*, 22 Mo. 333. So, it has been said, it is as well raised by general denial "as any other answer could raise it." *Wiswell v. Tefft*, 5 Kan. 263; *Bliss*, Pl. p. 353; *Allen v. Richard*, 83 Mo. 55; *Hackett v. Watts*, 138 Mo. 502. In *Springer v. Kleinsorge*, 83 Mo. 156, in passing upon a similar question, it is said: "On such state of the pleadings, the plaintiff, as said by Ryland, J., in *Hook v. Turner*, 22 Mo. 333, 'must produce legal evidence of the existence of the agreement, which cannot be established by parol proof.' This logically results from the general denial authorized by the practice act. The general denial puts in issue every fact included within the allegations of the petition which the plaintiff must prove in order to a recovery. *Northrup v. Mississippi Valley Ins. Co.* 47 Mo. 435-444, 4 Am. Rep. 837. In the action of replevin and of ejectment under a general denial the defendant may show that the claim of plaintiff is fraudulent and bad and thus avoid the plaintiff's title. *Greenway v. James*, 84 Mo. 328; *Bobb v. Woodward*, 42 Mo. 488; *Mather v. Hutchinson*, 25 Wis. 35, 36; *Hayden v. Dunlap*, 8 Bibb, 216. The answer in this case contains, first, a general denial of the allegation of the petition. It is true, it pleads other matters of special defense, but the new matter is in no wise inconsistent, in contemplation of the practice act, with the general denial. They can well exist together in point of fact and law. *Nelson v. Brodhack*, 44 Mo. 596, 100 Am. Dec. 328. This construction of the pleading in this case is in no wise in conflict with the cases of *Gardner v. Armstrong*, 81 Mo. 535; *Rabsuhl v. Lack*, 85 Mo. 316; and *Graff v. Foster*, 87 Mo. 512. In the first case cited the court simply holds that the petition was not demurrable for failing to recite that the contract was in writing. That was matter of defense to be raised by the answer. It does not say that the question would not be well raised, under our present practice act, by the general issue. So, in the case in 85 Mo. the answer admitted the indebtedness without pleading the statute. And in *Graff v. Foster* an examination will show that the answer did not deny the contract but merely put in issue the indebtedness. To deny the indebtedness is no denial of the existence of the contract,

out of which the petition avers the indebtedness arose. *Engler v. Bate*, 19 Mo. 543." The effect of the denial by plaintiff, in her replication to defendants' answer, of all allegations therein, except as to the facts alleged in the petition, was to deny that she ever promised defendants, or agreed with them, that, if they would become the sureties of Hightower, she would save them harmless; and as the alleged contract was merely oral, as shown by the answer, the plea of the statute was as well raised by the denial as it would have been by special plea. The contract, if made, was clearly within the statute of frauds, and no bar to plaintiff's action.

Upon the facts disclosed by the record, instruction numbered 8 asked by plaintiff presented to the jury the question of ratification, which was raised by the pleadings, and which the evidence tended to prove; and in its refusal error was committed which justified the court in setting aside the verdict. As it is manifest from the record that defendants have no defense which could be made available by repleading, the judgment is affirmed.

All concur, except **Barclay**, Ch. J., and **Macfarlane**, J., who dissent.

Barclay, Ch. J., dissenting:

When this cause was in the first division, an opinion was filed (36 S. W. 671) which expresses our idea of the case. In view of the full statement of facts in the learned opinion of the majority of the court in banc, some parts of the divisional opinion need not now be repeated.

1. A number of minor points in regard to the procedure in the circuit court have been raised. We shall not touch upon them all, but discuss only those which seem to be finally material. As plaintiff had possession of the note, and filed it, the burden of proof at the trial was upon defendants to establish some one of their defenses. Though the Code of Procedure makes no mention of a motion for judgment notwithstanding the verdict, yet it obviously may be resorted to on a proper occasion. If neither the defendants' evidence at the trial nor their pleadings, disclosed any defense to the cause of action stated by plaintiff, it would not serve the ends of justice to grant a new trial; there being really nothing to try, according to the final opinion of the trial judge. In that event the court might properly give its view of the case on a motion such as that plaintiff filed (waiving now the question whether or not it was offered in due season). The filing occurred more than four days after the verdict, and the motion is attacked on that account. But, as we consider it untenable on its merits, we forbear ruling on the question of its timeliness. We also consider it immaterial to decide whether a motion for judgment notwithstanding the verdict is available where a good affirmative defense appears in the answer, but is not supported by evidence tending to discharge the burden of proof as to that defense. We entertain no doubt that the testimony offered by defendants tended to prove at least one of the defenses set up in their answer. But, as we hold that the judgment should be reversed for a new trial, we prefer to refrain from any comment on the probative

effect or weight of the evidence, further than the general statement just made.

2. The important and decisive question in the case raised by the answer is whether its allegations avoid the prima facie showing of the petition. The gist of the plaintiff's contention is that the answer admits the delivery of the note, and that the facts alleged in connection therewith are legally insufficient to avoid the liability created by the delivery. The defendants repeal that contention with vigor, and the discussion which that issue has elicited has been both entertaining and useful to the court. It will be noticed that the answer does not precisely admit an absolute delivery. It states that the note "was delivered to plaintiff by one R. L. Yeager, as hereinafter set forth." The answer then proceeds to set forth a conditional delivery to Mr. Yeager, and a failure of the condition, the facts of which are fully given: To simplify the case as now presented, we shall assume that the conditional delivery was made to plaintiff's agent (or in effect, to plaintiff herself), though there is some question as to whether the facts should be so interpreted. We consider that view of them, however, most favorable to plaintiff, and we will endeavor to apply upon that ground work the rule of law which we think controls this branch of the case. Plaintiff's learned counsel argue that no condition could be connected with the delivery of the paper to plaintiff's attorney. They assert that a note cannot be conditionally delivered to the payee or to the payee's agent. The principles which govern that subject are by no means universally settled. On the contrary, we find, not only conflicting opinions thereon in other states, but a want of harmony in the decisions in Missouri. The proposition contended for by plaintiff finds support in rulings (or at least remarks) in *Massmann v. Holcher* (1871) 49 Mo. 87; *Henshaw v. Dutton* (1875) 59 Mo. 189, and (1878) 67 Mo. 666; and *Jones v. Shaw*, 67 Mo. 667. While in *Carter v. McClintock* (1860) 29 Mo. 464, it was distinctly held that mere manual delivery of a note to the payee created no liability, where the intent to deliver was wanting. In that case the doctrine that a delivery of such paper may be conditional is conceded and acted upon. That decision was cited in *State, Bothrick, v. Potter* (1876) 63 Mo. 212, 21 Am. Rep. 440, a case which appears to assume the correctness of the proposition that delivery of a document may be conditional as between immediate parties. That judgment however asserts that the condition does not bind third persons who, without notice, acquire rights under the document, delivered in violation of the condition, in such circumstances as that case describes. That ruling has been often approved in subsequent cases, and is a leading one on the topic which it treats. The analogy afforded by the Missouri rulings on conditional delivery of chattels (before the enactment of Rev. Stat. 1889, § 5180) tends to sustain the doctrine announced in *Carter v. McClintock* (1860) 29 Mo. 464, as to controversies between contiguous parties to notes. See *Dannefeller v. Weigel* (1858) 37 Mo. 45; *Little v. Page* (1869) 44 Mo. 412; *Oester v. Sittlington* (1893) 115 Mo. 247. The principle of the *Carter Case* was also recognized in 41 L. R. A.

State, Moore, v. Sandusky (1870) 46 Mo. 377, followed by the second division in *Gay v. Murphy* (1896) 134 Mo. 98. Defendant's answer asserts that the note was to be signed by Mr. Hightower before final delivery, and that Mr. Yeager had full notice of that fact on receiving the paper as custodian. The true question in such cases is as to the intent of the parties touching the delivery. If the instrument, though complete in form, is incomplete in fact, for want of a further signature to be given it, and in that state (pending the last signature) it is placed in possession of the payee (having full knowledge of its incompleteness), with the mutual understanding that the missing signature is to be added before the note is to be regarded as delivered, the payee cannot afterwards treat it as delivered, without more, even at law, and still less in equity. *Jordan v. Loftin* (1843) 13 Ala. 547. To treat it as delivered in its incomplete condition would be a fraud of the simplest and most obvious character. This proposition does not infringe upon the valuable and general rule that protects writings from change by oral evidence. It is not even an exception to that rule. Until delivery is complete, the writing does not become operative as a contract between the parties. *Rogers v. Carey* (1871) 47 Mo. 282, 4 Am. Rep. 322. Bare possession of a document cannot be made a substitute for its delivery, which involves the expression (in some form) of an executed purpose to deliver. *Huey v. Huey* (1877) 65 Mo. 689; *Scott v. Scott* (1888) 95 Mo. 900. We are writing only of a case in which the issue arises between the immediate parties to such a transaction. That is the case in hand. We shall try to confine our comments within the field of legal view afforded by its record. Possession of a note by the payee may, unexplained, be competent evidence of its delivery. But the normal inference from such possession may be counteracted by proof that no delivery was intended in advance of some event which has not happened. Proof of such a state of facts does not contradict the instrument. It only shows that the last act necessary to give it life as a contract has not taken place. The paper remains but a paper while the intent essential to put legal vigor into its form is wanting. It is not needful to inquire whether possession of a note by the payee pending another signature (as alleged in the answer) constitutes a holding in escrow. The classification of the act is unimportant, as compared with its legal substance. Whatever name the act may bear cannot change the principles regulating its effect. We prefer at this time to avoid any attempt to define an "escrow." It appears to us that facts are stated in the answer which amount to a defense to the note in suit, for want of a full and legal delivery of it. We forbear any further discussion of the subject, in view of the thorough treatment it has recently had in the Supreme Court of the United States, in a learned judgment, which we fully accept. *Burke v. Dulaney* (1894) 158 U. S. 284, 38 L. ed. 700, since approved in *Michels v. Olmstead* (1895) 157 U. S. 198, 39 L. ed. 671. In addition to the valuable precedents cited in the *Burke* decision, we refer to a few others having a tendency to support the result we an-

nounced. *Bell v. Ingestro* (1848) 12 Q. B. 817; *Sweet v. Stevens* (1863) 7 R. L. 875; *Michels v. Oimstead* (1862) 14 Fed. Rep. 219; *Westman v. Krumweide* (1883) 30 Minn. 818; *Merchants' Exch. Bank v. Luckow* (1887) 37 Minn. 542; *Belleville Sav. Bank v. Bornman* (1888) 124 Ill. 200. The ruling in *Burke v. Dulaney* is sustained by the following standard text-books, besides those cited in that case: 2 Am. & Eng. Enc. Law, 1st ed. p. 843; Browne, Parol Ev. 1st ed. § 68; Byles, Bills, 13th ed. *103; 1 Greenl. Ev. 15th ed. § 284; Leake, Contr. 1st ed. p. 187; Story, Notes, Thorndike's 7th ed. p. 67, note; Taylor, Ev. 8th ed. § 1037; Tiedeman, Com. Paper, 1st ed. § 34d. Whatever is said or intimated to the contrary in the *Massmann*, *Henshaw*, and *Jones Cases* should not be regarded as any longer authoritative.

8. Plaintiff insists that the first defense in the answer is insufficient, because the statute of frauds defeats it. Whether that statute, if available to plaintiff, would have that effect, is a proposition we do not take up. It is involved in some doubt, as the discussion in a modern text-book indicates. Reed, Stat. Fr. 1st ed. § 144. But it plainly appears from the answer in this case that the agreement on which the statute is supposed to bear was oral, and the statute is not set up in the reply as a defense to it. Hence that statute cannot be resorted to as a barrier to prevent the enforcement of the prom-

ise. *Gardner v. Armstrong* (1863) 31 Mo. 535; *Gordon v. Madden* (1884) 82 Mo. 193.

4. But the order granting a new trial to plaintiff was plainly right. The plaintiff's eighth refused request for an instruction properly submitted the issue of a ratification of the alleged unauthorized delivery of the note in the form it now has. We do not see that the refusal of that instruction was harmless, and are hence bound to assume that the trial court regarded it as prejudicial to plaintiff, since the verdict was set aside on that account. Rev. Stat. 1889, §§ 2100, 2240; *Bunyan v. Citizens' R. Co.* (1895) 127 Mo. 12. Notwithstanding the fact that the note may have been invalid between the first parties, for want of delivery without the signature of Hightower, it was competent for those who did sign it to make the delivery their own by duly ratifying it, as they might have made the delivery unconditional in the first place. *Leaf v. Gibbs* (1830) 4 Car. & P. 466; *Perry v. Patterson* (1844) 5 Humph. 133, 42 Am. Dec. 424; *Robbins v. Phillips* (1878) 68 Mo. 100.

We think the judgment should be reversed, and the cause remanded for a new trial. We respectfully dissent from any other judgment here.

Macfarlane, J., joins in this opinion.

Rehearing denied.

NEW JERSEY COURT OF ERRORS AND APPEALS.

DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY, *Plff. in Err.*,

v.

Caroline REICH.

(.....N. J.)

*1. **The plaintiff, a young child, was injured** while upon a turntable of the defendant company. The turntable was located upon the private property of the defendant, near to a public street, and was entirely unprotected and unguarded. Children of all ages frequently congregated upon the defendant's premises to play upon the turntable. *Held*, that there was no liability on the part of the railroad company to answer for the plaintiff's injury.

2. **A landowner is ordinarily under no obligation to a mere licensee or to a trespasser to keep his premises in a safe condition;** and the fact that the licensee or the trespasser is an infant of tender years affords no reason for modifying this rule, and charging the landowner with a duty which does not otherwise exist.

3. **When an owner of lands erects upon his premises, for their more beneficial user, a structure which happens to be attractive to children, he does not, by such action, extend an invitation to children to enter thereon.**

(*Dixon, Ludlow, Krueger, JJ., dissent.*)

(June 24, 1896.)

*Headnotes by GUMMERE, J.

NOTE.—As to liability of railways for injuries to children trespassing on turntable, see also *Fort Worth & D. C. R. Co. v. Robertson* (Tex.) 14 L. R. A. 41 L. R. A.

ERROR to the Essex County Circuit Court to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

Statement by Gummere, J.:

The defendant in error (who was the plaintiff below), on the 15th day of June, 1896, then being thirteen years of age, had her foot crushed while in the act of rescuing her brother, a child of six years of age, who was playing on a turntable of the defendant company. It appeared in the case that the brother of the plaintiff, in company with several other little children, went to the company's turntable to play, and that she, deeming her brother to be in peril, went to the turntable, while the same was motionless, for the purpose of taking her brother off; and that while she was in the act of stepping with him from the turntable, it was turned by one of the other children, and her foot was thereby caught, and crushed so badly that it had to be amputated. It further appeared that the turntable was located in an open field on the land of the company, within 90 feet of a public street, and was entirely unguarded and unprotected. It also appeared that a path led across this field, passing the turntable within a few feet, and this path was used by the public without any hindrance or objection on the part of the railroad company. It also appeared that the turntable was

781, and note; also *Walsh v. Fitchburg R. Co.* (N. Y.) 27 L. R. A. 724.

frequented by children of all ages, who congregated there for the purpose of playing upon it. The case was left to the jury on the theory that, if the turntable was a structure of a character to tempt children to meddle with it, and dangerous to them if they yielded to the temptation, the railroad company was chargeable with the duty of using reasonable care to protect them from harm, the negligent performance of which would render the company liable for injuries received. There was a verdict for the plaintiff.

Messrs. Depue & Parker, for plaintiff in error:

The turntable was not so near Manor avenue as to endanger those using that highway with reasonable care.

Vanderbeck v. Hendry, 34 N. J. L. 467; *Daneck v. Pennsylvania R. Co.* 59 N. J. L. 415; *Hounsell v. Smyth*, 7 C. B. N. S. 729; *Binks v. South Yorkshire R. & River Dun Co.* 3 Best & S. 242; *Harcastle v. South Yorkshire R. & River Dun Co.* 4 Hurlst. & N. 67; *Blyth v. Topham, Cro. Jac.* 153, 1 Rolle, Abr. p. 88.

The limit of the doctrine of actionable negligence is that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining the loss.

Kahl v. Love, 37 N. J. L. 8; *Lechman v. Hooper*, 52 N. J. L. 253; *Pennsylvania R. Co. v. Knight*, 58 N. J. L. 267.

Had the plaintiff been an adult she could not have maintained this action.

Vanderbeck v. Hendry, 34 N. J. L. 467; *Collyer v. Pennsylvania R. Co.* 49 N. J. L. 59; *Diebold v. Pennsylvania R. Co.* 50 N. J. L. 478; *Phillips v. Burlington Library Co.* 55 N. J. L. 807; *Hammill v. Pennsylvania R. Co.* 56 N. J. L. 870, 24 L. R. A. 581; *Fitepatrick v. Cumberland Glass Mfg. Co.* (N. J. L.) 39 Atl. 675.

A manufacturer or other owner is not bound to fence his dangerous machinery in favor of a simple licensee.

Mathers v. Benet, 51 N. J. L. 80; *Holmes v. North Eastern R. Co.* L. R. 4 Exch. 254; *Bolch v. Smith*, 7 Hurlst. & N. 736.

Is there any exception to this rule where the trespasser or licensee is a minor?

In two cases in this state the doctrine has been applied to its full extent, although the plaintiffs were infants.

Vanderbeck v. Hendry, 34 N. J. L. 467; *Fitepatrick v. Cumberland Glass Mfg. Co.* (N. J. L.) 39 Atl. 675.

In *Walsh v. Fitchburg R. Co.* 145 N. Y. 301, 27 L. R. A. 724, it was held the plaintiff could not recover; so in *Frost v. Eastern R. Co.* 64 N. H. 220.

Liability in turntable cases has also been denied in—

Bates v. Nashville, C. & St. L. R. Co. 90 Tenn. 36; *St. Louis, V. & T. H. R. Co. v. Bell*, 81 Ill. 76, 26 Am. Rep. 269.

In *Caulley v. Pittsburgh, O. & St. L. R. Co.* 95 Pa. 398, 40 Am. Rep. 664, a boy seven years old was injured while playing on a flat car loaded with sand and standing upon a switch of defendant's road. It was held he could not recover.

Duff v. Allegheny Valley R. Co. 91 Pa. 458, 36 Am. Rep. 675; *Flower v. Pennsylvania R. Co.* 69 Pa. 210, 8 Am. Rep. 251, 41 L. R. A.

The following are cases of alleged dangerous situations, other than turntables, in which the decisions have been favorable to the landowner.

McEachern v. Boston & M. R. Co. 150 Mass. 515; *McGuinness v. Butler*, 159 Mass. 233; *Grindley v. McKechnie*, 168 Mass. 494; *Holbrook v. Aldrich*, 168 Mass. 15, 36 L. R. A. 493; *Morrissey v. Eastern R. Co.* 126 Mass. 877, 30 Am. Rep. 686; *Wright v. Boston & A. R. Co.* 142 Mass. 296; *McCarty v. Fitchburg, R. Co.* 154 Mass. 175; *Clark v. Manchester*, 62 N. H. 577; *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555; *Cusick v. Adams*, 115 N. Y. 55; *Greene v. Linton*, 7 Misc. 272; *Newdell v. Young*, 80 Hun. 364; *Collis v. New York C. & H. R. R. Co.* 71 Hun. 504; *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365; *Rodgers v. Lees*, 140 Pa. 475, 12 L. R. A. 216; *Springer v. Pyram*, 187 Ind. 15; *McCaull v. Bruner*, 91 Iowa, 214; *Carson v. Chicago, R. I. & P. R. Co.* 96 Iowa, 583; *Overholt v. Vieths*, 93 Mo. 422; *Witte v. Stifel*, 126 Mo. 295; *Barney v. Hannibal & St. J. R. Co.* 126 Mo. 372, 26 L. R. A. 847; *Moran v. Pullman Palace Car Co.* 134 Mo. 641, 33 L. R. A. 755; *Butz v. Cavanaugh*, 137 Mo. 503; *Hargreaves v. Deacon*, 25 Mich. 1; *Charlebois v. Gogebic & M. River R. Co.* 91 Mich. 59; *Central Branch Union P. R. Co. v. Henigh*, 23 Kan. 847, 33 Am. Rep. 167; *Chicago, K. & W. R. Co. v. Bockoven*, 53 Kan. 279; *Haesley v. Winona & St. P. R. Co.* 46 Minn. 233; *Ratte v. Dawson*, 50 Minn. 450; *Nolan v. New York, N. H. & H. R. Co.* 53 Conn. 461; *Callett v. St. Louis, I. M. & S. R. Co.* 57 Ark. 461; *Slayton v. Fremont, E. & M. Valley R. Co.* 40 Neb. 840; *Richards v. Connell*, 45 Neb. 467; *Omaha v. Bowman*, 52 Neb. 293, 40 L. R. A. 531; *Kliz v. Nieman*, 68 Wis. 271, 60 Am. Rep. 854; *Gulf, C. & S. F. R. Co. v. Cunningham*, 7 Tex. Civ. App. 65; *Misner v. K. & T. R. Co. v. Edwards*, 90 Tex. 65, 32 L. R. A. 825; *Missouri, K. & T. R. Co. v. Dobbins* (Tex. Civ. App.) 40 S. W. Rep. 861, Affirmed 41 S. W. Rep. 63; *Peters v. Bowman*, 115 Cal. 345; *Robinson v. Oregon, Short Line & U. N. R. Co.* 7 Utah, 493, 13 L. R. A. 765; *O'Connor v. Illinois C. R. Co.* 44 La. Ann. 339; *Fredericks v. Illinois C. R. Co.* 46 La. Ann. 1180; *McAdory v. Louisville & N. R. Co.* 94 Ala. 272.

In Australia a recent decision in the court of New South Wales is favorable to the landowner.

Patterson v. Woollahra, 16 New South Wales Law Rep. Cases at Law. 229. See also *Slade v. Victorian R. Co.* 15 Victorian Law Rep. 190.

The more recent English cases are to the same effect.

Singleton v. Eastern Counties R. Co. 7 C. B. N. S. 287; *Hughes v. Macfie*, 2 Hurlst. & C. 744; *Mangan v. Atterton*, L. R. 1 Exch. 239.

The rule imposing upon landowners a special duty to children cannot properly be extended beyond the reasons upon which the duty is claimed to rest. A minor going upon a stranger's land, with knowledge of the dangers to be encountered there, and not attracted by any childish curiosity, but influenced by other motives, can stand in no better position than an adult acting under similar circumstances.

Bridger v. Asheville & S. E. R. Co. 25 S. C. 24; *Twist v. Winona & St. P. R. Co.* 39 Minn. 164; *Newdell v. Young*, 80 Hun. 364; *Gibson v.*

Leonard, 148 Ill. 162, 17 L. R. A. 588; *Sterger v. Van Sicklen*, 182 N. Y. 499, 16 L. R. A. 640.

Damages to be recovered must be the natural and proximate consequences arising from the wrong complained of, and not from the wrongful act of a third party remotely induced thereby. The intervention of the independent act of a third person between the wrong complained of and the injury sustained, which act was the immediate cause of the injury, is made the test of the remoteness of damage which forbids its recovery.

Cuff v. Newark & N. Y. R. Co. 85 N. J. L. 17, 10 Am. Rep. 205, Affirmed on error 85 N. J. L. 574; *Delaware, L. & W. R. Co. v. Salmon*, 89 N. J. L. 299, 23 Am. Rep. 214; *Wiley v. West Jersey R. Co.* 44 N. J. L. 247; *Warwick v. Hutchinson*, 45 N. J. L. 61; *Kuhn v. Jewett*, 32 N. J. Eq. 647; *Carter v. Towne*, 103 Mass. 507; Bigelow, Lead. Cas. on Torts, p. 609; *Rich v. Basterfield*, 4 C. B. 788.

The intervention of the independent act of a third person between the wrong complained of and the injury sustained, which was the immediate cause of the injury, is made a test of that remoteness of damage which forbids its recovery.

Ashley v. Harrison, 1 Esp. 48; *Milne v. Smith*, 2 Dow, P. C. 390; *Fitzsimons v. Inglis*, 5 Taunt. 584; *Hoey v. Felton*, 11 C. B. N. S. 142; *Daniels v. Potter*, 4 Car. & P. 262; *Had-dan v. Lott*, 15 C. B. 411; *Walker v. Goe*, 4 Hurlst. & N. 850; *Parkins v. Scott*, 1 Hurlst. & C. 152; *Crain v. Petrie*, 6 Hill, 523, 41 Am. Dec. 765; *Stevens v. Hartwell*, 11 Met. 542; *Toomey v. London, B. & S. Coast R. Co.* 8 C. B. N. S. 145; *Williams v. Jones*, 3 Hurlst. & C. 256; *Mangan v. Atterton*, L. R. 1 Exch. 289; *Bank of Ireland v. Evans's Charities*, 5 H. L. Cas. 889; *Victorian R. Comrs. v. Coullas*, 8 English Ruling Cases, 405.

Mr. Samuel Kalisch for defendant in error.

Gummere, J., delivered the opinion of the court:

This case was tried below, and has been argued here by counsel on both sides, on the theory that the legal position of the parties, so far as their respective rights and duties are concerned, is the same as if the plaintiff had been injured while herself playing upon the defendant company's turntable, in ignorance of the danger to which she was subjecting herself; and that such ignorance was due to the fact that she was not of an age to understand or appreciate the peril. For the purpose of disposing of the case, therefore, it will be assumed that this is the true situation of the parties, although it may well be considered that the plaintiff, in doing what she did, took upon herself all the risk of danger which was incident to her undertaking. The underlying question, upon the solution of which our decision must rest, is whether the owner of land who constructs or places upon it anything which, though necessary for its proper enjoyment, happens to be of a character which is attractive to children, and at the same time dangerous to them if they yield to the attraction, thereby becomes chargeable with the duty of using reasonable care to keep them off his premises, or to protect them if they enter; for 41 L. R. A.

it must be admitted that, unless such user creates a duty on the part of the landowner to protect the child who comes upon his premises, the neglect of which produces injury to the child, no liability rests upon him for such injury. If there is no duty in the case, there can be no negligence. There cannot be such a thing as the negligent performance of a non-existent duty. It is universally acknowledged that no such duty rests upon the owner of lands with regard to adults, but in many of the decided cases a distinction is made between trespassers of mature years and children, and it is held that, as to the latter, the duty of protection exists. Most of the cases in which this doctrine has been enunciated have arisen on facts similar to those presented by the case now before us; that is, in cases where children have been injured while playing upon turntables located upon the private property of railroad companies. *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745, is the first of this line of cases. *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393; *Koons v. St. Louis & I. M. R. Co.* 65 Mo. 592; *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Ferguson v. Columbus & R. R. Co.* 75 Ga. 637; and *Barrett v. Southern P. Co.* 91 Cal. 296, also support this doctrine, and, are, all of them, so-called "turntable cases." It is apparent, however, that, if the duty exists in the case of a railroad company having a dangerous attraction upon its land, it exists equally in the case of a private landowner, who, for the purpose of carrying on his business properly, maintains upon his premises an attraction of a character dangerous to children. And, in fact, numerous cases may be found in the books where "dangerous attractions" other than turntables, placed upon the premises of the individual owner, for their more complete beneficial user, have been held to charge him with the duty of protecting children who are allured thereby. *Siddall v. Jansen*, 168 Ill. 43, 39 L. R. A. 112; *Berge v. Gardiner*, 19 Conn. 607, 50 Am. Dec. 261; *Whitley v. Whitman*, 1 Head, 610; *Powers v. Harlow*, 58 Mich. 507, 51 Am. Rep. 154; and *Bransom v. Labrot*, 81 Ky. 688, 50 Am. Rep. 193, are cases of this character. But, although this doctrine has received the support of many courts of high distinction, it has been absolutely repudiated by other courts, whose decisions rank equally high. The cases of *Frost v. Eastern R. Co.* 64 N. H. 220; *Daniels v. New York & N. E. R. Co.* 154 Mass. 349, 13 L. R. A. 248; and *Walsh v. Fitchburg R. Co.* 145 N. Y. 301, 27 L. R. A. 724, all declare that no distinction exists between adults and infants when entering uninvited upon lands of another, with relation to the duty which the owner or occupier of such lands owes to them. The same view is expressed by the supreme court of this state in the case of *Turess v. New York, S. & W. R. Co.* (N. J. L.) 40 Atl. 614, in an opinion by Magie, Ch. J., which has lately been promulgated, in which the whole subject is carefully and exhaustively considered. This court, however, has, up to the present time, never been called upon to decide the question, and we are free to adopt either the view taken by the United States Supreme Court in *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed

745, and the cases which have followed it, or that taken by the courts of Massachusetts, New Hampshire, and New York, as well as by our supreme court, according as the one or the other shall the more commend itself to us.

It must be conceded, I think, that the rule which imposes liability upon the landowner is a hard one, so far as he is concerned, in this respect; that, no matter how carefully he may endeavor to protect himself by discharging the duty which the law places upon him, the probability of his failure is great. When contemplating the alteration of his land from the condition in which nature left it for the purpose of obtaining a more beneficial user therefrom, he must first consider whether the alteration will render it attractive to children of tender years, and, if so, whether they will be subjected to danger if they succumb to the attraction. If he honestly concludes that the change will not operate to attract children, and that, therefore, although it may make his property dangerous, he is under no obligation to provide for their safety, or if he concludes that, although the alteration may render his property attractive to children, they will not incur danger by coming upon it, and for either of these reasons fails to take precautions for their safety, it will be for the jury to say whether he must answer for the result if injury to a child follows upon his omission; and their verdict will depend upon whether, in their opinion, he had reasonable ground for his conclusion. So, too, if he appreciates that the change which he proposes to make will render his premises dangerously attractive to children, and takes precautions to exclude them therefrom, it is still possible that they may elude his vigilance, and receive hurt while trespassing; and when that occurs it at once becomes a question for the jury to say whether or not the injury was the result of the want of due care on the part of the landowner in affording that protection which his duty required. What the conclusion of the jury would be in any given case, of course no one can tell. The fact, however, is suggestive that in every reported case, so far as I have examined them (and I have examined many), where this doctrine has been under consideration, it has always been the landowner, and never the injured child, who was trying to avoid the result of the verdict of the jury. It is only in those cases where the action of the jury has been controlled by the trial court that the injured child has sought a review. The probability that the landowner will not be able to avoid liability for injuries to children who come upon his lands without invitation, no matter how careful he may have been, while it affords no reason for denying the existence of the rule which holds him to responsibility, certainly requires that we should not accept it as sound, unless it rests upon a solid foundation. Some of the cases above cited, in which the liability of the landowner has been sustained, assume that the duty of protection rests upon him merely by reason of the inability of the child to care for its own safety, and discuss only the question whether the alleged duty has been negligently performed. Others of the cases consider the question of the existence of the duty, and sustain it on the ground

that the landowner who places upon his land anything which is attractive to children, and at the same time dangerous to them if they yield to the attraction, is presumed to know that they are likely to be overcome by the temptation presented to them, and that, therefore, he is to be considered as having "allured" or impliedly invited them to come upon his premises, and submit themselves to the dangers there encountered.

The suggestion contained in the line of cases first adverted to, *viz.*, that the duty of protection is cast upon the landowner solely by reason of the inability of the child to care for its own safety, seems to me to be unsound in principle. Primarily, the duty of affording protection to a child rests upon the parent, who is responsible for its being. If the parent neglects the duty which the law casts upon him, and permits his child to stray upon the land of another, and there incur peril, why should the duty of protection be shifted from the negligent parent to the owner of the land? It is usually the fact, in cases of this kind, that the landowner has no knowledge that children have come upon his premises, and are exposed to danger there, until after injury has actually occurred; while other persons, who are passing by, frequently observe the risk that is being run by childish intruders, but take no steps to bring it to an end. If the duty of protection, under such circumstances, is to be shifted from the parent to a third person, it would seem more consonant with reason to place it upon those who have knowledge of the existence of the danger and opportunity to terminate it, rather than upon the landowner, who is entirely ignorant of the entry of the children upon his premises. The mere fact that a child is unable to guard itself against peril, and that its parent fails to provide for its safety, does not, *ipso facto*, cast upon any third person the duty of affording it protection.

Nor am I able to appreciate the force of the reasoning upon which the conclusion is based that a landowner who puts upon his premises a structure which is attractive, and also dangerous, to children, is to be regarded as having by implication invited them to enter, or as having "allured" them into danger, and is, therefore, to be held to the same measure of responsibility as if he had expressly invited them to come upon his lands. No one, I presume, will contend that a landowner, who, in the beneficial user of his premises, places thereon something which attracts children into danger, really puts it there with the intention of extending an invitation to them, or of luring them into jeopardy. On the contrary, it will be admitted that the entry is ordinarily against the desire of the landowner, and that, if his permission was asked, it would be refused. But the argument is that the intent, although it does not exist in fact, nevertheless exists in law, because every man is presumed to intend the natural consequences of his acts. The fallacy of this argument is clearly shown in an interesting and instructive article on the liability of landowners to children entering without permission, by Hon. Jeremiah Smith, a former justice of the supreme court of New Hampshire, published in the Harvard Law Review

in January and February, 1898. The author says: "The so-called presumption 'that every man intends the probable consequence of his acts' is not a rule of law 'further or otherwise than as it is a rule of common sense;' in other words, the 'presumption' is, at most, only a *prima facie* presumption, and may be strong, weak, or utterly inefficacious, according to the varying situations where the attempt is made to apply it. If the result in question is one which men are frequently prone to desire, and there is no assignable reason for the act except the single one of accomplishing that particular result, the inference that the result was intended is strong. If, on the other hand, the result is one which not one man in ten thousand desires, and there is another assignable reason for the act, and one, moreover, by which men are generally influenced, and which is amply sufficient to account for the act, the inference is, practically speaking, reduced to zero." If the landowner is to be held responsible for injuries resulting from an entry by a child upon his premises, merely because he has placed there something which presents a temptation to the child that it cannot (or, rather, does not) resist, although the entry is not only without his consent, but against his desire, why, in principle, is he not equally responsible for injuries received by an adult trespasser, who yields to the temptation presented by a dangerous attraction which is placed upon the land, particularly if such trespasser be so constituted mentally as not to appreciate the impropriety of his entry, or to understand the danger which he is incurring? The viciousness of the reasoning which fixes liability upon the landowner because the child is attracted in the assumption that what operates as a temptation to a person of immature mind is, in effect, an invitation. Such an assumption is not warranted. As was said by Holmes, J., in *Holbrook v. Aldrich*, 168 Mass. 16, 86 L. R. A. 493: "Temptation is not always invitation. As the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it, or hold property owners bound to contemplate the infraction of property rights because the temptation to untrained minds to infringe them might have been foreseen." No good purpose will be effected by discussing here the various cases which have been supposed to sustain the doctrine first put forward in *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745. I refer to cases like *Bird v. Holbrook*, 4 Bing. 628, where the plaintiff was injured while trespassing upon the lands of the defendant by the discharge of a spring gun, which had been set by the defendant for the protection of his property against thieves; *Townsend v. Wathen*, 9 East, 277, where the plaintiff's dogs were caught and killed in traps set by the defendant upon his premises, and baited with decaying meat, for the purpose of entrapping his neighbor's dogs; and *Lynch v. Nurdin*, 1 Q. B. 29, where the plaintiff, a child, was injured while playing with a horse and cart which the defendant's servant had carelessly left standing unguarded in the public highway. That they are not, in fact, authority for any such doctrine is clearly

shown by Peckham, J., in *Walsh v. Fitchburg R. Co.* 145 N. Y. 801, 27 L. R. A. 724, and by Lathrop, J., in *Daniels v. New York & N. E. R. Co.* 154 Mass. 849, 13 L. R. A. 248.

The general rule with regard to the duty which a landowner owes to persons coming upon his premises is that, where the entry is made by his invitation, either express or implied, he is required to use reasonable care to have his premises in a safe condition; but that, where the entry is made merely by his permission (and a *fortiori*, where it is an actual trespass), the landowner is under no obligation to keep his premises in a nonhazardous state; his only duty to a licensee or a trespasser is to abstain from acts wilfully injurious. And this rule has been frequently enforced by the courts of this state. *Phillips v. Burlington Library Co.* 55 N. J. L. 807; *Mathews v. Bessel*, 51 N. J. L. 80; *Vanderbeck v. Hendry*, 34 N. J. L. 467; *Fitzpatrick v. Cumberland Glass Mfg. Co.* (N. J. L.) 39 Atl. 675; *Turess v. New York, S. & W. R. Co.* (N. J. L.) 40 Atl. 614. In the cases of *Frost v. Eastern R. Co.* 64 N. H. 220; *Daniels v. New York & N. E. R. Co.* 154 Mass. 849, 13 L. R. A. 248; *Walsh v. Fitchburg R. Co.* 145 Mass. 801, 27 L. R. A. 724, and *Turess v. New York, S. & W. R. Co.* (N. J. L.) 40 Atl. 614 (in which, as has already been stated, the courts of New Hampshire, Massachusetts, New York, and our own supreme court, have refused to adopt the rule of liability as declared in *Sioux City & P. R. Co. v. Stout*, and the cases which followed it), the basis of decision was the rule just adverted to. In the New York case the infant plaintiff was conceded to have been upon the defendant company's premises by its permission. In the Massachusetts and New Hampshire cases he was a mere trespasser. In each case the conclusion was that a licensee or a trespasser, who entered upon the lands of another, assumed all risk of danger which was incident to the condition of the premises; that the landowner was not responsible for injuries received by him unless they were intentionally inflicted; and that the fact of the licensee or trespasser being an infant of tender years afforded no reason for modifying the rule, and charging the landowner with a duty which did not otherwise exist. In *Vanderbeck v. Hendry*, 34 N. J. L. 467; *Fitzpatrick v. Cumberland Glass Mfg. Co.* (N. J. L.) 39 Atl. 675; and *Turess v. New York, S. & W. R. Co.* (N. J. L.) 40 Atl. 614,—our supreme court took a similar view, holding in each case that the infancy of the plaintiff afforded no ground for a recovery against the landowner. In my judgment, the reasons upon which the doctrine of landowner's liability for injuries received by children entering upon his premises is rested do not justify such a material restriction upon the full and untrammelled enjoyment of real property. On the contrary, it seems to me that the doctrine of nonliability, promulgated by the line of cases last referred to, is more in accord with settled principles, and should therefore be adopted by this court. I conclude, therefore, that there was error in submitting to the jury the question whether, under the circumstances of this case, the defendant company was chargeable with the

duty of providing for the safety of the plaintiff. The trial judge should have directed a verdict for the defendant.

The judgment below should be reversed.

Collins, J., concurring:

The trial judge expressly charged the jury that proprietors of land are "liable for injuries resulting to children, although trespassing at the time, when, from the peculiar nature and open and exposed position of some dangerous defect or agent, the owner should reasonably anticipate such an injury to flow therefrom as actually happens;" and, in effect, he also charged that if "the turntable was, from the construction and location, as to children of tender years, a dangerous, and at the same time an alluring, machine,—one which when seen would allure children to come upon it for the purpose of playing upon it,"—or if "it was located in such proximity to the public highway, or the locality was such a public one, that it might be reasonably anticipated that children would be allured to it," then a duty was due from the defendant "to exercise due care to protect children of tender age from injury." Exception was duly taken. The Chief Justice, in repudiating like assumptions in the *Turess Case*, now approved, gave conclusive reasons for holding them erroneous, and for those reasons I vote to reverse the judgment now before us. Mr. Justice Gummere correctly recites the untenable theory upon which this case was left to the jury, and nothing more is rightly now involved. The question of duty to children who, by license of the owner, are upon private property in proximity to an alluring danger, is not at present open for decision.

Dixon, Ludlow, and Krueger, JJ., dissent.

John WHALEN, *Plff. in Err.*,
v.

CONSOLIDATED TRACTION COMPANY.

(.....N.J.....)

- *1. When a passenger in charge of a common carrier shows that he was injured through some defect in the appliances of the carrier, or through some act or omission of the carrier's servant, which might have been prevented by a high degree of care, the jury have the right to infer negligence attributable to the carrier, unless the carrier proves that due care was exercised.
2. The plaintiff testified that, while a passenger standing upon the running board of a crowded trolley car, he was thrown off the car by the conductor of the car stumbling against him as he passed along the board in the discharge of his duties, but that he

*Headnotes by DIXON, J.

NOTE.—As to presumption of negligence in case of injury to passenger, see *note* to *Barnowski v. Nelson* (Mich.) 15 L. R. A. beginning on page 36; also *Budd v. United Carriage Co.* (Or.) 27 L. R. A. 279, and other cases cited in *footnote* thereto.
41 L. R. A.

did not know the cause of the stumble. *Held*, that on this state of the case a nonsuit was erroneous.

(June 20, 1896.)

ERROR to the Supreme Court to review a judgment granting a nonsuit in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed*.

The facts are stated in the opinion.

Messrs. McEwan & McEwan and Frank N. Hardenbrook, for plaintiff in error:

The negligence of the defendant consisted:

(1) In permitting its cars to become overcrowded to such an extent as to render its passengers, by reason of such overcrowding, liable to increased danger; (2) in the conductor attempting to pass by and around the plaintiff while he occupied such a position upon the running board; (3) in interference of the conductor with the plaintiff while he occupied such a position on the running board; (4) if the conductor could have passed around plaintiff without endangering his safety, the conductor should have done so, and if he could not, then it was negligence to attempt it.

Lehr v. Steinway & H. P. R. Co. 118 N. Y. 556; *Germantown Pass. R. Co. v. Walling*, 97 Pa. 55, 39 Am. Rep. 796.

Standing on the front of a horse car when there is room inside is not of itself conclusive evidence that a person injured by the negligence of the driver was not in the exercise of due care.

Maguire v. Middlesex R. Co. 115 Mass. 239; *Werle v. Long Island R. Co.* 98 N. Y. 650.

Permission to occupy the platform is implied from the crowded condition of the interior of the car, and also from acceptance of fare with passenger in such a position.

Graham v. Manhattan R. Co. 149 N. Y. 836; *Mervin v. Manhattan R. Co.* 48 Hun. 608, Affirmed without opinion in 118 N. Y. 659; *Clark v. Eighth Ave. R. Co.* 36 N. Y. 135, 93 Am. Dec. 495; *Ginna v. Second Ave. R. Co.* 87 N. Y. 596; *New York, L. E. & W. R. Co. v. Ball*, 53 N. J. L. 283; *Watson v. Camden & A. R. Co.* 55 N. J. L. 125, 19 L. R. A. 487.

Messrs. Vredenburg & Garretson for defendant in error.

Dixon, J., delivered the opinion of the court:

The circumstances presented by the plaintiff's evidence on the trial of this cause are as follows: On June 21, 1896, about 9:40 o'clock P. M., the plaintiff with his wife and four young children, boarded a trolley car of the defendant in Bayonne for the purpose of riding to Jersey City. The car was an open one, with a board running along the outside upon which the conductor walked to collect fares. When the car stopped to receive the plaintiff, it was crowded with passengers, not only within the car, but also on the running board outside. The plaintiff's wife and children secured places inside, but the plaintiff himself stood upon the board near the middle of the car, crowded in among other passengers, and holding on to an upright post of the car. When he had been in that position about fifteen minutes, the conductor, who had passed by him

several times collecting fares, approached him again in going from front to rear on the board, and then occurred the accident for which the plaintiff sues, and which on the trial he thus described: "He [the conductor] was passing right around me, and somehow he stumbled,—I could not say how,—but he caught hold of me to save himself. He caught me by the shoulder, and threw me off the car. He tried to catch the upright, and lost his foot, and caught hold of me." Upon this evidence a judgment of nonsuit was entered, which the plaintiff seeks to have reversed.

It is clear that, although, by taking his stand upon the outside running board of the car, the plaintiff assumed the risk of such dangers as were obviously incident to that position, still the company, by accepting him there as a passenger, owed to him the duty arising out of that relation. *City R. Co. v. Lee*, 50 N. J. L. 485; *New York, L. E. & W. R. Co. v. Ball*, 53 N. J. L. 288; *Watson v. Camden & A. R. Co.* 55 N. J. L. 125; *Graham v. Manhattan R. Co.* 149 N. Y. 336. Consequently, while one of the obvious dangers of his position was that resulting from the use of the board by the conductor, it would nevertheless be competent for the plaintiff to insist that in the manner of using it the conductor had been guilty of a breach of the defendant's duty towards him.

It is contended for the plaintiff that the company might be held responsible for not providing a car within which he might ride safely, or for not furnishing other means for the passage of the conductor in the discharge of his functions; but, even if it could be maintained that the company was under such obligations to the public, it was evident to the plaintiff, before he boarded the car, that with respect to that ride those duties could not be performed towards him, and for that ride he took the risk of their nonperformance, and absolved the company therefrom. Under the circumstances of this case, the only breach of duty chargeable against the defendant would lie in a lack of due care on the part of the conductor as he passed along the board and therefore we must consider whether the evidence was such as should have been submitted to the jury on the question of his negligence. The ordinary rule in actions for negligence is that plaintiff must produce some affirmative proof of the want of care on the part of the defendant; and, if his evidence is as consistent with care as with negligence in the defendant, he must fail. *Cotton v. Wood*, 8 C. B. N. S. 568; *Hammack v. White*, 11 C. B. N. S. 588; *Weller v. McCormick*, 47 N. J. L. 397, 54 Am. Rep. 175; *Searles v. Manhattan R. Co.* 101 N. Y. 661. But in actions for injuries suffered by passengers while in charge of common carriers the rule is somewhat different. The rule there applicable is modified by the doctrine which seems to have given rise to the almost absolute responsibility of the common carrier of goods,—the doctrine that the carrier's greater means of ascertaining and disclosing the cause of damage place upon him a greater duty of explanation. The rule supported by authority is that when a passenger shows that he was injured through some defect in the appliances of the carrier, or through some act or omission of the carrier's servant, which might have been prevented by

due care, then the jury have the right to infer negligence, unless the carrier proves that due care was exercised. Thus in *Christie v. Griggs*, 2 Campb. 79, the plaintiff, a passenger in a stage coach, proved that the axle-tree broke; and Mansfield, Ch. J., deeming such proof *prima facie* evidence of negligence, called upon the defendant to show that the damage arose from mere accident. In *Carpus v. London & B. R. Co.* 5 Q. B. 747, where the train had left the track, Chief Justice Denman instructed the jury that, the exclusive management of the machinery and railway being in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause by which it was produced, which explanation the plaintiff, not having the same means of knowledge, could not reasonably be expected to give. In *Stokes v. Saltontail*, 18 Pet. 181, 10 L. ed. 115, where the plaintiff's wife had been injured by the upsetting of a stage coach in which she was a passenger, a charge to the jury that the fact that the coach was upset was *prima facie* evidence of carelessness, was approved. In *Feital v. Middlesex R. Co.* 109 Mass. 398, 12 Am. Rep. 720, it was held that on trial of an action against a street-railway corporation for injuring a passenger, proof that the injury was caused by a car's running off the track at a place where the track and the car were under the exclusive control of the defendants was sufficient to charge them with negligence, in the absence of any evidence that the accident happened without their fault. The same application of the rule was made in *Seybolt v. New York, L. E. & W. R. Co.* 95 N. Y. 563, 47 Am. Rep. 75. In *Pennsylvania R. Co. v. MacKinney*, 124 Pa. 462, 2 L. R. A. 820, the plaintiff, while a passenger on one of the defendant's trains, was struck in the eye by some hard substance hurled from without, and the trial judge charged the rule of law applicable to the case to be that the mere happening of an injurious accident to a passenger while in the hands of a carrier will raise *prima facie* a presumption of negligence, and throw the *onus* of proving that it did not exist on the carrier. Of this charge the supreme court said, "It is an old and well-settled principle of law of very general application in cases of injury to passengers while in the course of transportation," but that it could be invoked only where there was some evidence tending to connect the carrier, or his servants, or some of the appliances of transportation, with the happening of the injury. See also 2 Shearm. & Redf. Neg. 5th ed. § 516. Under this rule we think the plaintiff's evidence presented a question for the jury. His injury was the direct result of the conductor's act in seizing him to save himself as he stumbled. The cause of his stumbling the plaintiff did not know, and could not reasonably be required to ascertain and disclose, while it probably was known to the conductor, the agent of the defendant. Bearing in mind that the care due from a common carrier and his servants towards passengers in their charge is a high degree of care (*Readhead v. Midland R. Co.* L. R. 4 Q. B. 379, 393; *Caldwell v. New Jersey S. B. Co.* 47 N. Y. 282; *Feital v. Middlesex R. Co.* 109 Mass. 398, 12 Am. Rep. 720; *City R. Co. v. Lee*, 50 N. J. L.

435; *Consolidated Traction Co. v. Thalheimer*, 59 N. J. L. 474). It is certainly not irrational to infer that the conductor, who had passed so often over the same place under apparently the same conditions without stumbling, on this occasion stumbled through a failure to exercise

that high degree of care required of him. To preclude the jury from drawing such an inference, the defendant should have been called on to explain the true cause of the occurrence. *The judgment of nonsuit must be reversed, and a venire de novo awarded.*

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *ex rel.*
Alonzo A. BURBY, *Recept.*,

v.

Lansing M. HOWLAND *et al.*, *Appts.*

(155 N. Y. 270.)

The exclusion of the justices of the peace of a single town from the exercise of any criminal jurisdiction by Laws 1896, chap. 22, relieving them of the duty to enforce the criminal law, denying them compensation for such business, and virtually prohibiting all peace officers from obeying the writs of such justices in criminal cases, is a violation of Const. art. 6, which provides for justices of the peace without expressly saying what a justice of the peace shall be.

(*O'Brien and Haight, JJ., and Parker, Ch. J., dissent.*)

(March 8, 1898.)

A PPEAL by defendants from an order of the Appellate Division of the Supreme Court, Third Department, affirming an order of a Special Term for Washington County awarding a writ of mandamus to compel defendants to audit relator's claim for services as justice of the peace. *Affirmed.*

Statement by Vann, J.:

The town of Ft. Edward, in Washington county, embraces a territory about 10 miles long and 8 or 4 miles wide, with a population of 6,000 people. It contains two villages, Ft. Edward, with a population of nearly 4,000, and embracing a territory of about 1 square mile, and Ft. Miller, a very small place, 8 or 9 miles from Ft. Edward. During the year 1896 it had four justices of the peace, of whom the relator was one, and five constables, and all these officers had duly qualified and were acting as such. In March of that year, pursuant to chapter 22 of the Laws of 1896, George Turner, one of said justices of the peace was elected police justice of said town, and Charles W. Dean, one of the constables, was elected police officer thereof, and both promptly assumed the duties of their respective offices, and continued to discharge the same during the remainder of the year. Between the 1st of June and the 15th of October, 1896, the relator, who was elected in March, 1894, performed services for said town as a justice of the peace in criminal actions and proceedings, and on the 12th of November following ren-

dered a bill therefor, duly verified to the town board, which refused to audit any part thereof, for the reason, as certified by the officers composing the board, "that chapter 22 of the Laws of 1896 prohibits the audit and allowance of the same." It is not denied that the services were in fact rendered, or that the fees charged are at the rate allowed by law. Upon a petition showing these, with other facts, an application was made by the relator at a special term of the supreme court, on notice to the members of the board, for a peremptory writ of mandamus to compel them to audit and allow his bill, and the court, after hearing both parties, granted the motion, and issued the writ. The order granting the application having been affirmed by the appellate division, the defendants appealed to this court:

Mr. Edgar T. Brackett, with Mr. George Scott, for appellants:

A statute will be declared unconstitutional only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law; and until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible, the statute will be upheld.

People, Henderson, v. Westchester County, Supers. 147 N. Y. 1, 80 L. R. A. 74.

There is nowhere in the Constitution any attempt to prescribe the power, or jurisdiction, of justices of the peace, and limitations not there, either in express language, or by necessary implication, do not exist.

Hiller v. Burlington & M. River R. Co. 70 N. Y. 223.

The ultimate result of the act is simply to revise, as to the town of Fort Edward, the duties resting upon justices of the peace, and where they are relieved from the obligations of certain duties, to relieve the town of the burden of paying them for services which they are not compelled to render.

There is nowhere in the Constitution anything prohibiting the legislature from so doing.

Sill v. Corning, 15 N. Y. 297; *Brandon v. Avery*, 22 N. Y. 469; *People, Lynch, v. Duffy*, 49 Hun, 276.

The Constitution contains express authority for the establishment of inferior local courts, limitations not being expressed or implied not existing.

People, Sinkler, v. Terry, 106 N. Y. 1; *Brandon v. Avery*, 22 N. Y. 469; *Curtin v. Barton*, 139 N. Y. 505.

Messrs. Lewis E. Carr and Edgar Hull, for respondent:

Where the auditing tribunal refuses to audit a proper charge against the division of the state

NOTE.—For constitutional protection of terms of office, see also *State, Gibson, v. Friedley* (Ind.) 21 L. R. A. 634; *Aikman v. Edwards* (Kan.) 80 L. R. A. 149; and *State, Yancey, v. Hyde* (Ind.) 13 L. R. A. 79, 41 L. R. A.

that tribunal represents, the claimant may compel audit by mandamus.

People, Johnson, v. Delaware County Supers. 45 N. Y. 106; *People, Myers, v. Barnes*, 114 N. Y. 317; *People, Thurston, v. Elmira Town Auditors*, 82 N. Y. 83.

The act of 1896 offends the constitutional provision requiring that the subject of private or local bills shall be expressed in the title, because the title to this act is deceptive and misleading, and so within the mischief the constitutional provision was intended to prevent.

Johnston v. Spicer, 107 N. Y. 185; *Astor v. Arcade R. Co.* 118 N. Y. 93, 2 L. R. A. 789; *People, Lee, v. Chautauqua County Supers.* 48 N. Y. 10; *People, McConvill, v. Hille*, 35 N. Y. 449; *Ferguson v. Ross*, 126 N. Y. 459.

The act of 1896 is invalid because it in effect destroys a constitutional office. It aims to prohibit the justices of the peace of the town of Fort Edward from discharging their duty, and so, by indirection, brings about what the legislature had no power to do.

Geraty v. Reid, 78 N. Y. 64; *People, Outwater, v. Green*, 56 N. Y. 466; *People, Bolton, v. Albertson*, 55 N. Y. 55; *Black, Const. Law*, 252; *Kent, Com. p.* 454; *People, Henry, v. Nostrand*, 46 N. Y. 875; *Bouvier, Law Dict. title, Office; Reid v. Smoulter*, 128 Pa. 324, 5 L. R. A. 517; *People, McEwan, v. Keeler*, 29 Hun. 175; *State, Kennedy, v. Brunst*, 26 Wis. 414, 7 Am. Rep. 64; *Warner v. People, Conner*, 2 Denio, 272, 43 Am. Dec. 740; *Com., Hepburn, v. Mann*, 5 Watts & S. 403.

The act is invalid because it creates in the town of Fort Edward a court, not local and of inferior jurisdiction, but equal to and co-ordinate with the courts recognized in the Constitution.

A justice's court in a town is not an inferior court.

It must be inferior to the court whose province it invades, and in whose jurisdiction it is created.

Waters v. Langdon, 40 Barb. 408; *Geraty v. Reid*, 78 N. Y. 64; *Deposit v. Vail*, 5 Hun. 810; *Bocock v. Cochran*, 82 Hun. 521; *Ziegler v. Corwin*, 12 App. Div. 60; *Baird v. Helfer*, 12 App. Div. 23; *Pierson v. Fries*, 3 App. Div. 418.

An inferior and local court which the legislature has power to create and establish has no power beyond its territorial limits, and its process cannot run into, or be executed in, adjacent territory.

Geraty v. Reid, 78 N. Y. 67; *Waters v. Langdon*, 40 Barb. 408; *Pierson v. Fries*, 3 App. Div. 418; *Landers v. Staten Island R. Co.* 53 N. Y. 450; *Baird v. Helfer*, 12 App. Div. 23; *Ziegler v. Corwin*, 12 App. Div. 60; *People, Sinkler, v. Terry*, 108 N. Y. 1; *Curtin v. Barton*, 139 N. Y. 505.

Vann, J., delivered the opinion of the court:

The question presented by this appeal is whether certain sections of chapter 22 of the Laws of 1896, entitled "An Act to Provide for the Better Administration of Justice in the Town of Fort Edward, in the County of Washington," are in conflict with the Constitution of the state. By its first twelve sections this statute provided for the election, at the an-

nual town meeting in the year 1896, of a police justice, to hold office for two years, with a salary of \$300 per year, and declared that "said office shall be one of the town offices of said town." He was given the same jurisdiction in all criminal cases and proceedings as is possessed by justices of the peace in said town, and it was made his duty "to hear, try, and determine all criminal cases and proceedings which a court of special sessions has power to hear, try, and determine." On or before the 5th day of each month he was required to pay over to the supervisors of the town, for the use of the poor thereof, all moneys received by him for costs, charges, fees, or fines in any proceedings before him for the month immediately preceding. The next six sections provided for the election at the same time, of a police officer, "as town officer of said town," at a salary of \$30 per month, with all the powers, duties, and liabilities that constables of said town "have with regard to all criminal matters and all proceedings of a criminal nature." All fees received by him were to be paid over once a month to the supervisor for the use of the poor of the town, and both he and the police justice were required to be resident electors of the town. Sections 19 and 20 of said act are as follows:

"Sec. 19. The sheriff, under sheriff, deputy sheriffs, or constables elected or appointed in the county of Washington, or the village or town of Fort Edward, or any railroad officer or detective employed by any railroad company whose road extends into or runs through said county of Washington, shall not, as such, be compelled to serve within the town of Fort Edward, or village of Fort Edward, any summons, warrant, subpoena, commitment, order, notice, paper, or process whatever, issued or directed by the police justice of said town, or village, or any justice of the peace, residing or doing business therein, in execution of the laws of this state for the prevention of crime and the punishment of criminal offenders, or of the police laws or regulations of the state, or in any proceedings collateral to or connected with the execution of such general laws or regulations, or of the by-laws, rules, regulations, or ordinances of said town, or of said village aforesaid; nor shall the county of Washington, or any of the towns therein, or the village of Fort Edward, be chargeable with, or in any way liable to pay any such sheriff, under sheriff, deputy sheriff, constable, or railroad officer or detective, any fees for services rendered, or disbursements paid or incurred, under or by virtue of such warrants, subpoenas, commitments, order, notice, paper, or process whatever.

"Sec. 20. No justice of the peace of the town of Fort Edward or police justice of said village shall be compelled to issue any summons, warrants, subpoenas, commitment, order, notice, paper, or process whatever, for any criminal offense, within said town, nor shall the county of Washington, or any town therein, or the village of Fort Edward, be chargeable with, or in any way liable to pay any such justice of the peace, or police justice of such village, any fees for any services rendered, or disbursements paid or incurred, un-

der or by virtue of any such warrants, subpoenas, commitments, orders, notices, papers, or process whatever."

The object of this act, as claimed by the appellants, is "the abolition of fees and the consequent saving to the taxpayers" of the town of Ft. Edward; but, as claimed by the respondents, it is the abolition *pro tanto*, and by an indirect method, of the office of justice of the peace in said town. The main question presented for decision is whether the sections quoted above from the act of 1896 are in violation of article 6 of the Constitution of this state. That article establishes the judiciary of the state, the same as previous articles had established the legislative and executive departments of government. By its 17th section it provides that "the electors of the several towns shall, at their annual town meetings, . . . elect justices of the peace, whose term of office shall be four years. . . . Justices of the peace and judges or justices of inferior courts not of record, and their clerks, may be removed for cause, after due notice and an opportunity of being heard by such courts as are or may be prescribed by law. Justices of the peace and district court justices may be elected in the different cities of this state in such manner, and with such powers, and for such terms, respectively, as are or shall be prescribed by law." It is provided by § 20 of the same article that "no judicial officer, except justices of the peace, shall receive to his own use any fees or perquisites of office;" by § 22, that "justices of the peace and" certain other local judicial officers "in office when this article takes effect, shall hold their offices until the expiration of their respective terms;" and by § 28 that "courts of special sessions shall have such jurisdiction of offenses of the grade of misdemeanors as may be prescribed by law." These provisions, except § 22, are not new, as they are continued from the Constitution of 1846, which was not abolished, but was revised by the convention of 1894 and the subsequent action of the people. See Const. 1777, § 28; Const. 1821, art. 4, § 7; Const. 1846, art. 6, §§ 11, 17; 1 Rev. Stat. p. 110.

The office of justice of the peace came down to us from remote times. It existed in England before the discovery of America, and it has existed here practically during our entire history, both colonial and state, at first with criminal jurisdiction only, but for more than two centuries past with civil jurisdiction also. 1 Col. Laws, 226 (act May 6, 1691); 2 Col. Laws, 964 (act Dec. 16, 1787); 3 Col. Laws, 1011 (act Dec. 7, 1754); 4 Col. Laws, 296 (act Dec. 16, 1758); 5 Col. Laws, 209 (act Feb. 16, 1771); Law Dict. title *Justice of the Peace* (Tomlins, Burrill, Black, and Anderson). It exists in every state of the Union, and is regarded as of great importance to the people at large, as it opens the doors of justice near their own homes, and not only affords a cheap and speedy remedy for minor grievances as to rights of property, but also renders substantial aid in the prevention and punishment of crime. The office as it now exists in towns was established by the Constitution, which does not, in express terms, say what a justice of the peace shall be. As, however, the office was well known when the Con-

stitution was adopted, it is presumed that the framers thereof and the people meant to establish it as an office with such civil and criminal jurisdiction, within the limitations of that instrument, as the legislature saw fit to confer upon it. As it has always had criminal jurisdiction, and was an existing office with such jurisdiction when each Constitution was adopted, it is at least doubtful whether the legislature has any power to deprive it of criminal jurisdiction altogether, since that would tend to partially abolish the office as it had been known for time out of mind. A constitutional office cannot be abolished by legislation having that result as a direct object, although it has been held that, under the provision of the Constitution authorizing the legislature to create cities and villages, it may abolish a town altogether, even if the effect is to deprive a justice of the peace of his office. *Gertum v. Kings County Supers.* 109 N. Y. 170. The court, however, was careful to bound such legislation by the limitation of good faith and a proper constitutional object. Thus, Chief Judge Ruger, in delivering the opinion, said: "It is undoubtedly beyond the power of the legislature, by direct legislation, to abolish the office of justice of the peace in towns, or shorten their terms of office, so long as the town exists; but they have an unquestioned right to alter and change the limits of their jurisdiction, or abolish the town organization altogether, provided it be done in good faith, and for proper constitutional objects. The whole force and effect of the provision in relation to justices is satisfied by enforcing it, so long as there is a town organization in existence, authorized under the Constitution to elect justices of the peace, and requiring the performance of their functions in the government of the town."

Not only is the office itself placed beyond the reach of hostile legislation, but also the term thereof, the method of filling it, and, by implication, the method of removing an incumbent. As was well said by the learned appellate division in deciding this case [17 App. Div. 169], "when the Constitution has fixed the term of office, and prescribed the cause for which and the method by which an incumbent of such office may be removed, such cause and method are exclusive, and it is beyond the power of the legislature to remove or suspend him from office for any other cause, or in any other method. *Rathbone v. Wirth*, 150 N. Y. 459, 475, 34 L. R. A. 408; *Lowe v. Com.* 3 Met. (Ky.) 237; Black, Const. Law, 255." The Constitution does not prescribe the powers or duties of justices of the peace in towns, but leaves that to be done by general laws, which, hitherto, have been uniform, applying alike to all justices of the peace in towns throughout the state. Their civil jurisdiction is prescribed by the Code of Civil Procedure, and includes most common law actions where the sum claimed does not exceed \$200. Sections 2861-2864. Their criminal jurisdiction as committing magistrates, covers crimes of all grades, and, as justices holding courts of special sessions, crimes of the grade of misdemeanor. Code Crim. Proc. §§ 56, 62, 147, 156. A justice of the peace in towns, therefore, may be defined as a constitutional judge, elected by

the people for a fixed term, protected from removal except by a judicial tribunal, on notice and for cause, with civil jurisdiction in most actions where the sum claimed does not exceed \$200, and with criminal jurisdiction to apprehend and commit for all crimes, and to try and convict in cases of misdemeanor. Does this define the position held by the relator, as hampered and limited by the act of 1896? What does that act attempt to do with justices of the peace in the town of Ft. Edward? While it does not directly or in terms take away from them the jurisdiction conferred by law upon such officers throughout the state, the effect is the same, so far as criminal jurisdiction is concerned, as if the office were absolutely abolished. *Warner v. People, Conner*, 2 Denio, 272, 281, 43 Am. Dec. 740. In three respects, each of which is essential to effective jurisdiction, the office is attacked: (1) By expressly removing the duty to enforce the criminal law, either as a magistrate or as a court; (2) by virtually prohibiting all peace officers from serving process or executing commitments; (3) by taking away all compensation for services rendered in criminal matters. This is done by legislation, which discriminates in these respects against justices of the peace in one town in the entire state, and cuts down the power of this constitutional office in that town alone, leaving it unaffected elsewhere. Thus a judicial officer, named in the Constitution, elected for a term fixed by the Constitution, with jurisdiction to act conferred by general laws, and by those laws entitled to fees for his services, while not in theory deprived of the power to act, is practically prevented from acting by a special statute, the direct object of which is to accomplish that result. Can the legislature leave these officers with jurisdiction to act, and yet not only relieve them of the duty of acting, but virtually render judicial action impossible by preventing all executive officers from serving their process, and by depriving them of all compensation for acting? Is not this an interference with the office itself? If a substantial part of the power of four justices of the peace out of several thousand in the state is taken away from them, are they still justices of the peace within the meaning of the Constitution? Does not the prohibition against taking fees operate as a substantial abolition of criminal jurisdiction, and to that extent as an abolition of the office itself? *Rid v. Smoulter*, 128 Pa. 324, 5 L. R. A. 517. Does not the taking away of the duty to act have the same effect? Does not the withdrawal of compensation to peace officers for acting, as well as the abolition of their duty to act, render justices of the peace powerless to discharge their duties, and to that extent abolish the office? While bare jurisdiction may exist, will it be exercised when it is no longer a duty, and, if exercised, it must be without compensation? *Com., Hepburn, v. Mann*, 5 Watts & S. 408, 409. Can it be exercised when the peace officers are bound and hamstrung? A judicial officer cannot serve his own papers, and if he is deprived of the right to compel executive officers to serve them, does he continue to be a judicial officer? Even if criminal process were issued by a justice of the peace in the town of Ft. Edward,

no officer could be compelled to serve it, and, after a lawful judgment of conviction, the commitment of the offender might be of no avail for the want of someone to execute it. The hands of a constitutional judge are thus tied as completely as legislation can tie them, so far as the administration of the criminal law is concerned. The Constitution created courts of special sessions, and the legislature, by general laws, defined the criminal jurisdiction of those courts, authorized justices of the peace to hold them, and prescribed the compensation they were to receive therefor; yet an act, applicable only to a single town in the state, virtually deprives these constitutional justices of the power to hold these constitutional courts, and takes from them the compensation to which, otherwise, they would be entitled by law. While the legislature has power to increase or diminish the jurisdiction of these officers generally, can it confer full judicial power upon all, and yet not only take away judicial duty from some, but even render judicial action by them practically impossible, without affecting the office itself? If this can be done as to criminal actions, why can it not be done as to civil actions also, and thus leave justices of the peace officers in name only?

It is conceded that the legislature cannot abolish the office directly, and, if not, can they do so indirectly? Is there any difference between abolishing an office altogether, and practically preventing the incumbent from discharging the functions thereof? "Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision." *People, Wood, v. Draper*, 15 N. Y. 543. As was said by Judge Allen in an important case, "an act violating the true intent and meaning of the instrument, although not within the letter, is as much within the purview and effect of a prohibition as if within the strict letter; and an act in evasion of the terms of the Constitution, as properly interpreted and understood, and frustrating its general and clearly expressed or necessarily implied purpose, is as clearly void as if in express terms forbidden." *People, Bolton, v. Albertson*, 55 N. Y. 60, 55. When the main purpose of a statute, or of part of a statute, is to evade the Constitution by effecting indirectly that which cannot be done directly, the act is to that extent void, because it violates the spirit of the fundamental law. Otherwise, the Constitution would furnish frail protection to the citizen, for it would be at the mercy of ingenious efforts to circumvent its object and to defeat its commands. The main purpose of §§ 19 and 20 of the act under consideration was to so circumscribe justices of the peace in one town of the state as to prevent them from performing important official functions, and to divert the business confided to them by general laws to a new officer created by special act for the express purpose of doing that business. Thus it is made the duty of the new police justice to hear and determine all criminal cases which courts of special sessions have power to hear and determine, and the justices of the peace of the town, although still authorized to hold those courts, are relieved of that duty, deprived of compensation if they discharge it,

and are prevented from discharging it through inability to compel peace officers to obey their commands. The necessary effect of such legislation indicates its object, which was to silence the justices of the peace and transfer their duties to the police justice. We think it is not in the power of the legislature to enact that justices of the peace in the state of New York shall have certain powers and duties, except in the town of Ft. Edward, and that there only they shall not have those duties, and, if they voluntarily attempt to discharge them, shall have no power to enforce their judgments. If this can be done as to one judicial officer named in the Constitution, it can be done as to another, and the duties imposed generally upon justices of the supreme court throughout the state cannot only be altogether withdrawn as to certain justices, but the power to discharge them withdrawn also. The Code of Criminal Procedure declares that justices of the supreme court, justices of the peace, and certain other judicial officers shall be magistrates, and important criminal powers are expressly conferred upon them, and, by implication, it is made their duty to exercise those powers in a proper case. Code Crim. Proc. §§ 147, 156. The legislature can, of course, amend and change that statute, by adding to or taking from those powers and duties; but can it so amend it as to declare that it shall not be the duty of justices of the supreme court residing in a certain district to act as magistrates, and that, if they do so act, peace officers shall not be compelled to serve their warrants or enforce their commitments? Without directly taking away the power, can the duty be withdrawn and the power so undermined as to make it practically useless, and the office still be left intact?

The object of a written Constitution is to regulate, define, and limit the powers of government by assigning to the executive, legislative, and judicial branches distinct and independent powers. The safety of free government rests upon the independence of each branch, and the even balance of power between the three. Unite any two of them, and they will absorb the third, with absolute power as a result. Weaken any one of them, by making it unduly dependent upon another, and a tendency towards the same evil follows. It is not merely for convenience in the transaction of business that they are kept separate by the Constitution, but for the preservation of liberty itself, which is ended by the union of the three functions in one man, or in one body of men. It is a fundamental principle of the organic law that each department should be free from interference, in the discharge of its peculiar duties, by either of the others. Nothing is more essential to free government than the independence of its judges, for the property and the life of every citizen may become subject to their control, and may need the protection of their power. Not a contract is made except in reliance upon their ability to afford redress if it is violated. Men part with property upon the promise of their fellows, walk the streets by day, and sleep in peace at night, in the confidence that the silent and unseen power of the judiciary is always ready to protect their rights. Any legislation that ham-

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pers judicial action, or interferes with the discharge of judicial functions, is in conflict with the principles of the Constitution. Whenever a judge, however humble, is authorized by law to hold a criminal court, established by the Constitution, and to require executive officers to serve his warrants and enforce his judgments, the legislature cannot leave him the power to act, and withdraw from him the power of compelling obedience to his lawful mandates, without affecting his independence and depriving him of the essential powers of a judge.

On the 26th of June, 1896, the relator, upon complaint being made before him, issued a warrant, and the offender was arrested, and tried and sentenced to imprisonment. Thereupon the justice issued the usual commitment to a peace officer to take the person convicted to the county jail. But, according to § 19 of the act under consideration, he could not require that officer to obey the order, and the command of a judge to enforce a valid judgment became no more than a mere request to do so. He was thus obliged to coax those whom, if he was still a judge, he had the right to command, and the enforcement of a lawful judgment depended upon the good will of a constable. In other words, a judge acting according to law in every respect, was by this legislation made dependent upon the favor of an executive officer in order to have his lawful commands obeyed. Is any argument necessary, under these circumstances, to show that the independence of the judge was destroyed? The lawful command of a judge is the command of the people of the state of New York, in their organized capacity under the Constitution, and the legislature has no power to say, directly or indirectly, that such a command shall not be obeyed. While, in many cases it can take away the jurisdiction of the judge altogether, it cannot leave him clothed with full power to render judgment, and then prevent him from causing that judgment to be enforced, by saying to peace officers that they need not obey his lawful commands unless they choose to do so. If such legislation is sustained, the independence of the judiciary and the freedom of the law will depend upon the generosity of the legislature.

While we hesitate, as every court should, to set aside a solemn act of legislation, yet it is our high prerogative to defend the Constitution, and to protect the humblest judge from interference with his judicial functions in violation of its command. That duty we now discharge by adjudging that §§ 19 and 20 of chapter 22 of the Laws of 1896 are unconstitutional and void.

The order appealed from should be affirmed, with costs.

O'Brien, J., dissenting:

The courts below have held that §§ 19 and 20 of chapter 22 of the laws of 1896 are in conflict with the Constitution, and therefore null and void. That is the only question presented by the appeal. The act is entitled "An Act to Provide for the Better Administration of Justice in the Town of Fort Edward in the County of Washington." There are two records and two appeals, involving the same

question. They were heard and decided below as one case, and may now be discussed and reviewed in the same way. The relator Ryan is a constable of the town of Ft. Edward, and also a deputy sheriff. In December, 1896, he presented to the board of supervisors of Washington county a bill of \$12.90 for fees charged by him in the arrest and detention of two parties charged with crime in the town of Ft. Edward. The board rejected the claim, and refused to allow the same, on the ground that, by the terms of the two sections of the act above mentioned, it was not a legal charge against the county or the town. The relator Burby is one of the justices of the peace of the town of Ft. Edward, elected in March, 1894, to fill a vacancy in an unexpired term ending the last of December, 1896. He presented to the town board, in the month of November, 1896, a bill of \$24.75 for fees in proceedings before him as justice in certain criminal cases, which the board refused to allow, on the ground that, by the terms of the two sections above referred to, the claim was not a legal charge against the town. On looking into the bill it will be seen that a large part of it consists of items for fees and services in the arrest and examination of persons charged with being what are there styled "state tramps." The courts below have held that both the justice and the constable were entitled to peremptory writs of mandamus requiring the boards to audit and allow the bills, although the sections of the statute above referred to declare that they are not legal charges against the town or the county. The 19th section enacts that no constable or deputy sheriff shall be required to serve any criminal process in the town, and that neither the town nor the county should be in any way chargeable for such services, or bound to pay the same. The 20th section provides that no justice of the peace should be required to issue any criminal process in cases within the town, and that neither the town nor county should be chargeable with any fees or services rendered by a justice of the peace in criminal cases. All that the legislation in question did was to relieve the justice and the constable from all obligation to perform any duties in criminal cases arising in the town, and, having relieved them from the duties, deprived them of the right to charge the town or the county with fees for services which it was not their duty to perform.

The courts below have held that the legislature has no power to do this, since the Constitution stands in the way. On looking into the opinion of the learned judge at special term, and then into that of the learned judge who spoke for the appellate division, it is quite difficult to identify the particular constitutional provision which they supposed had been violated by the legislature in this case. The learned judge at special term was apparently of the opinion that the two sections violated that provision which forbids the legislature from passing any private or local bill decreasing the fees or allowances of public officers, while the learned judge at the appellate division virtually held that the sections were void because they practically abolished the ancient and constitutional office of justice of the peace in the

particular town in question. The act in question contains twenty three sections, and in order to properly consider the questions presented by this appeal, the general scope and purpose of the act, as a whole, must be kept in view. It provides for the election of a police justice in the town, to be paid a salary of \$800 per year, and confers upon him the same jurisdiction in criminal cases as the justices of the peace of the town. It provides that the fees charged and received by him in criminal cases shall be paid over to the supervisor, and not applied to his own use. It then provides for the annual election of a police officer at a fixed compensation, with power to serve all criminal process, and requires him to serve all process issued by the police justice in criminal cases, and that the costs and fees therefor chargeable by law shall not be retained for his own use, but must be paid over to the supervisor. It appears, therefore, that this rural town, with a population of 6,000 people all told, and a territory 10 miles in length and 3 or 4 miles wide, was provided with adequate machinery for administering the criminal law and preserving the public peace. The legislature decided that both economy and efficiency would be promoted by concentrating the duties of examining magistrate and conservators of the peace in this town in two persons, and relieving the justices of the peace and constables from all duties in that regard.

That it was not a wanton or arbitrary interference with the local affairs of the town appears from a very significant affidavit by the supervisor of the town and chairman of the board of supervisors of the county, which appears in the record and is not denied or questioned. The origin and purpose of this legislation is there clearly stated. It is shown that the statute was passed at the request and solicitation of a large majority of the people of the town, not only for the purpose of better conserving the cause of law and order, but of reducing the burden of taxation, by putting an end to the ill-considered and ill-advised action of justices of the peace and constables in soliciting and procuring tramps and vagrants to be arrested and committed for maintenance to the county jail for the sole purpose of enabling the justices and constables to present bills for services against the town or county, and that this practice had become such a grievous abuse that upon more than one occasion the supreme court had instructed the grand juries to inquire into the same. Moreover, he states that, after the act became a law, and at a public meeting of the voters of the town, a resolution was unanimously passed thanking the senator and assemblyman representing the town in the legislature for their aid in procuring the enactment of the law. All this, however, counts for nothing, unless the legislature had power to pass the bill and to enact the sections in question. It only shows that the will of the people, however flagrant may be the abuse which they attack, or however laudable the reform which they advocate, must be subordinated to the restraints of the fundamental law. It appears that the justices of the peace and the constables, like the silversmiths of Ephesus, were not satisfied with the new law. It damaged

their business and reduced the opportunities for making money, and they appealed to the courts for protection, and thus far they have had it, since it has virtually been held that, after a justice of the peace or a constable has been once installed in office, the law-making power of the state is powerless to deprive them of the opportunity of earning fees from the town or county in looking after tramps and vagrants, and acting occasionally in the early stages of other cases of a criminal character. In this case the justice and constable volunteered to perform services which it was not their duty to perform, and yet, in defiance of the express mandate of the legislature, and of the will of the town and county, they have been awarded compensation to the same extent and in the same way as if the legislature had never passed the act in question. The claims of these two parties, when united, were less than \$88, though the costs awarded upon the application for the mandamus were \$50; and it must be quite clear that the only importance that the case could ever assume is due to the fact that the parties and the courts below regarded it as involving an important question of constitutional law. This brings us to the inquiry as to what provision of the Constitution has been violated by the legislature in the passage of this act.

1. It does not increase or decrease the fees or allowances of any public officer. The fees of a justice of the peace or a constable are just the same now in the town of Ft. Edward as they were before the passage of the act. They have not been increased or diminished. The only change made is with respect to the persons entitled to receive them, and the uses to which such fees may be applied. The relators are affected by the act only in one respect, and that is that they cannot charge fees to the town or county when they volunteer to perform services in criminal cases but the fees are still the same. The volume of the relators' business may have been diminished by this legislature, but the fees of justices of the peace and constables have not. If we inquire with respect to the amounts which a justice of the peace or constable may charge for any given service in the town of Ft. Edward in criminal cases now, and find that they are the same as before the passage of the act, it must follow that the bill did not increase or decrease fees. The police justice and police officer created by the act are entitled to charge the same fees allowed before, and no more, but they must be paid to the supervisor, for the benefit of the town, since these two officers are compensated by fixed salaries.

2. There is nothing in the body of the act not germane to the title. The two sections in question simply provide that justices or constables are relieved from all duties, and therefore may not charge fees, to the town or county in criminal cases. That such provisions may properly be inserted in a private or local bill, with such a title as that now before us, is too plain for argument.

3. The legislature had power to create the police court in the town under that provision of the Constitution which authorizes the creation of inferior local courts of civil and criminal jurisdiction. Const. art. 6, § 18.

4. The act does not in any sense or in any degree abolish the office of justice of the peace. The act does not touch the power, jurisdiction, or authority of the justice in the slightest particular. He may now do everything that he could have done before the act was passed. He can exercise every power now that he could then. In ancient times the office was an honorary one purely. There were no fees attached to it, and no civil jurisdiction. All that is found in statutes, and I suppose no one will deny that the legislature may repeal or modify the statutes. The Constitution, while recognizing the office of justice of the peace, does not deal at all with either the jurisdiction or the fees. All that is left to the legislature, and it may increase or diminish either the one or the other, or both, at pleasure. This statute, therefore, does not in the slightest degree abolish, or attempt or even tend to abolish, the office of justice of the peace, unless, indeed, we hold that the office consists of what may be made out of it under the most favorable circumstances. The business of hunting down tramps and vagrants in the rural districts, in what are called "hard times," is capable of being developed into a very high state of perfection, and if the justice and constable have a sort of vested right in what can be earned in that way, in the nature of property, beyond the power of the legislature, there must be certain guaranties in the Constitution that have never been discovered before.

When we consider the origin and history of the ancient and honorable office of justice of the peace, it occurs to me that it is now very much belittled, if not disgraced, by the contention that it is destroyed whenever the legislature attempts to interfere with the opportunities of the person who happens to hold it for the time being of making money out of it. When this case is stripped of all irrelevant argument and illustration, the only objection that can be urged against the statute in question is that, and nothing more. The legislature has relieved the justice of a very small part of his duties, and has enacted that, if he still insisted on performing them, it should be without fees against the town or county, as his predecessors in England did centuries ago. That this was not only a constitutional, but, under the circumstances, a just and reasonable, exercise of power, I cannot doubt. It is a mistake to suppose that the legislature is prohibited from abolishing the office of justice of the peace. In point of fact, numerous statutes have been passed abolishing the office, and they have been held to be constitutional. *Curtin v. Barton*, 189 N. Y. 518. There is scarcely a city in the state where the office of justice of the peace did not once exist, but has been abolished by some form of legislation. The only provision of the Constitution upon the subject is to be found in article 6, § 17, which simply provides that the electors of the several towns shall, at their annual town meetings, or at such other time and in such manner as the legislature may direct, elect justices of the peace, whose term of office shall be four years. There is nothing whatever in the statute in question which in the slightest degree interferes with the right of the electors of the town to elect justices of the peace at town

meetings, or that changes the tenure of the office. The electors must still elect justices of the peace in the same way and for the same term. They may not have quite so much criminal business to do hereafter, as they have had heretofore, but surely that is no reason for pronouncing a solemn act of the legislature void. Indeed, when all the reasons for holding the statute invalid are fully weighed and measured, it is quite difficult to treat or consider them all seriously. It is claimed that this legislation was enacted for the purpose of insidiously undermining the office of justice of the peace in this particular town. There is nothing on the face of the bill that gives the slightest color to this assertion, and surely we ought not to attribute to the legislators a purpose or motive in the enactment of a law that is not disclosed by the statute itself. *Waterloo Woolen Mfg. Co. v. Shanahan*, 128 N. Y. 345, 14 L. R. A. 481. The only purpose that the legislature had in the enactment of the statute was to relieve the taxpayers from claims upon the treasury of the town or county for services in colorable proceedings against tramps, vagrants, and petty criminals,—a business which, it seems, had been developed and enlarged to such an extent as to become an abuse and a scandal. This was the moving cause of the legislation, according to the uncontradicted affidavit of the town authorities themselves, and they add that the statute, in its actual operation, has accomplished the purpose by correcting the abuses. The motive and purpose of the enactment was, therefore, not only legal, but laudable.

But this court has nothing to do with the motives of the legislature. It is not for the courts to attribute improper motives to the legislature, any more than it is for the legislature to attribute improper motives to the courts for their judicial action. The question is one of power and nothing else. When that simple inquiry is divested of all sentimental considerations, and the question divorced from the vigorous rhetoric and specious argument in which it is beclouded, the proper solution depends upon the correctness of a few propositions that seem to me so plain that every professional mind must accept them: (1) The legislature had the power to provide for the election of a police justice and a police officer in a town containing a considerable village, to fix their salaries, and confer upon them the powers of a justice of the peace and constable in criminal cases. That was the main purpose of the bill, and no one seriously questions the validity of the law in that respect. (2) Having gone so far, did the legislature have the power to relieve the people of the town from all legal obligation to pay fees for services in criminal cases, or compensation to local officers, other than the sum fixed and designated as salaries? That is the power which it has exercised in the two sections of this statute which it is claimed are invalid, and I am not aware of any suggestion at the argument, or in the printed brief, that casts the slightest doubt upon the existence of this power in a lawmaking body which is supreme, except so far as restrained by the Constitution. (3) May the legislature, when providing for the administration of criminal justice in a town by

a police justice and police constable, divest or relieve justices of the peace from all legal obligation or duty to entertain complaints or issue process in criminal cases? Inasmuch as every duty that can be performed by a justice of the peace in criminal cases is imposed by some statute or law enacted by the legislature, the conclusion would seem to be irresistible that the power which enacted the law may repeal it or modify it, and the same power that imposed the duty can withdraw it. If the legislature may lawfully exercise the powers specified in these three propositions, then there can be no fair question with respect to the validity of the statute. That it does possess such power cannot, I think, be doubted; and to hold that the legislation in question abolishes the office of justice of peace is little less than asserting that an office is abolished whenever its pecuniary attractions are diminished by law. The particular justice who instituted this proceeding possessed, after the passage of this statute, every right and power as an officer that he possessed before, except the right to charge fees to the town or county in criminal cases; and to say that a statute which affects him to that extent only is void seems to me to be a proposition that cannot be seriously discussed, and I have discussed it only because able and eminent counsel who has presented the other view of the case has evidently the utmost confidence in the correctness of his position, and, moreover, has impressed the court with the same view.

Suppose we hold this law to be constitutional and valid; will the office of justice of the peace in the town of Ft. Edward be then abolished? Of course, if the office of the relator in this case will be abolished, so will that of all the other justices in the town in like manner, and the result must be, if the relator's contention is correct, that hereafter there can be no justices of the peace, in the constitutional sense, in the town. If that be so, it must follow that the right to charge fees to the town and county in criminal cases is an essential part of the office itself, annexed to it by the Constitution in perpetuity, and beyond the power of the legislature to change. I doubt if anyone would seriously urge such a proposition, and yet it is what the relator's contention must really mean when analyzed. That office is abolished, or it is not abolished, by this legislation, since it is impossible to conceive of any middle state between regular official existence and that statutory death which it is claimed that the legislature has inflicted upon these town officers in violation of the Constitution. But the truth is, as everyone must know, that no law providing for the election of justices of the peace has been interfered with in the slightest degree. They will still continue to be elected just the same as if the act had never been passed, and they will still possess the same powers, and be authorized to do precisely the same things, that they always did, except to draw fees from the town or county for services that they are not required to perform. The town has elected another officer, at a fixed salary, to do the things that the relator has volunteered to do; so that, from whatever point we start, we come back again to the inquiry whether the legislature has

power to reduce the business of a justice of the peace by relieving him from all duties in criminal matters, and the town or county from all obligation to pay him, should be elect to do the things which he is no longer required to do. When powers or duties are created solely by statute, it would seem to be a plain and reasonable proposition that the same authority that originally granted the power or imposed the duty may recall it, and relieve the officer from all obligation with respect to the duty thus imposed. The officer certainly can have no vested right in the exercise of a statutory power or the performance of a statutory duty.

It requires no argument to show that the people of a town, through an act of the legislature, may reduce the expenses of local government, and lighten the burden of local taxation; but, in order to do that, they must necessarily reduce the business or fees of the officers to whom the taxes are paid. The act in question does that, and nothing more; and, if the legislature has offended the Constitution, that is the head and front of the offending. I cannot bring myself to believe that this court is warranted in declaring such a statute, or any part of it, void. So much legislation of this character has been enacted that I fear such a decision would form a precedent that might be very troublesome hereafter. There is scarcely a volume of the session laws in which legislation of this character may not be found. The sheriffs and county clerks are certainly constitutional officers, in at least the same sense as a justice of the peace is. They were all formerly, and most of them still are, compensated by fees; but no one can doubt that this whole subject is within the scope of legislative power. The fees may be abolished, and a salary, great or small, substituted in their place; and no one would claim that the office was abolished because its money value had been diminished. Can there be any doubt as to the power of the legislature to provide that fees in criminal cases shall be paid over to the town by the justice of the peace for the benefit of the poor, and a nominal salary substituted in their place? This would reduce his income in the same sense that the act in question does, but, unless the justice had a vested right to all fees prescribed when he went into office, the legislation would be valid.

But, whatever may be said about the justice, clearly the constable was not a constitutional officer, and he cannot complain, even if his office was abolished, though it certainly was not. The legislature could certainly dispense with his services as a peace officer if it thought proper, and provide that, in case he elected voluntarily to perform services that he was not bound to perform, then no fees should be chargeable for such services to the town or county. It has so declared in a separate and distinct section of the act, and how any provision of the Constitution was violated by such a law it is certainly very difficult to see. The power and duty of the judiciary, when called upon to deal with the question of the validity of a statute, was well expressed by Judge Andrews in this court in these weighty words: "Only when required by the most cogent reasons, nor, indeed, unless compelled by unanswerable grounds, will a court declare a statute
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to be unconstitutional." *People v. Budd*, 117 N. Y. 18, 5 L. R. A. 559. There has been, I think, a wide departure from this rule in dealing with the statute in question. The services of both the justice and constable having been performed long after the act in question took effect, their claims were not valid charges against the town or county, and the respective boards to which they were presented for audit and allowance properly rejected them. The order of the appellate division and that of the special term, awarding the mandamus to the relators, should be reversed.

Parker, Ch. J., and Haight, J., concur.

JEWELERS' MERCANTILE AGENCY,
Limited, *Resp't.*

v.

JEWELERS' WEEKLY PUBLISHING
COMPANY et al., Appts.

(155 N. Y. 241.)

1. A statutory copyright operates to defeat a party of the common-law right.
2. A book is published so as to defeat what is known as the common-law copyright or right of first publication, if it is put within reach of the general public so that all may have access to it, no matter what limitations be put upon the use of it by the individual subscriber or lessee.
3. A lease of the reference books of a mercantile agency to subscribers, retaining title and providing that the books shall be returned when the subscription expires, constitutes a publication which will defeat a common-law copyright.

(March 8, 1898.)

APPPEAL by defendants from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of a Special Term for New York County in favor of plaintiff in a suit brought to enjoin defendants from infringing plaintiff's copyright. *Reversed.*

Statement by **Parker, Ch. J.:**

The judgment appealed from enjoined the defendant from making any use of the plaintiff's reference books or confidential sheets, and from copying, appropriating, printing, publishing, or using in any way, information taken therefrom, or furnishing such information to others. The plaintiff, a domestic corporation, has, ever since its incorporation, in 1883, been engaged in the business of a mercantile agency, which consisted in obtaining information regarding the business, street addresses, kinds and extent of business, commercial standing and mercantile credit of individuals, firms, and corporations engaged in the jewelry trade in the United States and Canada. This information is printed twice a year in the form of a reference book. A duplicate of smaller form

NOTE.—As to the common-law rights in literary property, see also note to *Simmons Hardware Co. v. Waibel* (S. D.) 11 L. R. A. 267.

is also printed. The plaintiff also issues weekly a confidential sheet of changes and corrections. These books and confidential sheets are furnished and lent to subscribers subscribing therefor, upon a contract which reads as follows:

The undersigned employs the Jewelers' Mercantile Agency, Limited, from —, 189—, to —, 189—, to aid in answering inquiries by verbal or written reports, reference books, and correction sheets, as to the responsibility, character, and standing of persons and firms in the jewelry and kindred trades, within the United States and Canada; said inquiries not to exceed one hundred and to be made within the period of this contract. For such aid and service, including the loan of —, 189—, and —, 189—, volumes of reference book the undersigned will pay to said company \$75 at the commencement of this subscription, and for each inquiry exceeding the one hundred, 30 cents on demand. All information which may have been or may be obtained by agents of said company, who are appointed our sub-agents, and communicated to us, shall be strictly confidential between the parties hereto, and the sub-agent's name or names are not to be disclosed by said company to the subscriber or other person, and the communicated information is not to be disclosed to the person or persons reported on. No information is guaranteed as to correctness, and the said company is not responsible for act or negligence of the subagent or agents. Title to the reference books to remain in said company, and books are to be returned upon expiration of subscription. On return of amount of unexpired term of subscription, said company reserves the right to terminate this contract, and the reference books are then to be returned to it.

Dated —, 189—.

Signature: —

(The conditions of this subscription are absolute, and no verbal or other understanding will be considered or allowed by the company.)

The plaintiff's reference book in the larger form bears upon the cover thereof, distinctly printed, the statement: "This is the property of the Jewelers' Mercantile Agency, Limited. Confidential Reference Book." And within, conspicuously printed, appears the following: "This book is the property of the Jewelers' Mercantile Agency, Limited, and is held by —, under agreement of —, eighteen —, with them." It does not appear that the reference book was confined exclusively to the jewelry trade, nor does it appear but that anyone could obtain a copy of the same by subscribing for it according to the terms of such contract. The defendant is also a domestic corporation, organized in January, 1891. It took the business which had before been carried on by the defendant Rothschild, and earlier by both Rothschild and Ulmann. The defendant took and appropriated from the plaintiff's reference book certain material information therein contained, and made use of it in a publication of its own, which came into competition with the plaintiff's publication.

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It also appeared that on the 28th day of June, 1890, the plaintiff, in pursuance of the copyright laws of the United States, deposited in the copyright office, with the librarian of Congress, the title of the plaintiff's book of July, 1890. And on the 28th day of June, 1890, the plaintiff, in further pursuance of said copyright law, deposited in the office of the librarian of Congress two copies of said reference book. And the said plaintiff printed on the page following the title page in the said book of July, 1890, the following notice: "Entered according to act of Congress, in the year 1890, by the Jewelers' Mercantile Agency, Limited, in the office of the librarian of Congress at Washington." The plaintiff, however, insists the copyright failed because of its omission to make publication of the reference book, and stands upon its common law right that there has never been such a publication as to entitle the general public to the use of the book. The acts which defendant urges amounted to a publication were the delivery of the book to such subscribers as cared for it, and were willing to become parties to the contract, *supra*, and the deposit of two of the books in the library of Congress.

Messrs. Sondheim & Sondheim and Wheeler H. Peckham, for appellants:

The plaintiff has lost any literary property it ever had in its reference book of July, 1890, it having published the said book and having dedicated the information contained therein to the public in various ways.

Plaintiff deposited in the library of Congress two copies of its reference book of July, 1890. This was as complete, formal, and solemn a dedication of the said book to the public as it was possible for the plaintiff to make.

14 Enc. Britannica, 535; *People, American Geographical Soc., v. New York Taz Comrs.* 11 Hun. 505.

The mere fact that the delivery of copies of a book to a public officer was under special limitations would not prevent the delivery from constituting a publication, provided the delivery insured the public or an indefinite portion of it should, without further action on the part of an author, have access to it.

Callaghan v. Myers, 128 U. S. 657, 32 L. ed. 559; *Turner v. Robinson*, 10 Ir. Ch. Rep. 510; *Dalglish v. Jarvie*, 2 Macn. & G. 231.

In the absence of restrictions as to copying, there can be no doubt that the deposit of a picture in a place to which the public have free access is a publication of the same.

Pierce & B. Mfg. Co. v. Werckmeister, 38 U. S. App. 399, 72 Fed. Rep. 58, 18 C. C. A. 481.

The plaintiff could have adopted no better way to dedicate his books to the public than by depositing them in the great public library of the United States, where they will remain for all time to come, open to the free and unrestricted inspection of the public.

Rees v. Pelzer, 75 Ill. 475; *Merrell v. Tice*, 104 U. S. 561, 26 L. ed. 855.

To constitute a publication it is necessary that the work be exposed for sale or offered gratuitously to the general public, so that any person may have an opportunity of enjoying that for which a copyright is intended to be secured.

plainants on the extent or number of persons to whom the book might be distributed under the conditions which they had provided. Though adapted specially for persons engaged in the trades of which we have spoken, yet even these are indefinite in number, and there is no evidence that the circulation was intended to be limited to them. In any view, it might be difficult to sustain this proposition, because, as the statute now stands, an author is compelled to complete his title to his copyright before publication, so there is at least one point of time, although it may be a very minute one, when the author, who has entitled himself to a copyright, is also entitled to look to the statutes of the United States for protection notwithstanding he has not published. . . . However, we do not rest the case on this point, because we are satisfied that there has been a publication. . . . So far as concerns the interests of the public and the general policy of the copyright statutes, this case stands in all respects practically the same as though the complainants' publication had been sold by unrestricted titles; and there is no substantial reason why, if the complainants had not obtained copyrights, they should now be protected against infringers." We find ourselves in agreement with the learned judge, not only in the conclusion reached, but also in the argument which led to it, and, before referring to authorities upon that subject, it should be observed that it does not appear from this record but that every person in the United States was at liberty to become a subscriber of the plaintiff, and, as such, entitled to a reference book. Plaintiff's position, therefore, in effect is that a distinction should be drawn between selling or giving a book away and leasing it; that to offer to sell a book to the public or give it to public libraries, where all the public may have access to it, is to publish it; but to lease it to such of the public as care for it is not to publish it. The latter is certainly an effective method of putting the contents of the book in the possession of such portions of the public as desire it. By this method a party parts with the secret in such a way that the public may know it, provided the individuals composing such public are willing to become subscribers, and lease the book. And, if leasing books to the public generally does not constitute a publication of them, then an author or publisher would have but to extend the period of leasing from 1 year to 99 or 999 years, as is the case in certain leaseings of railroads, in order to secure almost as many lessees as there would be purchasers if the books were offered for sale. The buyer of the average book would be quite content with a restrictive title, which, nevertheless, assures him the possession of a book for either of the periods mentioned. It has not hitherto been understood to be the law that the common law right could be so utilized as to secure to an author or publisher a continuing revenue from the public for a much longer period of time than Congress has been willing to grant to him the exclusive right to publish.

We shall now briefly refer to what has been said on the subject which seems to have persuaded counsel that the judgment in this case can be supported. In the first place, if 41 L. R. A.

must be conceded it has not been said, except in *Ladd's Case*, 75 Fed. Rep. 705, that leasing a book under an agreement not to show it to anyone constitutes a publication of it; and this is so, probably, because it was not until a comparatively recent period that an attempt seems to have been made to obtain for a book subscribers who should agree that they would neither show nor loan it to others. So, when Coppinger & Scruton and Drone & Shortis, in their works on the subject of Copyright, assert that, "to constitute publication it is necessary that the work shall be exposed for sale or offered gratuitously to the general public, so that any person may have an opportunity of enjoying that for which the copyright is intended to be secured," they did not intend to imply that the leasing of a book for a year or a term of years to any and all persons who would accept it on such terms would not constitute a publication. They did not have such a situation in mind. The consideration and discussion of the principles established by such cases as they succeeded in finding in England and this country, bearing upon the question of publication, did not suggest to them the possibility of such a claim being made. It will be observed that the general rule which we have quoted from Coppinger asserts, first, that to expose for sale is to constitute publication. It is not necessary that the book be actually sold; it is sufficient if it be offered to the public. The act of publication is the act of the author, and cannot be dependent upon the act of the purchaser. The actual sale of a copy is evidence that it has been offered to the public, but that fact may also be shown by other evidence. It then asserts that, if a book be offered gratuitously to the general public, it will constitute publication. This may be done by presenting it to public libraries, and this is so because the author or publisher, by that act, puts it in such a place that all the public may see it if they choose. The reason why exposing for sale or offering gratuitously to the general public constitutes publication is stated in the last part of the rule as follows: "So that any person may have an opportunity of enjoying that for which the copyright is intended to be secured." And this reason, which lies at the foundation of all decisions upon this subject, is applicable to this situation. All persons were given the opportunity of enjoying this book upon the plaintiff's terms. Several cases have arisen where the courts have held that the private circulation of pictures, manuscripts, or printed books did not constitute a publication, such as *Prince Albert v. Strange*, 2 De G. & S. 652; also *Bartlett v. Cristenden*, 4 McLean, 800, where the plaintiff, a teacher of bookkeeping, for the convenience of his pupils, wrote his system of instructions on separate cards, which they were permitted to keep for their convenience. So a gratuitous circulation of copies of a work among friends and acquaintances has been held not to amount to a publication. *Dr. Paley's Case*, cited in 2 Ves. & B. 23, was one where a bookseller was restrained from publishing manuscripts left by Dr. Paley for the use of his own parishioners only. Coppinger, in his work on Copyright, at page 117, after considering the last case cited and others,

reached the following conclusion: "The distinction is in the limit of the circulation. If limited to friends and acquaintances, it would not be a publication; but, if general, and not so limited, it would be." In this case the circulation was not limited to friends and acquaintances, or even to a class. The limitation was upon the character of the use which a subscriber could make of it. It was the privilege of any and all persons who desired to become subscribers to obtain possession and use of the reference books. The fact that the publisher of the book undertook to place restrictions on the use which individual purchasers could make of it, the effect of which might be to increase, rather than diminish, the public demand for the book, does not constitute such a limitation as takes away from the act of the plaintiff its real character, which is that of publication.

In *Callaghan v. Myers*, 128 U. S. 617, 32 L. ed. 547, Myers was a reporter of the supreme court of the state of Illinois, and, desiring to secure a copyright for such portions of the reports as he was entitled to have copyrighted, undertook to provide the three conditions prescribed by the copyright statute, namely, a deposit, before publication, of a printed copy of the title of the book, the giving of information of the copyright by the insertion of a notice thereof on the title page or the next page, and by depositing a copy of the book within three months after the publication. It was insisted, as to one of the volumes, that Myers had not deposited a copy of the book within three months after the publication as the statute then required. It was shown that under the statutes of the state of Illinois a reporter of decisions was required to supply to the secretary of state a certain number of copies of the reports for the purposes expressly provided by law. This statute Myers complied with more than three months before he deposited in the clerk's office a volume of the reports containing the insertion of the notice giving the information of a copyright. It did not appear that these books were ever distributed from the secretary of state's office, but the court held that the delivery of the copies for the use of the state was a publication of the volumes, and therefore his copyright should fail. Myers did not expose the books for sale in the usual way. He was required by the statute to make delivery of them at the time he did, but that fact was held not to prevent publication, and the reason for it may be found scattered through the cases bearing upon that subject in the fact that by the delivery, whatever the occasion for it, the public, or an indefinite portion of it, were assured of access to the book without further action on the part of the author.

The case of *Palmer v. De Witt*, 47 N. Y. 532, 7 Am. Rep. 480, is not in conflict with the views we have expressed. In that case the plaintiff procured an assignment of a play, which secured to him the author's right of its first printing and publication. Before printing it, he put the play upon the stage, and thus the defendant was able to obtain and print it before the plaintiff did. Judgment was obtained preventing the defendant from selling, the court holding that the representa-

tion of a dramatic composition upon the stage is not such a dedication of it to the public as will authorize others to print and publish it without the author's permission. On his way to this conclusion Judge Allen said: "The rights of an author of a drama in his composition are twofold. He is entitled to the profit arising from its performance, and also from the sale of the manuscript, or the printing and publishing it," and its representation on the stage "does not give to the hearer any title to the manuscript, or a copy of it, or a right to the use of a copy."

In *Kiernan v. Manhattan Quotation Teleg. Co.* 50 How. Pr. 194, it was held that the transmission of news over telegraphic instruments does not constitute a general publication, the argument being that the case was analogous in principle to the writing and delivery of letters, the writer having such interest therein as will authorize him, in certain cases, to restrain their publication. Is there any difference, said the court, because he (the plaintiff) writes to his customers by telegraph?

The learned counsel for the respondent, apparently not unmindful that to sustain his contention requires the court to take a very long step in advance of any hitherto taken upon this question, urges the very large pecuniary interest involved for the plaintiff, and insists that courts of equity should find a way to protect property rights such as plaintiff claims, even if there are no precedents for doing so; and refers to the remarks of the court in *Piper v. Hoard*, 107 N. Y. 73, in which the court said: "If the most that can be said is that the case is novel, and is not brought plainly within the limits of some adjudged case, we think such fact not enough to call for a reversal of this judgment." If the plaintiff's interests are of so important a character, and the public interest would be best subserved were the law such as plaintiff insists it to be, then is presented a proper subject for legislative action. But our examination leads us to the conclusion that the present state of the law is that, if a book be put within reach of the general public, so that all may have access to it, no matter what limitations may be put upon the use of it by the individual subscriber or lessee, it is published, and what is known as the common-law copyright, or right of first publication, is gone. So far as is disclosed by this record, the plaintiff was in that situation at the time of the commencement of this action.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

Gray, O'Brien, and Haight, JJ., concur; and **Bartlett, Martin, and Vann, JJ.,** concur for reversal upon special ground, as follows: We concur in the result upon the ground that the plaintiff, by depositing two copies of its reference book in the office of the librarian of Congress, published the same, even if it obtained no copyright; that, if it did obtain a copyright, it thereby waived its common-law right of literary property in said book, and its statutory rights under Federal legislation can be protected only in the Federal courts.

NORTH DAKOTA SUPREME COURT.

C. T. CLEVELAND, *Appt.*,

v.

S. A. McCANNA, *Resp.*

(7 N. D. 455.)

* 1. The official acts of a de facto officer cannot be collaterally attacked.

2. Mutual judgments cannot be set off one against the other in such a manner as to defeat the exemption laws; and when, on an application of a judgment debtor to have a judgment owned by him and against his creditor set off against the judgment owned by such creditor, and against him, such judgment creditor files a verified schedule of his personal property, showing that the whole thereof, including such judgment, is less in value than the amount allowed by law as exempt, such set-off should be refused.

(May 10, 1896.)

APPEAL by plaintiff from an order of the District Court for Grand Forks County setting off upon a judgment in favor of appellant for damages for wrongful seizure of exempt property a judgment against him for the price of goods alleged to have been sold and delivered. *Reversed.*

The facts are stated in the opinion.

Mr. Burke Corbet, for appellant:

The pretended action commenced, and the pretended judgment rendered, by W. A. Winslow as justice, was without jurisdiction and void.

The city justice of the city of Larimore in 1894 had no jurisdiction to bring an action or render judgment for \$200 damages, \$20 attorney's fees, and \$13 costs.

U. S. Rev. Stat. 1907, vested all judicial authority in four kinds or classes of courts. Any act of the territorial legislature attempting to create another class or kind of court or to vest any judicial power in any other court, board, or officer was void.

Spencer v. Sully County, 4 Dak. 474; *Rupert v. Alturas County Comrs.* 2 Idaho. 21; *Hedges v. Lewis & Clarke County Comrs.* 4 Mont. 280; *Ferris v. Higley*, 20 Wall. 375, 22 L. ed. 333.

If the territorial laws creating city justices and police justices were valid as territorial laws, the law as to city justices of the peace was repugnant to the state Constitution, and did not survive the admission of the state.

Const. § 112.

Const. §§ 112 and 113, did not contemplate the continuance of the territorial justice of the peace or police justice in any event longer than necessary to enable the legislature to pass laws for the election of the justices of the peace provided for in § 112, or the police magistrate provided for in § 113.

Even if the territorial laws could survive throughout 1894, and authorize the election of city justices and the exercise of the jurisdiction conferred upon him by chapters 33 and 73

of 1889, the jurisdiction would be only to the amount of \$100.

The amount claimed in the summons, if too great, is fatal to the jurisdiction of the court, and cannot be cured by any subsequent act.

Plunket v. Evans, 2 S. D. 434; *Warder, B. & G. Co. v. Raymond*, 7 S. D. 451.

A judgment for damages for the wrongful taking or conversion of exempt personal property is exempt to the judgment creditor from setting off claims or judgments against him in favor of the judgment creditor.

Ellis v. Pratt City, 111 Ala. 629, 36 L. R. A. 264; *Houghton v. Lee*, 50 Cal. 101; *Hall v. Fulghum*, 86 Tenn. 451; *White v. Fulghum*, 87 Tenn. 231; *Crawford v. Carroll*, 93 Tenn. 661, 26 L. R. A. 415; *Reynolds v. Haines*, 83 Iowa, 342, 13 L. R. A. 719; *Kaiser v. Seaton*, 63 Iowa 463; *Stebbins v. Peeler*, 29 Vt. 289; *Mitchell v. Milhoan* 11 Kan. 617; *Cooney v. Cooney*, 65 Barb. 524; *Smyth, Homesteads & Exemptions*, § 103; *Waples, Homesteads & Exemptions*, p. 609.

A judgment recovered for the negligent killing of animals exempt from execution is also exempt.

Crawford v. Carroll, 93 Tenn. 661, 26 L. R. A. 415; *Duff v. Wells*, 7 Helsk. 17; *Reynolds v. Haines*, 83 Iowa, 342, 13 L. R. A. 719; *Kaiser v. Seaton*, 62 Iowa, 463; *Cullen v. Harris*, 111 Mich. 20; *Collier v. Murphy*, 90 Tenn. 300; *Millington v. Laurer*, 89 Iowa, 322; *Howard v. Tandy*, 79 Tex. 450; *Below v. Robbins*, 76 Wis. 600, 8 L. R. A. 467; *Tillotson v. Wolcott*, 49 N. Y. 188; *Mallory v. Norton*, 21 Barb. 424; *Temple v. Scott*, 8 Minn. 419; *Puget Sound Dressed Beef & Pkg. Co. v. Jeffs*, 11 Wash. 466, 27 L. R. A. 808; *Cullers v. May*, 81 Tex. 110; *Deering v. Ruffner*, 82 Neb. 845; *Mudge v. Lanning*, 68 Iowa, 641; *Cameron v. Fay*, 55 Tex. 62; *Beckman v. Manlove*, 18 Cal. 359; *Butner v. Bowser*, 104 Ind. 255.

The fact that the owner of the property so seized may not be able to give bond, and avail himself of the more expeditious remedy of suing out such process as will place him in possession of the property, and that instead thereof he sues for damages, and obtains judgment, which is paid, should not operate in the latter case to practically deprive him of the results of the suit and the benefits of the exemption.

Howard v. Tandy, 79 Tex. 450; *Below v. Robbins*, 76 Wis. 600, 8 L. R. A. 467.

Exemplary damages should not be given as a mere punishment to the wrongdoer, but only for full compensation for the wrong done, including, not only determinate, but indeterminate or estimated, damages.

7 Am. & Eng. Enc. Law, pp. 450, 451, and note.

Under Comp. Laws, § 5128, Rev. Codes, § 5518, a judgment creditor may hold his judgment to the amount of \$1,500 exempt from attachment, execution, or set-off, regardless of the cause of action on which it was rendered.

Atkinson v. Pittman, 47 Ark. 464; *Curley v. Thomas*, 74 N. C. 51; *Thompson, Home-*

* Headnotes by BARTHOLOMEW, J.

NOTE.—As to set-off of judgments, see also *Benson v. Haywood (Iowa)* 23 L. R. A. 335, and note, and *Roberts v. Mitchell (Tenn.)* 20 L. R. A. 705, 41 L. R. A.

steads & Exemption, §§ 892, 894; *Wilson v. McElroy*, 83 Pa. 82; *Collett v. Jones*, 7 B. Mon. 586.

Statutes of exemptions are to be liberally construed.

Butner v. Bousser, 104 Ind. 255; *Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 280; *Carpenter v. Cool*, 115 Ind. 184; *Burdge v. Bolin*, 106 Ind. 175, 55 Am. Rep. 724; *Taylor v. Dueterberg*, 109 Ind. 165; *Barnard v. Brown*, 112 Ind. 53; *Dumbould v. Rowley*, 118 Ind. 858; *Collier v. Murphy*, 90 Tenn. 800.

Messrs. O. A. Wilcox, Bangs & Fisk, and Cochrane & Feetham for respondent.

Bartholomew, J., delivered the opinion of the court:

In March, 1894, the respondent, McCanna, obtained a judgment against the appellant, Cleveland, before the city justice of the city of Larimore, in Grand Forks county, for the sum of \$200 and costs, amounting in all to \$235. An abstract of said judgment was duly filed in the office of the clerk of the district court of said county, and the judgment was properly entered and docketed in that court, and is still in force and entirely unpaid. On April 24 following, appellant commenced the action against respondent in which this proceeding is entitled, and sought to recover \$3,000, actual and exemplary damages, for the alleged wrongful and unlawful seizure and conversion by respondent of certain enumerated personal property belonging to appellant, which it was claimed constituted appellant's absolute and alternative exemptions. On the trial of this action, the jury found the value of such personal property to be \$367.25, and a general verdict was returned for appellant for \$717; and subsequently judgment was entered thereon, which, with costs and interest, amounted to \$849.90. This judgment was subsequently reduced by the court to \$620.74, for which sum it is still in force and unpaid. An execution was issued thereon in January, 1897. Thereupon the respondent applied for and obtained an order on appellant to show cause why the judgment in respondent's favor and against appellant, should not be set off *pro tanto*, against the judgment in favor of appellant, and against respondent. The application for the order was supported by an affidavit setting forth the rendition of the judgments as herein stated. On the return day, the respondent, in support of his motion, introduced the pleadings in both cases and the affidavit on which the order was issued. Appellant introduced testimony showing that the property for the conversion of which he recovered judgment was property that was exempt from seizure or sale under legal process, and also a verified schedule of his property showing that the value of the whole thereof, including the judgment against respondent, was less than the amount exempted by law, and claimed to hold such judgment as exempt from application on his own debts. The court, after a full hearing, granted the motion to set off, and made the proper order therefor. The appeal is from such order.

It is first urged that the judgment rendered by the city justice of the city of Larimore against appellant was and is a nullity, for the reason that no such officer as a city justice of the

peace is known or authorized under our Constitution and laws. The office of the justice of the peace is recognized, and, as such, the officer was claiming to act. This contention cannot prevail. It is conceded that such justice was a *de facto* officer, performing all the functions of a justice of the peace. This attack is purely collateral. It is well settled that the validity of the acts of a *de facto* officer cannot be attacked in a collateral proceeding.

But the second point raised is of more importance. Our statute declares (Rev. Codes, § 5499): "Mutual final judgments may be set off *pro tanto* the one against the other by the court upon proper application and notice." Such was the rule in equity, independent of any statute. 22 Am. & Eng. Enc. Law, p. 446, and cases in note 3. The power is no broader under the statute. But this power will never be exercised where the set-off would deprive a party of his legal rights. Id. p. 448, note 3. It is claimed that the allowance of the set-off in this case would deprive appellant of his legal right to his exemptions. There is a special reason alleged in this case why appellant's judgment against respondent should be protected from such set-off. It is urged that this judgment was obtained: for the wrongful conversion of exempt property, and for that reason it stands in lieu of the property, and is equally exempt; and the cases so hold. *Crawford v. Curroll*, 93 Tenn. 661, 26 L. R. A. 415; *Kaiser v. Seaton*, 62 Iowa. 468; *Cullen v. Harris*, 111 Mich. 20. But we think that holding more applicable in states where certain specific articles are exempt by statute, as is the case in the states from whence these authorities are cited. In this state, we think, the ruling should be placed upon a broader ground. Our Constitution provides (§ 208): "The right of the debtor to enjoy the comforts and necessities of life shall be recognized by wholesome laws exempting from forced sale to all heads of families a homestead, the value of which shall be limited and defined by law, and a reasonable amount of personal property; the kind and value shall be fixed by law." In pursuance of this constitutional requirement, our legislature has declared by § 5516 *et seq.*, Rev. Codes, that to each head of a family there shall be exempt from seizure certain articles which the statute terms "absolute exemptions," and which include all wearing apparel of the debtor and his family, and provisions and fuel for one year. The statute then provides that, in addition to these absolute exemptions, the debtor may select from any personal property that he possesses other property not to exceed \$1,500 in value. To effect this, the debtor must present to the officer holding the process a verified schedule of all his personalty. The law then provides for an appraisal. If the appraised value exceeds \$1,500, the debtor may select from the list any property he desires, but not exceeding in value \$1,500, according to the appraisal. If the appraisal be \$1,500 or less, of course the debtor takes it all. It follows logically that, if we are to give full effect to the exemption law, a debtor has an absolute right to select as a part of his exemptions a judgment that he may own, and it is entirely immaterial upon what the judgment may be based. It is prop-

erty in his hands, and it rests exclusively with himself to say what property, within the limit, he will elect to hold as exempt. Likewise, he might, before his claim was reduced to judgment, have elected to hold that claim as a part of his exemptions. Hence the judgment simply represents exempt property in another form, and all the authorities hold that a judgment that represents the proceeds of exempt property cannot be set off on a judgment against such judgment creditor. The case of *Butner v. Bousier*, 104 Ind. 255, was decided under a statute the same in character as ours, and is exactly in point; and the general principle is sustained by the authorities cited *supra*, and by 1 Freeman, Executions, § 235, and cases there cited. And see *Ellis v. Pratt City*, 111 Ala. 629, 83 L. R. A. 264; *Duff v. Wells*, 7 Heisk. 17; *Reynolds v. Haines*, 88 Iowa, 342, 13 L. R. A. 719; *Millington v. Laurer*, 89 Iowa, 322; *Howard v. Tandy*, 79 Tex. 450; *Below v. Robbins*, 76 Wis. 600, 8 L. R. A. 467. The only cases that we have found holding a contrary doctrine are *Mallory v. Norton*, 21 Barb. 424, *Temple v. Scott*, 8 Minn. 419 (Gil 806), and *Knabb v. Drake*, 28 Pa. 489, 62 Am. Dec. 352. The case in 21 Barb. is entirely destroyed by *Tillotson v. Wolcott*, 48 N. Y. 188. The cases from Minnesota and Pennsylvania are based upon the alleged principle that exemption laws, being in derogation of the common law, must be strictly construed,

—a principle now almost universally discarded.

It is true that the procedure under our exemption statute refers more particularly to seizures under attachments and executions, but that is because it is by means of those writs that property is usually seized. But it would be an exceedingly narrow view of the law that would deny exemptions where it was sought to take property by other means. This court is unqualifiedly committed to a liberal construction of exemption statutes. *Red River Valley Bank v. Freeman*, 1 N. D. 196. In that case we expressly held that the fact that the machinery of the law did not contemplate the exact case there under consideration could not defeat a claim for exemptions. We must make the same ruling here. In response to the order to show cause, the appellant presented a verified schedule of all his personal property, and claimed his judgment against respondent as exempt. His entire personalty outside of that judgment amounted, according to the schedule, to \$27. If there was a doubt as to the correctness of that schedule, the court had full power to investigate the matter. But its correctness was not questioned and the claim for exemptions should have been allowed.

The order appealed from is reversed.

All concur.

OHIO SUPREME COURT.

STATE of Ohio, *Plff. in Err.*,

John POWELL.

(58 Ohio St. 321.)

- *1. Section 7032a, Rev. Stat., making it, among other things, an offense punishable by fine and imprisonment for anyone on the first day of the week, commonly called Sunday, to play baseball or exhibit "any baseball playing," neither requires nor prohibits any religious observance, and does not therefore violate the right of conscience in matters of religion, secured to the individual by the 7th section of our bill of rights.**
- 2. It is competent to the general assembly, in the exercise of its legislative power, to adopt all such wholesome laws as may be necessary to promote the peace, health, and well-being of society. Laws fixing regularly recurring days of rest from all secular pursuits, such as our Sunday laws, are of this character, and do not violate the personal liberty of the individual, secured by the 1st section of our bill of rights.**

(April 19, 1898.)

EXCEPTIONS by the prosecuting attorney to rulings of the Court of Common Pleas for Cuyahoga County reversing a judgment of the Police Court of the City of Cleveland

*Headnotes by the COURT.

NOTE.—For constitutionality of Sunday laws, see note to *Judefind v. State* (Md.) 22 L. R. A. 721; also *People v. Havner* (N. Y.) 81 L. R. A. 689; *Ex parte* 41 L. R. A.

convicting defendant of violating the Sunday law by playing baseball on that day. *Sustained.*

The facts are stated in the opinion.

Messrs. T. L. Strimple, Harvey R. Keeler, and Charles W. Snider, for plaintiff in error:

Sunday is the creature and offspring of the police power of the state, and the validity of the law creating it is neither strengthened nor weakened by the fact that the day of rest it enjoins is the Christian Sabbath.

Blackstone, in his Commentaries, defines the police power to be: "The due regulation and domestic order of the kingdom, whereby the inhabitants of the state, like members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations."

Judge Cooley says, in his work on Constitutional Limitations, 2d ed. p. 572, that "the police power of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which it is sought, not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment

Jentzsch (Cal.) 32 L. R. A. 664, and *Eden v. People* (Ill.) 32 L. R. A. 660.

of his own, so far as is reasonably consistent with a like enjoyment of rights by others."

The legislative power of this state shall be vested in a general assembly, which shall consist of a senate and house of representatives.

Const. 1851, art. 2, § 1.

That includes all legislative power which the object and purposes of the state government may require; and we must look to other provisions of the Constitution to see how far, and to what extent, legislative discretion is qualified or restricted.

Lehman v. McBride, 15 Ohio St. 591.

The repugnancy which must cause the law to fall must be necessary and obvious; if by any fair course of reasoning the law and the Constitution can be reconciled, the law must stand.

Case v. Dillon, 2 Ohio St. 607.

No such prohibition or limitation can be found in the Constitution. Sunday regulation is clearly within the Constitution.

People v. Hawnor, 149 N. Y. 195, 31 L. R. A. 689; *Roberts v. Barnes*, 127 Mo. 405; *Lindemuller v. People*, 38 Barb. 548; *State v. Granneman*, 132 Mo. 326; *Gunn v. State*, 89 Ga. 341; *State v. O'Rourke*, 85 Neb. 614, 17 L. R. A. 830; *State v. Fernandez*, 39 La. Ann. 538; *Cincinnati v. Rice*, 15 Ohio, 225; *Sellers v. Dugan*, 18 Ohio, 489; *Bloom v. Richards*, 2 Ohio St. 387; *Specht v. Com.* 8 Pa. 312, 49 Am. Dec. 518; *Charleston v. Benjamin*, 2 Strobb. L. 508; *McGatrick v. Watson*, 4 Ohio St. 568.

Playing baseball on Sunday comes within the definition of sporting and renders the persons engaged therein liable to the punishment provided for in § 241, Neb. Code.

State v. O'Rourke, 85 Neb. 614, 17 L. R. A. 830.

Mr. J. E. Ingersoll also for plaintiff in error.

Messrs. Solders, Hogsett, & Tilden, for defendant in error:

The statute is in the nature of an *ex post facto* law, in that it makes punishable an act done, which when done is innocent, not prohibited, not criminal.

1 Chitty's Bl. Com. p. 31.

It was impossible that the party could foresee that the action, innocent when it was done, could afterwards be converted into a crime by subsequent law (or as said in § 7092 A, by complaint), and he therefore have no cause to abstain from it.

Any baseball playing on the first day of the week would become an offense, depending entirely upon the views of the various localities and counties of the state—lawful if the liberal sentiment of the community will tolerate it, and unlawful if the religious sentiment of the community disapproves it. It is in the nature of an act depending entirely upon the popular will, and not upon the will of the sovereign power in declaring the act to be an offense.

The absolute and equal freedom of all persons at birth is a fundamental principle of American institutions, proclaimed with independence and incapable of abrogation.

Anderson v. Poindexter, 6 Ohio St. 622.

Those who have advocated Sunday laws, so called, have shown an inclination to treat constitutional limitations lightly.

41 L. R. A.

2 Story, Constr. § 1847.

The Constitution of the state is higher authority than any law. In any case of conflict the fundamental law must govern, and the act in conflict with it must be treated as of no legal validity.

Cooley, Const. Lim. p. 48; *Cincinnati, W. & Z. R. Co. v. Clinton County Comrs.* 1 Ohio St. 81.

That is not legislation which prescribes a rule of conduct contrary to the general law, and orders it to be enforced. Such power simulates itself closely to despotic rule.

The first Sunday law was in the time of Constantine, March 7, A. D. 321.

By the law of the year 386 those older laws effected by the Emperor Constantine were more rigorously enforced, and in general civil transactions of every kind on Sunday were strictly forbidden.

Neander, Church History, p. 300.

In 401, A. D., the bishops passed a resolution and petitioned the Emperor, praying that the public shows might be transferred from the Christian Sunday and from the feast days to some other days of the week.

Soon after this petition, in 425 A. D., the desired Sunday law was procured and the reason attached, to wit: "In order that the devotion of the faithful might be free from any disturbance."

The first Brownist Sunday law, so called, was passed in England in 1623, but this act did not say a word about work, but proclaimed that the holy keeping of the Lord's day was "profaned by people going to bear-baiting, bull baiting, interludes, common plays, and other unlawful exercises and practices;" and with such play (not work) it proceeded to interfere.

A century and a half elapsed after this first Brownist Sunday law, so called, before any work (that is, one's ordinary calling, with the exceptions of works of necessity and charity) was forbidden on Sunday.

All legislation from the earliest dawn of civilization is based upon (however much sought to be denied in our time) the historic truth that Sunday laws represent and embody union of church and state.

Weldon v. Colquitt, 62 Ga. 449; *Davis v. Fish*, 1 G. Greene, 406, 43 Am. Dec. 387; *People v. Ruggles*, 8 Johns. 290, 5 Am. Dec. 335; *Johnston v. Com.* 22 Pa. 102; *Stockden v. State*, 18 Ark. 186; *State v. Amba*, 20 Mo. 214; *State v. O'Rourke*, 35 Neb. 614, 17 L. R. A. 830; *Corey v. Bath*, 35 N. H. 530; *Varney v. French*, 19 N. H. 235; *Moore v. Hagan*, 2 Duv. 437; *Davis v. Somerville*, 128 Mass. 594, 35 Am. Rep. 899; *George v. George*, 47 N. H. 27; *Com. v. Dupuy*, Brightly (Pa.) 44.

The word "desecrate" is from *sacerare*, to consecrate; *sacer*, sacred. To debase of sacred character; to divert from sacred purposes; to violate the sanctity of; to profane; to put to unworthy use. It means the opposite of consecrate.

Consecration is: To appropriate to sacred uses; to set apart, dedicate, or devote to the service or worship of God.

This indicates beyond all question that the main idea underlying such legislation is the religious view maintained as to how the day shall be utilized.

Civil government is civil and has nothing to do by legislation with religious observances on any day, or with aiding any religious sect in enforcing their views as to how the day shall be observed.

Matthew xxii., 21.

The law cannot deprive any man of the right to abstain from religious exercises or religious observances on the first day or any other day of the week.

No law can be maintained making an act done on the first days of the week an offense which may be done on other days of the week without being an offense, unless the act is a transgression of the natural rights of another, and results in injury of which the law takes cognizance.

The majority can decide no such question without serious disturbance and violation of individual rights.

Bloom v. Richards, 2 Ohio St. 387; *Cooley*, Const. Lim. p. 476.

The language of most Sunday laws is so general as to strongly support the idea that spiritual betterment of the abstainer from physical work is what the state is aiming at, although it is sought to justify Sunday legislation on other grounds, that is, sanitary benefits.

Kennell v. Ridler, 5 Barn. & C. 406.

If the action of the people engaged in innocent acts prohibited in the section referred to is not an injury to civil rights, and not a trespass upon the rights of others, in other words, not a nuisance, as recognized by the law, the people have a right to so conduct themselves, and their prohibition is an interference with personal liberty.

The word "sporting" in the main comprehends amusements of the people, worldly action, and this term, years ago in England, received what odium still attaches to the word by reason of the worldliness of the participants therein, and hence Sunday legislation prohibited the same.

State v. O'Rourke, 85 Neb. 614, 17 L. R. A. 830; *State v. Williams*, 85 Mo. App. 545; *St. Louis Agri. & Mechanical Assn. v. Delano*, 37 Mo. App. 284, 108 Mo. 217.

Minshall, J., delivered the opinion of the court:

John Powell, with others was prosecuted in the police court of the city of Cleveland, on an information charging him, in one count, with having on Sunday, May 16, 1897, participated in playing baseball, and, in a second count, with having exhibited a game of baseball playing, on certain grounds in the city, a charge for admittance having been made. The case was tried to a jury on a plea of not guilty. He was found guilty on both counts, and after a motion for a new trial made and overruled, was sentenced to pay a fine and costs of prosecution. The case was then taken to the court of common pleas on error, where the judgment was reversed, and the defendant discharged, on the ground that the section of the Revised Statutes (7032a) under which the conviction was had is unconstitutional. This section, among other things, makes it an offense, punishable by fine and imprisonment, for anyone on the first day of the week, commonly called Sunday, to participate in, or exhibit to the pub-

lic in any "buildlog" or on any "ground" in this state, "any baseball playing." A bill of exceptions was taken by the prosecuting attorney to the ruling of the judge, and, on application, leave was given by this court to file the same. The question presented by the bill is the validity of our Sunday laws. After so many years of acquiescence in their adoption, and, I might say, of almost unquestioned validity, these laws are now assailed on the ground that they violate the guaranties of personal and religious liberty contained in the 1st and 7th sections of our bill of rights. These questions may be better considered in their reverse order.

The 7th section secures to every citizen of the state the fullest liberty of conscience in matters of religion. No one can be compelled to support or observe any form of worship against his consent. If the observance of Sunday as a day of rest and abstinence from all secular pursuits had for its object the enforcement of a religious requirement, there are few lawyers or judges that would undertake to sustain the statute as a valid enactment. It would clearly contravene the section of the bill of rights just referred to. But that they are secular in purpose, and not made to enforce any particular form of religious observance, is sustained by a consensus of opinion in the decisions of the courts of this country, rarely found upon any other subject. Indeed, there is not to be found a decision of a court of last resort to the contrary, except that of the state of California, which has since been overruled by the same court. *Ex parte Newman*, 9 Cal. 502, overruled in *Ex parte Andrews*, 18 Cal. 679. And though the day adopted for the observance of rest may coincide with the religious persuasion of a large part of the people, but not with all, this is not regarded as infringing upon the rights of the latter, since no religious observance of any kind is enjoined. Those who desire can devote the day to religious observances. Others may do as they see fit, so that they do not engage in such secular pursuits as, in accordance with the policy of the law, are prohibited. The policy of Sunday laws is based upon the observed fact, derived from long experience and the custom of all nations, that periods of rest from ordinary pursuits are requisite to the well being, morally and physically, of a people. If there were no such regularly recurring periods, there is reason to believe that the masses would become morbid in body and mind, crime would multiply, and degeneracy likely ensue. Rest recuperates the mind and body, gives new life and hope to the people, and cheerfulness and health attend renewed labor; and, as has been well observed, more, under these circumstances, can be accomplished in six days than would otherwise be accomplished in seven. This is the foundation and policy of all statutes regulating the observance of a day of rest; and whether the day selected is one consonant to the religious views of a portion of the people or not does not affect the validity of the regulation, where no religious observance is enjoined. Religious liberty does not consist in the right of any sect to oppose its views to the policy of a government. Such a claim would end in simple intolerance of all not in accord with the sentiments of the particular sect. Those who,

as a matter of religious faith, observe the seventh day of the week, are not prohibited from doing so; but they cannot insist that others shall do so, nor refuse to observe the day fixed by the state for secular reasons. There are sects who believe in polygamy, and adopt it as a part of their religion. But, however conscientious they may be in entertaining such notions, if one of them should come into Ohio, and bring with him his wives, his religious scruples would not protect him on an indictment for bigamy.

The question, however, is not an open one in this state. In *Bloom v. Richards*, 2 Ohio St. 387, decided in 1853, the whole subject was fully considered. While holding that the making of a contract is not within the meaning of the term "common labor," the statute, as thus construed, was sustained as a secular regulation, that in no way interferes with any one's rights of conscience. Thurman, J., in delivering the opinion, said that "acts evil in their nature, or dangerous to the public welfare, may be forbidden and punished, though sanctioned by one religion and prohibited by another; but this creates no preference whatever, for they would be equally forbidden and punished if all religions permitted them. Thus, no plea of religion could shield a murderer, ravisher, or bigamist; for community would be at the mercy of superstition, if such crimes as these could be committed with impunity, because sanctioned by some religious delusion." "We are, then," he said, "to regard the statute under consideration as a mere municipal or police regulation, whose validity is neither strengthened nor weakened by the fact that the day of rest it enjoins is the Sabbath day. Wisdom requires that men should refrain from labor at least one day in seven, and the advantages of having the day of rest fixed, and so fixed as to happen at regularly recurring intervals, are too obvious to be overlooked. It was within the constitutional competency of the general assembly to require the cessation of labor, and to name the day of rest. It did so by the act referred to, and, in accordance with the feelings of a majority of the people, the Christian Sabbath was very properly selected. But, regarded merely as an exertion of legislative authority, the act would have had neither more nor less validity had any other day been adopted." He then cites a number of cases, particularly *Specht v. Com.* 8 Pa. 312, 49 Am. Dec. 518, and *Charleston v. Benjamin*, 2 Strobb. L. 508, which fully support his opinion as to the secular character of Sunday laws and the policy on which they rest. Among the cases that may be cited sustaining the enactment of Sunday laws, in addition to those already referred to, are the following: *Watts v. Van Ness*, 1 Hill, 76; *Shover v. State*, 10 Ark. 259; *State v. Amba*, 20 Mo. 214; *Hall v. State*, 3 Ga. 18; *Boie v. State*, 7 Gill, 326; *Jones v. People*, 14 Ill. 196; *Story v. Elliot*, 3 Cow. 27, 18 Am. Dec. 423; *Com. v. Has*, 122 Mass. 40; *People v. Hannon*, 149 N. Y. 195, 31 L. R. A. 689; *Hennington v. State*, 90 Ga. 396, 4 Inters. Com. Rep. 413, affirmed by the Supreme Court of the United States, 163 U. S. 299, 41 L. ed. 166. They are also fully collected and well considered in the opinion of Fisher, J., in *State v. Goode*, 5 Ohio, N. P. 179. And it is proper to call attention

to the able dissenting opinion of Field, J., in *Ex parte Newman*, 9 Cal. 518, since the decision of the majority in this case was overruled by an unanimous decision in the subsequent case of *Ex parte Andrews*, 18 Cal. 679; and the law of that state "for the better observance of the Sabbath," sustained, though the same constitutional objections were urged against it that are made in this case, the provisions of their bill of rights being in this regard substantially the same as our own.

But it is further claimed that the statute violates the guaranty of personal liberty contained in the 1st section of the bill of rights. This, though one of the great maxims of our form of government has never been regarded as limiting the power of the legislature in the enactment of such good and wholesome laws as are required to secure the peace, health, and good order of society. The learned Sedgwick in his work on Statutory and Constitutional Construction (p. 153), commenting on the provisions usually contained in the bill of rights of our American constitutions, says: "They are of no little value as safeguards against error and injustice; but I think they must be regarded rather as guides for the political conscience of the legislature than as texts of judicial duty. Important as they are, still they are expressed in such general terms as necessarily to admit of great and prominent exceptions. As to the enjoyment of life and liberty, property, and the pursuit of happiness, all these rights are daily interfered with by the legislature, without scruple, for the common welfare. I suppose it must be admitted that, in a judicial sense, these clauses could not easily be made available." Liberty, as understood in this country, is not license, but liberty regulated by law. The personal liberty of every man is subject to such reasonable regulations as, in the wisdom of the legislature, are regarded necessary to promote, not only the peace and good order of society, but its well-being. This objection to the law is well answered in the clear and forcible language of Justice Field, in the dissenting opinion before referred to. "If," he says, "it be admitted that the legislature possesses the right to restrain each one in his freedom of conduct only so far as is necessary to secure protection to all others, from every species of danger to person, health, and property, no inference can be drawn against the validity of the act under consideration. The character and mode of protection, and what is dangerous to the person or to health and property, must necessarily be left to its determination and in the 1st section of the Constitution no inhibition to the exercise of its power in this respect can be found. The prohibition of secular business on Sunday is advocated on the ground that by it the general welfare is advanced, labor protected, and the moral and physical well-being of society promoted. The legislature has so considered it, and the judiciary cannot say that the legislature was mistaken, and therefore the act is unconstitutional, without passing out of its legitimate sphere, and assuming a right to supervise the exercise of legislative discretion in matters of mere expediency," and which he proceeds to say cannot be done.

We have carefully considered the able ar-

gument of counsel for the judge whose ruling is under review. The gist of his argument is that the purpose of the act is to enforce the observance of Sunday as a religious requirement and calls attention to the claims and views of those most zealous in its enforcement. No doubt, many who advocate Sunday observance, particularly the Christian ministry, do so from the persuasion that our Sunday laws are designed as religious observances only, and insist that they should be more rigidly enforced, that the people may be more accessible to the influences of the Christian pulpit. However desirable this may be from the Christian standpoint, it is certain that it is not in the power of the legislature to accomplish this by any direct legislation, so long as religious liberty is guaranteed, as it is in our bill of rights. This was settled by the case of *Bloom v. Richards*, 9 Ohio St. 387. The fact, however, that such views are entertained of the purpose of the law, and may have controlled the votes of many who supported it in the legislature, cannot affect its real character and proper construction. The purpose and object of the law are to be determined by the language applicable to its subject-matter. Speaking to the same point, Baldwin, J., in *Ex parte Andrews*, 18 Cal. 685, said: "The act itself, in the body of it, explains in what manner the day was to be observed, and shows that the object of it was only to require duties purely civic or secular." A law enacted for sufficient reasons of a secular nature, as the public health, cannot be held invalid because there is a variety of religious notions upon the subject. Nor can the state be prevented from adopting certain civil regulations, recommended by a wise public policy, simply because found to be in accord with the teaching of some religion. There is probably no religious observance that could not be enforced as a secular duty, without violating the guaranty of religious liberty, where there are sufficient secular reasons for doing so, independent of what is ordained as a matter of religion. In general, where there are secular and religious reasons for the same observance or law, the observance or law may be adopted as a civil regulation by the legislature for the attainment of the secular purposes; and, when enforced for these purposes alone, no one can complain of it simply because the observance or law finds support in the precepts of some religion. It is enjoined for secular, and not religious, reasons. It might be questioned whether the Jewish Sabbath was prescribed purely as a religious observance, and without any regard to the temporal welfare of the people. It must be remembered that the Jewish government was in the nature of a theocracy, and its precepts were given without much regard to what was of a spiritual nature, and what was secular and related to the temporal government of the people alone.

Exceptions sustained.

George POLLEY *et al.*, Admsrs., *etc.*, of Morgan Polley, Deceased, *Plff. in Err.*,
v.
Elizabeth A. HICKS.

(68 Ohio St. 218.)

***A delivery to a donee of a deposit book issued by a savings bank, containing entries of deposits to the credit of the donor, with the intention to give the donee the deposits represented by the book, and accompanied with appropriate words of gift, is a sufficient delivery to constitute a valid gift of such deposits, without assignment or transfer in writing.**

(March 29, 1898.)

ERROR to the Circuit Court for Cuyahoga County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover money which plaintiff alleged belonged to her by gift of a bank book by decedent. *Affirmed.*

Statement by Williams, J.:

Suit was brought in the court of common pleas of Cuyahoga county by Elizabeth A. Hicks against George Polley and John A. Hicks, as administrators of the estate of Morgan Polley, deceased, and individually, to recover \$1,816.50, which the plaintiff, in her petition, alleges became her property by gift from Morgan Polley, and was, after his decease, obtained and converted by the defendants to their own use. The gift, it is alleged, was made by the delivery to the plaintiff of a bank book issued by a Cleveland savings bank, showing deposits to the credit of the donor in the amount sued for. Issue was joined by George Polley upon the allegations of the gift, and a trial resulted in a verdict and judgment for the plaintiff, which was affirmed by the circuit court. George Polley prosecutes error here. Some questions are made concerning the state of the record, and a defect of parties, but we do not deem it necessary to report those questions. The facts constituting the alleged gift are stated in the opinion.

Mr. Henry C. Ranney, with Mr. Charles G. Canfield, for plaintiffs in error:

The gift was not completed by the parties; it was not executed and was revoked at the death of the donor.

Gano v. Fisk, 43 Ohio St. 462, 54 Am. Rep. 819; *Simmons v. Cincinnati Sav. Soc.* 31 Ohio St. 457, 27 Am. Rep. 521; *Starr v. Starr*, 9 Ohio St. 75.

Possession and dominion of the property given must vest in the donee, either by express act of the parties, or by unquestioned written title; otherwise, the death of the donor invalidates the gift.

Flanders v. Blandy, 45 Ohio St. 108.

Messrs. Johnson & Hackney for defendant in error.

***Headnote by the COURT.**

NOTE.—For delivery of bank book as gift of money in bank, see *Jones v. Weakley* (Ala.) 19 L. R. A. 700.

Williams, J., delivered the opinion of the court:

The facts which the evidence fairly tends to prove, and which, therefore, in view of the verdict and judgment, must be regarded as having been established to the satisfaction of the jury and the court whose duty it was to pass upon its weight, are substantially as follows: Morgan Polley died intestate in the city of Cleveland December 2, 1892, and the defendants below were appointed administrators of his estate. A few days before his death, Morgan Polley, having then in his possession a bank book issued to him by a Cleveland savings bank, showing deposits by him to the amount of \$1,600 and over, delivered the book to the plaintiff: accompanying the delivery with the declaration that he gave her the book, and the money it represented, as her property. This was done with the intention to thereby make an absolute gift of the book and money to the plaintiff. At that time Morgan Polley was ill of the malady of which he afterwards died; was conscious of his approaching death, and of sound mind. His apparent motive in making the gift was that an engagement of marriage existed between him and the plaintiff, and she was constant in her care of him during his illness. She accepted the gift when it was made, received the bank book into her possession, and retained its actual custody until some time after the death of Morgan Polley, when, without her consent, the defendants obtained possession of it; and George Polley, on its presentation to the bank, received the whole amount appearing to be due upon it, and claims the right to hold and administer the money as assets of Morgan Polley's estate.

The deposit book, under the regulations of the bank, was of such character that the amount on deposit, or any part of it, could be drawn upon the presentation of the book at the bank by the holder, without check or order from the depositor, and it could not be drawn without the production of the book; and any payment made upon a book of that kind was entered on it by the bank, when made, so that it always showed the actual amount which the bank owed upon it. If there was a sufficient delivery to effectuate the intended gift, there was present every element of a valid *donatio causa mortis*, as well as of a gift *inter vivos*. In support of their contention that the delivery was insufficient, counsel for the plaintiff in error cite the cases of *Hamor v. Moore*, 8 Ohio St. 239; *Starr v. Starr*, 9 Ohio St. 75; *Simmons v. Cincinnati Sav. Soc.* 81 Ohio St. 457, 27 Am. Rep. 521; *Gano v. Fisk*, 43 Ohio St. 462, 54 Am. Rep. 819, and *Flanders v. Blandy*, 45 Ohio St. 108. But the question we have here is different from that involved in any of those cases. In the last two of them there was no actual delivery to the donee of the subject of the alleged gift,—in one case, government bonds, and in the other, choses in action due the donor. In *Simmons v. Cincinnati Sav. Soc.*, the gift was of the drawer's check, payable to the donee, which was never accepted by the drawee, and was revoked before its presentation. It was subject to revocation, and there was no liability of the drawee upon it. In the first two of the cases referred to,

the things delivered were the donor's own promissory notes, payable to the donees. They were sought to be made available as a gift of the money which the donors promised to pay; but, the promises being without consideration, they amounted to no more than mere promises to give the money, and could not be enforced. In the case before us, the deposit book which Morgan Polley gave to the plaintiff was issued to him by the savings bank as evidence of its indebtedness to him, and was the only evidence thereof furnished in such cases. And, as no part of the deposit could be withdrawn without presentation of the book, upon which, at the time, the entries of the withdrawals are made by the bank, this book, at the time of its delivery to the plaintiff, showed the exact amount which the bank then owed upon it, and was complete evidence of the bank's obligation to pay that amount to the depositor, or whoever should become its lawful owner when duly presented at the bank. The question, then, which this case presents, is whether there can be a valid gift, *inter vivos* or *causa mortis*, of a chose in action by its delivery to the donee, without assignment in writing by the donor. We are not aware of any reported decision of this court in which the question has been considered. Elsewhere such gifts are sustained by the great weight of authority, and almost with unanimity. In Thornton on Gifts & Advancements (§ 273), that author says, "It may be stated that any written obligation is the subject of gift, without indorsement or assignment." Not only notes, bonds, mortgages, etc., but "all evidence of indebtedness which may be regarded as representing the debt, whether with or without indorsement, are the subject of a *donatio mortis causa*, and, of course, of *inter vivos*." And that doctrine is maintained, as the author shows, in a large number of the American states, and by the English courts. In 2 Redf. Wills, ed. 1866, *812, 813, it is laid down as the established rule that "notes and bills not negotiated so as to pass by delivery, and also promissory notes not negotiable, bonds, mortgages, policies of insurance, and all other evidences of indebtedness which may be regarded as representing the debt, may, by a parol gift, and the delivery of the paper by which the debt is evidenced, either with or without written assignment or indorsement, constitute a good gift *mortis causa*." There seems never to have been serious doubt of the validity of parol gifts of specialties negotiable by delivery, nor much controversy that a valid gift could be made by the delivery of instruments payable to bearer; but it was held in some early English cases that as delivery, without indorsement, of notes payable to order, and of non negotiable obligations, passed only the equitable title, a valid gift could not be made by such delivery. This holding rested upon the theory that it was necessary to resort to equity to compel the donor or his representative to transfer the legal title, and that equity would not lend assistance to compel the completion of a mere voluntary gift. This reason ceased to be of force when the donee became entitled to use the name of the donor or his personal representative in a suit to enforce collection of the instrument, and since all suits at law, as well as in equity,

may be brought in the name of the real party in interest, the rule may be regarded as obsolete. As said in *Thornton, Gifts & Advancements*, § 270: "The old rule that impeded the holding of such gifts as valid because the donee could not maintain an action thereon, is swept away by the more enlightened rule, which compels the personal representative of the donor, upon being indemnified for whatever costs he may be compelled to pay, to permit the action to be brought in his name, or by the equitable rule enforced by statutes or codes that the real party in interest may bring an action upon a note he holds, whether it was indorsed to him or not." The right to give is as clearly incident to the right of property as the right to sell, and choses in action are as much within the scope of this principle as lands and chattels; and hence a delivery, by way of gift, of an instrument evidencing a debt, without written indorsement by the donor, as effectually transfers the beneficial interest in the property to the donee as would such delivery by way of assignment for value. It was said by the master of the rolls in *Veal v. Veal*, 27 Beav. 303, that it was a "much more healthy state of the law that the validity of such a gift should not depend on whether the testator [donor] had written his name on the back of the bill or not, if it be clear that he intended to give them." The indorsement of the donor's name on the instrument is merely evidence of his intention to make a gift, which may be proved aside from such indorsement. In *Grover v. Grover*, 24 Pick. 261-263, 35 Am. Dec. 319, the supreme court of Massachusetts, in answering an objection that no valid gift of a chose in action could be made without written assignment, said that "as a good and effectual equitable assignment of a chose in action may be made by parol, and as courts of law take notice of, and give effect to, such assignments, there seems to be no good foundation for this objection. It is true that the cases, which are numerous, in which such equitable assignments have been supported, are founded on assignments for a valuable consideration; but there is little, if any, distinction in this respect, between contracts and gifts *inter vivos*; the latter, indeed, when made perfect by delivery of the things given, are executed contracts. 2 Kent, Com. 3d ed. p. 438. By delivery and acceptance the title passes, the gift becomes perfect and is irrevocable. There is, therefore, no good reason why property thus acquired should not be protected as fully and effectually as property acquired by purchase. And so we think that a gift of a chose in action, provided no claims of creditors interfere to affect its validity, ought to stand on the same footing as a sale." And this is the rule which prevails in the Federal courts, and in all of the states in which the question has arisen; and it has been before the court of last resort in many of them. *Thornton, Gifts & Advancements*, § 271.

In recent well-considered cases the rule has been applied to sustain gifts made by the delivery, without written transfer, of books of deposit issued by savings banks, in cases not distinguishable in any important feature from that now under consideration. In *Camp's Appeal*, 36 Conn. 88, 4 Am. Rep. 39, it is held 41 L. R. A.

that "a delivery to a donee of a savings bank book, containing entries of deposits to the credit of the donor, with the intention to give to the donee the deposits represented by the book, is a good delivery to constitute a complete gift of such deposits;" that "a delivery of a chose in action that would be sufficient to vest an equitable title in a purchaser, is a sufficient delivery to constitute a valid gift of such chose in action, without a transfer of the legal title;" and that, under statutes which provide "that the assignee of any chose in action may sue upon it in his own name, a delivery of such a chose in action would vest in the donee a legal title." In a case of the same kind in New York (*Ridden v. Thrall*, 125 N. Y. 572, 577, 11 L. R. A. 684), it is said the gift was consummated by the delivery of the savings bank book, "and no other formality was needed to constitute the actual delivery of the bank deposit needful to vest the possession and title in the donee." *Pierce v. Boston Five Cents Sav. Bank*, 129 Mass. 425, 37 Am. Rep. 871; *Tillinghast v. Wheaton*, 8 R. I. 536, 94 Am. Dec. 126, and *Hill v. Stevenson*, 63 Me. 364, 18 Am. Rep. 231, are cases of the same kind, and in which the courts hold as above stated.

We think, on principle and authority, the gift to the plaintiff was legally consummated, and the judgment in her favor should be affirmed. Judgment accordingly.

B. F. HELMAN, Admr., etc., of Sherman Weaver, Deceased, *Plff. in Err.*,

PITTSBURG, CINCINNATI, CHICAGO, & ST. LOUIS RAILWAY COMPANY.

(58 Ohio St. 400.)

"In the trial of an action brought by an administrator to recover damages, under §§ 6134 and 6135, Rev. Stat., it is competent for the defendant to introduce as evidence what the deceased said while in his right mind after the injury, tending to show that the injury was caused by his own fault, negligence, or carelessness.

(May 10, 1898.)

ERROR to the Circuit Court for Miami County to review a judgment reversing a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Affirmed*.

Statement by **Burket, J.:**

Sherman Weaver, having a wife and three small children, and being a yard brakeman in the employ of the Pittsburg, Cincinnati, Chicago, & St. Louis Railway Company, received injuries while in the discharge of his duties as

*Headnote by the COURT.

NOTE.—As to the effect of contributory negligence of person for whose death an action is brought, see also *Meyer v. King* (Miss.) 35 L. R. A. 474.

such brakeman, at Bradford Junction, in this state, on the 29th day of August, 1894, and died, as a result of such injury, four days thereafter. B. F. Helman was duly appointed administrator of his estate, and sued the railway company for damages, under §§ 6184 and 6185, Rev. Stat., and in his petition averred that the deceased was properly riding a cut of cars onto a certain track; that his superior was negligent in allowing another cut of cars to follow so closely as to overtake and bump against his cut of cars, thereby throwing him off, and causing the cars following to run over him; that his superior did not use ordinary care in the management of the cuts of cars; and that the brake on the cut of cars following his was defective, so that the brakeman upon that car could not properly check up the cut of cars so as to prevent the two cuts coming together. The administrator also averred that, under the laws of Ohio, the said Sherman Weaver would have been entitled to recover against said defendant for his injuries so sustained had death not resulted therefrom. The railway company admitted that it was a corporation; that the deceased had been in its employ; that he was hurt and died at the dates stated; and denied all the other averments of the petition; and averred that the injuries of deceased were caused wholly by his own carelessness and negligence. This was denied by the reply. The widow having received and accepted payment out of the relief department, the action proceeded as an action for the recovery of damages sustained by the children only. The railway company offered evidence tending to prove that on the second day after the injury, and while Mr. Weaver was in good mental condition, he stated in a conversation then had with a Mr. Heaton that at the time of the accident he was standing on the foot-board of the car talking to and watching another employee, who was riding a cut of cars on a parallel track, and that, while so talking and watching the other employee, the cut of cars following him struck his cut, and upset him. Objection being made to this evidence, the court sustained the objection, and refused to admit the evidence to be introduced to the jury to which the railway company excepted, and stated to the court what the witness would testify to if permitted to proceed. A verdict was returned in favor of the administrator. A motion was made for a new trial upon the ground, among others, that the court erred in ruling out said evidence. The motion was overruled, and exceptions taken, and judgment rendered on the verdict. The circuit court reversed the judgment upon the sole ground that the court of common pleas erred in rejecting said evidence. Thereupon the administrator filed his petition in error in this court, seeking to reverse the judgment of the circuit court, and asking that the common pleas be affirmed.

Messrs. H. H. Williams and M. K. Gantz for plaintiff in error.

Messrs. Frank Chance and Charles Darlington for defendant in error.

Burket, J., delivered the opinion of the court:

The facts showing that the death was caused

by wrongful act, neglect, or default, and that the act, neglect, or default was such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, should appear in the petition; and it is not necessary to aver that, if death had not ensued, the deceased would have been entitled to recover damages against the defendant in respect to his injuries so sustained; but such averment can do no harm. The principal questions to be tried are whether death was caused by wrongful act, neglect, or default, and, if so, if such act, neglect, or default, was such as would, if death had not ensued, have entitled the party injured to maintain an action, and recover damages in respect thereof. If death was not caused by wrongful act, neglect, or default, or, being so caused, the act, neglect, or default was such as would not have entitled the party injured to recover damages if living, the action by the administrator must fail. That death was caused by wrongful act, neglect, or default, and that the act, neglect, or default was such as would have entitled deceased to recover damages in respect thereof, are conditions upon which the action provided for in §§ 6184 and 6185, Rev. Stat., are given; and the facts constituting these conditions must be averred in the petition, and established on the trial by competent evidence. If facts are averred in the petition which would entitle the deceased, if living, to recover damages for the injuries by him sustained, and facts are averred in the answer, or denials therein made, which, if true, would prevent a recovery on his part if living, the whole evidence taken together must be of sufficient weight to establish affirmatively the facts constituting the conditions upon which the statute gives the right of action, the burden being on the plaintiff. *Wolf v. Lake Erie & W. R. Co.* 55 Ohio St. 517, 36 L. R. A. 872. The defendant therefore has the right to introduce any evidence which tends to weaken or disprove the facts necessary to be established to make out the plaintiff's cause, i. e., the facts constituting the conditions upon which the action is given by the statute. If death had not ensued, the deceased could not recover damages for his injuries, if it should be established on the trial that his injuries were caused by his own carelessness or negligence; and his statements after the injury, and while in his right mind, tending to show that the injury was caused by his own negligence and carelessness, would be good evidence against him in an action brought in his own behalf during his lifetime. Would it be evidence against his administrator in an action under the statute in behalf of the beneficiaries?

It is contended by counsel for plaintiff in error that there is no privity between the deceased and his administrator and beneficiaries, and that the action by the administrator is a new and independent action, given by the statute, not connected with, nor dependent upon, the right of action of the deceased. This contention is not tenable. The statute must be construed in connection with the common law as it existed at and before its passage. While at common law the party injured by the negligence of another had a right of action against

such party for damages, such right of action does not survive, but abates at his death. The effect of the statute is to pick up this abated right of action of the deceased, and permit it to be prosecuted by the administrator, for the benefit of the next of kin. It is not a new right of action that is prosecuted by the administrator, but it is the same right of action which the deceased had until his death. Upon the death of the injured party, the right of action, by the force of the statute, passes by succession to the administrator for the benefit of the next of kin. This succession more clearly appears when considered with reference to the defendant. By his wrongful act he caused an injury which caused a pecuniary loss to both the injured party and to his next of kin. The right of action to recover damages in respect to such act rests in the injured party alone so long as he lives, and should he be compensated in his lifetime no action can be maintained by his administrator or next of kin for damages, even though it should be clear that the next of kin sustained a great pecuniary loss by reason of the wrongful act. In such cases the pecuniary loss sustained by the next of kin is deemed compensated by the increase of the estate of the deceased. Should the defendant fail to make compensation to the injured party during his lifetime, the liability to make compensation for the pecuniary injury resulting from the wrongful act, instead of abating as at common law, is, by force of the statute, kept alive; and the administrator succeeds to the right to bring an action upon such liability to recover damages in the nature of compensation, for the pecuniary loss sustained by the next of kin by reason of such wrongful act.

The liability of the defendant to the party injured, and the liability over to the administrator for the benefit of the next of kin, is for the same wrongful act, and is the same liability; and such liability does not exist in favor of the injured party and his next of kin at the same time, but in succession. There is no new liability created by the statute upon death of the injured party, but the right of succession in the administrator to recover upon the liability already existing is created. So that, when viewed from the standpoint of either the administrator or of the party causing the injury by his wrongful act, there is succession in the right of recovery, which succession is created by force of the statute. And, where there is succession in rights, there is privity between the parties. It therefore follows that the administrator and the beneficiaries stand in privity with the deceased, and that such damages as may be recovered by the administrator are part and parcel of the damages which the deceased had a right to recover during his lifetime. This being so, the administrator, in his action in behalf of the beneficiaries, is bound by the acts and words of the deceased. Whatever he did or said while in his right mind tending to show that the injury was caused by his own fault, neglect, or carelessness is competent evidence against the plaintiff, and in behalf of the defendant. The evidence offered by the railway company, and rejected by the court, was competent and material, and its rejection was prejudicial. The circuit court was right in reversing the judgment and remanding the cause for a new trial.

Judgment affirmed.

TENNESSEE SUPREME COURT.

McNAIRY COUNTY, *Appl.*,

v.

Ellen McCOIN *et al.*

(.....Tenn.....)

An action by a county for indemnity out of the funds belonging to a lunatic may be brought against the lunatic and her guardian, when, by the latter's neglect, the county has been compelled to provide for her as a pauper.

(May 7, 1898.)

APPEAL by plaintiff from a decree of the Chancery Court for McNairy County sustaining a demurrer to the bill in a suit brought to recover compensation for supplies furnished to defendant McCoin who was a lunatic. *Reversed.*

The facts are stated in the opinion.

Messrs. Wood & Barnhill, for appellant:

The ward or her guardian is liable as upon an implied contract for necessities furnished to an insane ward.

11 Am. & Eng. Enc. Law, p. 185, note 2;

NOTE.—As to liability to reimburse county for support furnished to supposed pauper, see also *Albany v. McNamara* (N. Y.) 6 L. R. A. 212.

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Bishop, Contr. § 85; *Sawyer v. Lufkin*, 56 Me. 308; *Reando v. Misplay*, 80 Mo. 251, 59 Am. Rep. 13; *Nichol v. Steger*, 6 Lea, 393.

The McNairy County Asylum for the poor is not purely and exclusively a charity. Shannon's Code, § 2692, subsec. 1, 2.

But however that may be, a county may recover of a guardian of a lunatic ward for necessities furnished and supplied to such ward as an inmate of its poorhouse, or may recover of the ward's estate, and that upon an implied contract.

Goodale v. Lawrence, 88 N. Y. 513, 42 Am. Rep. 259; *Hanover v. Turner*, 14 Mass. 227, 7 Am. Dec. 203; *Templeton v. Stratton*, 128 Mass. 137; *Arlington v. Lyons*, 131 Mass. 328; *Werte v. Blair County*, 66 Pa. 18; *Jasper County v. Osborn*, 59 Iowa, 203; *McCook County v. Kammos*, 7 S. D. 558, 31 L. R. A. 461; *Howard v. Whetstone Twp.* 10 Ohio, 365; *Springfield Twp. v. Demott*, 13 Ohio, 104; *Ashland County Comrs. v. Richland County Infirmary*, 7 Ohio St. 65, 70 Am. Dec. 49; *Muskingum County Infirmary v. Toledo*, 15 Ohio St. 409; *Marion County Infirmary v. Westfield Twp.* 21 Ohio St. 374; *Montgomery County Comrs. v. Ristine*, 124 Ind. 242, 8 L. R. A. 461.

Mr. J. C. Houston for appellee.

McAlister, J., delivered the opinion of the court:

This bill was filed by McNairy county to recover the sum of \$300 for the board and maintenance of a lunatic. The lunatic and her guardian are both made parties defendant. It is alleged in the bill: That some time prior to the year 1891 the said lunatic, Ellen McCoin, left the custody of her regular guardian in Hardeman county, and came to McNairy county. That she remained there for some time, in a very destitute condition,—without friends, and without means of support. That her regular guardian continued to neglect her, and that it was absolutely necessary for the preservation of her life that necessary food, clothing, and medical attention be furnished her. That under these circumstances, in June, 1891, she was admitted by the commissioners of the McNairy county asylum for the poor as an inmate. The authorities of McNairy county at that time were not aware that the lunatic had a guardian in Hardeman county, or that he had any funds in his hands belonging to his ward. The county first became apprised of these facts in 1896, and thereupon made demand of said guardian for compensation for the expense incurred in the board and maintenance of said lunatic. The guardian declined to make compensation, or to remove her, and she is still an inmate of said institution. It is charged that said guardian has in hands the sum of \$560, funds belonging to said lunatic ward, and the bill prays that an order be made on him for the payment of said account out of said funds. A demurrer was interposed on behalf of the guardian and his ward, assigning as grounds thereof: First, that said lunatic ward had been admitted to said asylum without a contract, either express or implied, with the guardian of said ward; second, because said county asylum is a charitable institution, and said necessities were furnished said lunatic gratuitously, and constitute no charge against her or her said guardian. The chancellor sustained the demurrer, and dismissed the bill. The county of McNairy appealed, and has assigned errors.

It is insisted in support of the action of the chancellor that, the county asylum of McNairy county having been established under the general laws of the state, the court will take judicial notice that it is purely a charitable or eleemosynary institution, with no authority of law for charging inmates for accommodations furnished them. It is said, moreover, that there was no contract in this case, either express or implied, and, the accommodations having been furnished voluntarily, the county cannot recover; and the principle is invoked that, if services are rendered gratuitously, compensation cannot afterwards be claimed. It appears from the record that the McNairy county asylum was established in pursuance of the statute, which provides, *viz.*: "There shall be provided at the expense of every county of the state, an asylum for the poor thereof, consisting of a parcel of land of such size and of buildings thereon of such dimensions and construction as the county court may consider necessary and proper, a majority of the justices being present." Shannon's Code, § 2678. "The commissioners shall examine all appli-

cants for admission into the asylum, and admit or reject any applicant as they may think right," etc. Id. § 2690. "No person shall be admitted into the asylum who has not been an inhabitant of the county by actual residence in it for one whole year next preceding his application." Id. § 2691. "In the management of the asylum, the commissioners shall have power, *viz.*: (1) To prescribe rules and regulations for the management of the farm and for the treatment of the inmates of the asylum and modify and change them at pleasure. (2) To prescribe the manner in which said inmates shall live, sleep, be clothed and labor, if any of them are able to labor." It will be observed that in the sections quoted, which are the only provisions of the statute relating to this subject, there is no express authority for the commissioners to demand compensation for the care and treatment of paupers, but the institution is established as a charity, for the benefit of those who are incapable of taking care of themselves. It is insisted, however, that the lunatic ward and her guardian are liable for necessities furnished one who at the time was not a pauper, but had simply been neglected by her guardian. Mr. Bishop, in his work on Contracts (§ 232), lays down the general rule on this subject, *viz.*: "In any case of insanity, one who, whether by formal agreement with the insane person or not, in good faith furnishes him with 'necessaries'—being things required for his sustenance or comfort, and suitable to his means, condition, and habits of life,—can, if he is not otherwise supplied, recover of him, on a promise which the law will imply, what they are reasonably worth. Were the law 'not so, the insane might perish.' Even expenditures and services for the protection of his estate may be included in this class." But while stating this general principle, applicable to individuals who have furnished necessities to the insane, the author lays down a wholly different rule in cases where the benefit has been conferred by the county. "If a statute," says the author, "has imposed on a town or county the duty of rendering support to paupers, . . . after it has furnished the support in a particular instance, thus discharging its own obligation, it can recover therefor nothing of any other body or person. The common illustration is where the pauper is found afterward in possession of property, or his estate is so, upon his death; and it is held that, in the absence of fraud, there is no implied promise whereon to base an action for pay. Another form of reasoning, tending to the same result, is to regard the relief as an executed gift; which, therefore, cannot be reclaimed." Bishop, Contr. § 209. We fail to perceive any sound reason for the distinction taken between the two cases. In the case of *Goodale v. Lawrence*, 88 N. Y. 513, 42 Am. Rep. 259, it was insisted by counsel that, while an action may be maintained by a citizen for supplies furnished to a wife under such circumstances, no such action can be maintained by overseers of the poor. Said Justice Tracy: "No good reason can be assigned for such a distinction. If a citizen who volunteers to assist a wife abandoned by her husband may maintain an action at common law upon the implied assumpsit of the

husband, *a fortiori* may the poor authorities who, in furnishing such assistance, are not volunteers, but act in the discharge of a duty imposed by law." Again, in *Rumney v. Keyes*, 7 N. H. 576, it was held that where a wife, who lived separate from her husband, had become poor, and unable to maintain herself, and was assisted by the town, the town could maintain an action at common law to recover of the husband the amount of the expenditure on her account. Said Upham, J.: "No reason can be assigned why an individual should be holden liable at common law for all necessary supplies furnished by any citizen to his suffering wife or child, arising from his neglect to make such provision, while the town, whose special duty it is to grant such relief, should be debarred from such remedy." In the case first cited (*Goodale v. Lawrence*) it was held that, where a husband refused to support his wife, he neglects a duty imposed by the common law, and incurs a common-law liability to anyone who furnishes her a necessary support.

The duty imposed by the common law upon the guardian to maintain and support his ward is no less obligatory than that imposed upon the husband to support his wife; and if the guardian, with means of the ward at his disposal, breaches his duty, and permits his ward to become a charge upon the county, it should be reimbursed for expenses incurred in supplying necessities to said ward. It is true, the county asylum established under the laws of this state is a charitable institution. It was designed for the care and maintenance of indigent paupers, and not for the benefit of those who have means sufficient to support themselves. If, therefore, it appears that the county, through the neglect of the guardian, has been compelled to provide for one who was not a pauper, it would seem but just that the county should be indemnified out of the funds belonging to the ward; and to this effect is the great weight of authority. *Goodale v. Lawrence*, 88 N. Y. 513, 42 Am. Rep. 259; *Monson v. Williams*, 6 Gray, 416; *Rumney v. Keyes*, 7 N. H. 576; *Alna v. Plummer*, 4 Me. 258; *Charlestown v. Groveland*, 15 Gray, 15; 41 L. B. A.

Hanover v. Turner, 14 Mass. 227, 7 Am. Dec. 203; *Templeton v. Stratton*, 128 Mass. 137; *Arlington v. Lyons*, 181 Mass. 328; *Werts v. Blair County*, 66 Pa. 18; *Jasper County v. Osborn*, 59 Iowa, 208; *McCook County v. Kammos*, 7 S. D. 558, 31 L. R. A. 461. In the last case it appeared there was a statute of South Dakota imposing upon children the duty to support indigent parents, but no provision was made for enforcing same. Said the court: "The duty [under the statute] rests upon the child, but in consequence of his neglect, the statute humanely requires the county to provide such support. The county does not act officiously, but under the coercion of the law, and supplies the support which the son or daughter was under obligation [by statute] to supply. The duty to support being by law put upon the child, he is liable upon the same principles that the father is liable at common law for necessary support furnished to a destitute minor child, whom it is his duty to provide for. If, under such circumstances, the county, under the direction of the law, furnishes necessities to the indigent and helpless father, we think, upon principle, it ought to and may recover therefor against the children whose duty it was to furnish the same, but who neglected and refused so to do." See also *Howard v. Whetstone Twp.*, 10 Ohio, 365; *Springfield Twp. v. Demott*, 13 Ohio, 104; *Ashland County Comrs. v. Richland County Infirmary*, 7 Ohio St. 65, 70 Am. Dec. 49; *Muskingum County Infirmary v. Toledo*, 15 Ohio St. 409; *Marion County Infirmary v. Westfield Twp.*, 21 Ohio St. 374, 375; *Bangor v. Wiscasset*, 71 Me. 585; *Dakota v. Winneconne*, 55 Wis. 522; *Chester County Directors of Poor v. Malan*, 64 Pa. 144; *Turner v. Hadden*, 62 Barb. 480; 2 Kent, Com. 148. The case of *Montgomery County Comrs. v. Ristine*, 124 Ind. 242, 8 L. R. A. 461, decided by the supreme court of Indiana, and holding a contrary view, is out of line with the current of authority, and was decided, moreover, by a divided court.

The decree of the chancellor, sustaining the demurrer, is reversed, and the cause will be remanded for an answer. The county of McNairy will pay the costs of the appeal.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the First Quarter of the Judicial Year Beginning with October 1, 1898, Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS.
- V. FIDUCIARY RELATIONS.
- VI. TORTS; NEGLIGENCE; INJURIES.
- VII. PROPERTY RIGHTS; WILLS; LIENS.
- VIII. CIVIL REMEDIES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

Police power.

A statute prohibiting the deposit of sawdust in a lake or tributary thereto is held to be a valid exercise of the police power, although it does not apply to other lakes or rivers in the state. (N. H.) 177.

Sunday law.

A statute making baseball playing on Sunday an offense is held constitutional. (Ohio) 854.

Nuisances.

An equitable action by a city to compel the abatement of the nuisance of a slaughterhouse is sustained, although it was not injurious to public health, where the action was authorized by the charter. (Minn.) 821.

Highways.

Electric-light poles in streets, if properly placed, are held not to constitute any injury to the rights of abutting owners, but one placed where it will do unnecessary injury and annoy the abutting owner may be removed by mandatory injunction. (Iowa) 845.

The use of a bicycle on the street with handlebars lower than 4 inches below the center of the saddle at the top is in question under an ordinance prohibiting it, and the reasonableness of the ordinance is held to be a question of fact depending on proof as to the safety of such use. (D. C.) 208.

Regulation of business.

The constitutional right to labor and enjoy the fruits thereof is held subject to the legislative power to regulate a business for the protection of the public against incapacity and ignorance, when it directly concerns the public health and welfare, as in case of the business of plumbing. But a statute allowing all members of a firm to pursue the business when one of them has a license, or all members of a corporation to do so when the manager has a license, is held void for lack of equality. (Ohio) 689.

The practice of Christian Science is held not to be the practice of medicine or surgery within the meaning of those terms in a statute. (R. I.) 428.

A statute requiring physicians, though pre-
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viously practising medicine under a license obtained by law, to obtain a new certificate and license, and submit to investigation the validity of the former license and their fitness to practise medicine, is held valid. (Ind.) 212.

The Indiana statute fixing the rate of fare on street railroads in cities of 100,000 or more inhabitants according to the census of 1890 is held constitutional. (Ind.) 337.

Patent-right sales.

Restrictions on sales of patent rights by a statute requiring a copy of the patent to be filed with an affidavit of its validity, and also that any obligation of a vendee for such a right shall include the words "given for a patent right," is sustained as a valid police regulation. (Kan.) 549.

Eminent domain.

An electric passenger railway on a country road is held to constitute an additional burden. (Wis.) 575.

The destruction of property to prevent imminent public danger is held not to be a taking by eminent domain, but rather an exercise of the police power. (Vt.) 566.

The overflow of lands caused by a dam raising the water of a stream above high-water mark to improve its navigation is held to be a taking of property which entitles the owner to compensation. (Minn.) 871.

Confiscation.

An ordinance making it unlawful for the owner of a dead carcass to remove it, but requiring him to pay more than its value as a fee for its removal by a public contractor, is held unconstitutional as an indirect confiscation of the property. (Ky.) 219.

Taxes.

Nonresident trustees are held not to be taxable on property held by them outside of the state, although a statute provides for assessing trustees at the place where the beneficiary is an inhabitant. (Me.) 475.

On the ground that the right to take property by devise or descent is purely statutory, it is held that the Illinois act for taxing inheritances, etc., is constitutional, although it makes different classes of decedents, exempting some
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and making different rates for other classes. (Ill.) 447.

The remission or abatement of the taxes of insane, infirm, or indigent persons is held to be in violation of a constitutional provision for the taxation of all property not expressly exempted by the laws of the United States, or under the Constitution, in proportion to value. (Utah) 407.

A corporation engaged in buying, slaughtering, and selling sheep and lambs is held not engaged in manufacturing, within the meaning of a tax law, although it prepares and sells the animals as refrigerated mutton, rendered tallow, pulled wool, untanned hides, and also as fertilizer made from the offal, including the blood and legs. (N. Y.) 228.

Interstate commerce.

The purchase of a frame for a portrait in accordance with an option included in an order for the making of the portrait in another state is held to be a mere incident of the interstate order, and not within a statute against peddling. (S. C.) 501.

A state statute does not interfere with interstate commerce by providing that a carrier taking goods for transportation beyond its own line shall be liable for the whole distance in the absence of a written contract to the contrary, and even in case of such contract shall have the burden of proving that loss did not occur on its own line. (Va.) 511.

The requirement by state statute of equal, but separate, accommodations for white and colored persons on railroads, is held valid as applied to interstate commerce. (Tenn.) 432.

Public funds.

An injunction against the payment of a state warrant issued for the purchase of the site of an insane asylum at a place other than the seat of government, in violation of the Oregon Constitution, is sustained with disapproval of some of the language in a prior case, and the right of the state in its sovereign capacity to prevent the misapplication of the funds is upheld, without any showing of special injury to the state. (Or.) 692.

Courts.

A judge owning real estate in a city is held disqualified to sit in a suit contesting the validity of a contract to issue a large amount of city bonds which would require a special tax on the real property of the city for forty years. (Cal.) 762.

A statute depriving the justices of the peace of a single town of jurisdiction in criminal cases is held to be a violation of the constitutional provisions for the election of such officers. (N. Y.) 838.

An action by a white man against an Indian who belongs to a tribe and a reservation is held to be within the jurisdiction of a state court. (Wis.) 419.

Militia.

The decision of a board of examiners as to the qualifications and competency of a militia officer is held beyond the power of the court to review on a writ of error. (Mass.) 879.

Elections.

A case of first impression under the Missouri corrupt practices act holds that payments and promises to induce the withdrawal of a
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candidate and the indorsement by his party of another candidate do not constitute bribery of voters, although the fusion candidate thereby receives additional votes. (Mo.) 297.

The ousting of a person from office under a corrupt practices act is held not to be a punishment, and therefore not in conflict with the constitutional provision giving to the legislature the power to disqualify a person from office on account of conviction of an infamous crime. (Ohio) 291.

Primary elections.

The first decision as to the constitutionality of a statute providing for primary elections is probably that in which the California statute is held unconstitutional because it attempts to change the constitutional qualifications of voters. Such primary elections are held to be elections authorized by law within the meaning of the constitutional provision defining the qualifications of electors. (Cal.) 196.

Civil service.

The civil service law of Illinois receives very extensive discussion, and is held constitutional, while an ordinance attempting to change certain subordinate officers to the exempt class is held void. (Ill.) 775.

Officers; women.

A woman is held to be ineligible to the office of notary public under constitutional provisions which require an officer to be an elector, and that an elector must be a male citizen. (Ohio) 727.

Grand and petit juries.

Changes in the number of grand jurors, and in the number necessary to agree on a verdict by a petit jury, are held to be matters of remedy which do not constitute an *ex post facto* law. (La.) 718.

Schools.

The suspension of children from a public school is held proper, although they had not violated the rules, when their father or mother had entered the school during the school hours and used offensive and insulting language to the teacher. (Ga.) 593.

The exclusion of women from the principalship of boys' grammar schools or mixed or combined schools is held to be within the discretion of a board of education having power to prescribe qualifications of teachers and classify or grade them. The constitutional provision making women eligible to "any office of control or management under the school laws" is held inapplicable to teachers. (Pa.) 493.

Local self-government.

The right of local self-government is held to be a constitutional right which is infringed by a legislative attempt to interfere with the management of a fire department by authorizing the governor to appoint commissioners. (Neb.) 624.

City waterworks.

The right of a city to lease or otherwise transfer its waterworks is denied, where no special authority to do so had been given, although it was authorized in general terms to lease or transfer real and personal property for its benefit. (Utah) 805.

Water supply.

Discrimination between consumers, by a water company, in the rates charged, is held to be unlawful. (N. C.) 240.

Lighting railroad track.

An ordinance requiring a railroad company to light a track which it uses at certain street crossings, although the company does not own or lease the road, is sustained, notwithstanding it requires the use of electric lights which are subject to a patent and to the monopoly of an electric-light company in that place, as the municipality has power to prevent extortion in the prices. (Ohio) 422.

Railroad viaducts.

As an exercise of the police power it is held that railroads may be compelled to main-

tain and repair viaducts on which their roads cross the streets of a city. (Neb.) 481.

Compelling operation of franchise.

The duty of a street-railway company to continue to operate its road is held enforceable by mandamus. (Wash.) 515.

Pauper's support.

A county that has been obliged to support a lunatic as a pauper because of the guardian's neglect is allowed to bring an action for reimbursement on the finding that the guardian has funds in his hands. (Tenn.) 862.

Validating void judgment.

A statute attempting to validate void judgments rendered without jurisdiction is held to be beyond the law-making power. (Utah) 504.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

Validity.

An agreement to pay a rebate on purchases at a certain time, upon condition that the purchaser shall have bought exclusively of the seller up to that time, is held to make the condition such an integral part of the contract that the performance of the condition, unless waived or excused, is necessary to the enforcement of the contract for the rebate, even if it involved an invalid contract for a monopoly, since the condition is the sole consideration of the promise, and, if that is illegal, the promise falls with it. (C. C. App. 7th C.) 609.

A contract by officers of different corporations not to engage for five years in any business to compete with that of a new company, to which the old corporations sold their business, is sustained. (Mass.) 189.

But an agreement by the seller of a business not to engage for twenty-five years in the same business, in the state or in the United States, is held void as a general restraint of trade. (Ohio) 185.

ChamPERTY.

ChamPERTY is held in an elaborate discussion by the court of appeals of the District of Columbia to be illegal independent of statute, and to have been so at common law prior to any English statute on the subject. (D. C.) 520.

Lease.

The partial destruction of a building is held to be within the provisions of a statute that a lessee's agreement to repair does not require the restoration of buildings destroyed by fire or other casualty. (Ky.) 792.

Banks.

A depositor keeping a rubber stamp which will make a fac simile of his signature is held not for that reason liable for the loss occasioned by payment of his deposit on checks forged by the use of such stamp, in the absence of his negligence. (Pa.) 695.

Negotiable paper.

An unrestricted guaranty of payment indorsed on a negotiable instrument is held to be negotiable, passing with the instrument. (Kan.) 175.

A condition on the delivery of a note to a payee or his agent that another person must

sign before the note will be operative is held invalid. (Mo.) 823.

The general rule that the drawee of a check or bill of exchange is held to know the signature of the drawer, and makes payment at his own peril, is sustained except so far as it is modified by local custom. (Ohio) 584.

The doctrine of contributory negligence is denied application to the payee of unindorsed checks who does not use sufficient care to prevent a clerk, whom he might have known to be dishonest, from putting them in circulation on forged indorsements. (Mass.) 617.

Carriers.

Mere blindness of a person is held not to justify his rejection as a railroad passenger. (Miss.) 335.

A person having a ticket, and who crosses a track from a station to a platform where passengers are accustomed to take trains, is held to be a passenger under the Massachusetts statute. (Mass.) 198.

Samples of merchandise are held not to be baggage within the meaning of a statute regulating charges on excessive baggage. (Ark.) 838.

Insurance.

A statute making any application, constitution, or by-laws referred to in an insurance policy inadmissible in evidence unless a copy thereof accompanies the policy is held inapplicable to an accident policy. (C. C. App. 3d C.) 194.

A standard guaranty to maintain 80 per cent insurance, stamped on a policy, is held not to supersede a clause avoiding the policy for additional insurance. (Conn.) 159.

An insurance policy allowing the use of wood for a steam engine running a threshing machine only to start or kindle the fire is held not to authorize the use of wood to run the machine for a half hour or so entirely on wood and then use wood together with a small quantity of coal. (Wis.) 316.

The levy of attachments and executions on property is held not to make a policy of insurance void, when it provides that it shall be void for a change of title, interest, or possession, except change of occupants without increase of hazard. (Tenn.) 700.

The total destruction of a building which was insured only against such destruction is held to give no right of recovery when the foundation and the four walls remain substantially intact and the building could be repaired for little more than one third its value. (N. Y.) 818.

Riding on a railroad locomotive by invitation of an officer of the road is held not to preclude a person from being held a passenger within the clause of an accident policy doubling the

insurance for injury to passengers on railroad conveyances. (Cal.) 467.

Insurance obtained by an insolvent without paying the premium except by giving a worthless check is held to be free from any claim of his creditors as against the persons to whom the policy is payable. (Tenn.) 275.

The presumption against suicide is held insufficient to sustain an action for insurance, where a man was found in a cistern with an opening 15x20 inches. (Wis.) 587.

III. CORPORATIONS AND ASSOCIATIONS.

The license of a foreign insurance company is held properly revoked for failure to pay full license fees in past years. (Wis.) 557.

The right of a creditor of a corporation to sue stockholders is held to be merged in a decree obtained in another state for the payment of assessments by such stockholders to a receiver. (Md.) 867.

Building and loan associations.

A statute making valid all contracts of a building and loan association so far as the defense of usury is concerned, passed because the charter authorizing such contracts was of doubtful validity, is held constitutional, although retroactive. (Va.) 589.

See also *supra*, I., as to validating void judgments.

Partnership.

A penalty for wilfully and knowingly cutting trees is held not to apply to a partner for the acts of his copartner, done without his consent or knowledge. (Ala.) 650.

Tolls.

A right to take toll for a bicycle is denied under a charter authorizing toll to be collected from every carriage drawn by one or more beasts, and providing that any person driving any carriage of burden or pleasure might be stopped when attempting to pass without paying the toll specified. (N. J.) 457.

IV. DOMESTIC RELATIONS.

The annulment of a marriage because the husband is constitutionally afflicted with syphilis and in a state in which his chances of cure are very remote and doubtful may be granted, under Mass. Pub. Stat. chap. 145, § 11, on the ground of fraud, where, with knowledge of his condition, he did not inform his wife in regard to it, and she, learning of it on the day of the marriage soon after the ceremony, refused to live with him as his wife, and filed the libel for annulling the marriage before its consummation. (Mass.) 800.

The communication of syphilis to a wife by her husband, who has the disease in the tertiary stage and is probably incurable, whereby she is kept in a constant state of suffering, is a ground for a divorce under 1 Pepper & L. Dig. p. 1638, pl. 11, allowing a divorce for cruel and barbarous treatment endangering the wife's life or rendering her condition intolerable and life burdensome. (Pa.) 802.

A business partnership between husband and wife is held invalid under a statute making her liable for her debts contracted in her own

name as well as for her torts in which the husband did not participate. (Me.) 363.

A division of property between persons who have lived together as husband and wife is held to be within the power of the court on decreeing the nullity of a marriage because of a prior existing marriage of one of the parties, when the action is for a divorce. (Kan.) 849.

A stepfather is held not to be a parent under a statute giving a right of action for death, although the children were dependent upon him and he had no other children. (Ga.) 211.

The regularity, legality, or sufficiency of proceedings by which a child is committed to an industrial school is held not to be open to question on habeas corpus instituted by a parent, if the detention is manifestly for the welfare of the child. (Tenn.) 284.

The unborn heirs of a person against whose estate an action is brought to establish claims are held bound by the decree, if the living heirs of the same class were parties to the action. (Va.) 708.

V. FIDUCIARY RELATIONS.

A person is held not to be disqualified for executor by reason of a disputed indebtedness to the estate, where the statutes expressly specify grounds of unfitness among which this is not included. (Ala.) 154.

An administrator *de bonis non*, who at common law has the right to receive intestate property which exists *in specie*, unchanged and unconverted in the hands of a third person who has no right to it, is held to have, in Connecticut, the right to intestate property wanted for

distribution, even if it has been technically "administered." (Conn.) 204.

A provision in a will for the removal of a trustee and the appointment of another by the beneficiary, without the aid of the courts, for what he may deem good and sufficient cause, is upheld; but it is held that it must not be exercised wantonly and capriciously or arbitrarily, and its exercise may be reviewed by a court of equity. (D. C. App.) 787.

Creditors of an insolvent who join with him

in his deed of trust for their benefit are held not to be liable for goods purchased by the trustee in carrying on the business under the trust. (N. D.) 252.

The adoption by receivers of a street railway company of metal safes to be carried by con-

ductors for receiving fares, into which passengers are required to deposit their fares while the conductor registers them, is held to be a detail of management within the discretion of the receivers which the court will not control. (Mich.) 817.

VI. TORTS; NEGLIGENCE; INJURIES.

Penalty.

The refusal of a waiter in an eating house to wait upon a colored patron is held to make the proprietor liable to a statutory penalty, even if he did not aid or abet the waiter in his action. (Wis.) 658.

Civil liability for a penalty is denied in case of a railroad company where its conductor received unlawful rates of fare without the carrier's authorization or approval. (W. Va.) 689.

See also *supra*, III., as to partner.

Death of child.

A right of action by parents for the death of a minor child, causing them the loss of his services, is held not sustainable at common law. (Tex.) 807.

The right of action of the mother of a child whose father is dead to recover for the wrongful death of the child is held unaffected by the fact of her remarriage and the stepfather's assumption of parental obligations toward the child. (Mo.) 385.

Negligence as to fire.

A person who lies down on hay or straw in a barn and goes to sleep with a lighted pipe in his mouth is held liable for negligence and the consequent loss of the buildings of another person to which the fire is communicated from the barn which he sets on fire. (Mich.) 381.

Negligence in permitting oil to stand on a station platform in violation of statute and when the platform has become saturated is held not to be the proximate cause of loss by a fire set by the careless dropping of a match by a man who comes there in his own right to deliver goods. (Mass.) 794.

As to electricity.

A telephone lineman is held negligent in touching a span wire in contact with a trolley wire, an insulator of which was broken, when he had failed to test the insulator and knew that there was no other person except the linemen to make such tests. (Wash.) 410.

As to logs floating.

Damages to riparian owners by logs floated in a reasonably careful manner are held to give no right of action. (Minn.) 494.

As to elevator.

The insufficiency of a railing at the shaft of a freight elevator is held not to make the owner liable for failing to comply with the statute, in case an injury occurs because a third person, in using the elevator, has left the railing out of place and the shaft unguarded. (N. Y.) 487.

As to staging.

For the fall of an additional staging erected by a builder's employee on the main staging in a building, at the request of an employee of a manufacturer of ornamental work who had come to put up such work made on the builder's order, is held not to make the manu-

facturer liable to such employee, who was told that the builder would see to the staging, although he was assured that it would be entirely safe. (Conn.) 200.

A gratuitous lender of brackets for use in a staging is held not to be liable for an injury to a servant of the borrower, caused by a defect in the brackets of which the lender did not know, even if he ought to have known thereof. (N. H.) 889.

As to highway.

The purchaser of a street railway so constructed as to make a street defective is held liable for resulting injury to a traveler, although he had left the railway company in possession under an option to purchase, but without any agreement to remedy the defects. (Wis.) 287.

The duty of the owner to keep in repair a grate in a sidewalk in front of his premises is held to continue, notwithstanding his lease of a part of the adjacent building to a tenant who has the exclusive right to use the grate. (N. Y.) 554.

Landlord's liability.

A landlord is held liable to his tenant for dangers of which the former did not know if he might have known of them by the exercise of reasonable care and diligence. (Tenn.) 278.

Injury to passenger.

An experienced traveler who, in attempting to enter the closet of a sleeping car about 6 o'clock in the morning, when it is passing through a tunnel and the car is dark, by mistake steps out of the vestibule and falls on the track, is held guilty of negligence which precludes his recovering against the carrier. (N. Y.) 724.

A passenger attempting to enter a car of a mixed train at a distance from the station is held to have no remedy for injury caused by the sudden jolting of the car in coupling while the train was being made up. (N. Y.) 490.

Injury to trespasser.

The liability of the owner of premises for injury to a child who was trespassing thereon, by a wire projecting from the shaft of machinery, is denied, although children sometimes went there to play, and tramps resorted to the spot. (N. D.) 677.

The liability for injury to a child playing on a turntable is denied in a New Jersey case, where the turntable was on the owner's own premises. (N. J.) 831.

Injury to servant.

The want of self couplers for freight cars is held to be negligence *per se* on the part of a railroad company. (N. C.) 399.

The employment of a boy seventeen or eighteen years old to manage the brake controlling the passenger cage connecting with a mine is

held not to be negligence toward a coemployee, where the boy appeared competent for the place; and the fact that, after operating the machinery correctly for seven months, he turned it on one occasion the wrong way is not, in itself, sufficient to show that he was incompetent, or that the master was liable for the accident. (Mich.) 88.

Independent contractors.

Negligence of an independent contractor in

blasting while excavating preparatory to building is held not chargeable to his employer so as to make him liable for injuries to a building on adjoining premises. (N. Y.) 891.

Imputed negligence.

The doctrine of imputed negligence as applied to children is repudiated in an extensive opinion. (Ind.) 798.

VII. PROPERTY RIGHTS; WILLS; LIENS.

The right to cross the unimproved land of a person to reach a public pond, for the purpose of cutting and carrying away ice, is held not to exist under an ancient ordinance giving the right to fish and fowl there and to pass and repass on foot for that purpose. (Mass.) 268.

Water rights.

The appropriation of more water than is needed for the beneficial use intended is held ineffectual to prevent the subsequent appropriation of the excess by other parties to a beneficial use. (Utah) 311.

The discharge of mineral water from an artesian well after its use in a bath house by persons afflicted with infectious, syphilitic, or other similar disorders by carrying it to a stream which constitutes the only available drainage unless a sewer is built for more than a mile to a river which would cost from \$3,500 to \$4,000, besides the cost of purchasing the right of way, is held lawful. (Ind.) 787.

Copyright.

The lease of reference books of a mercantile agency to subscribers to be returned when the subscription expires is held to be a publication which will defeat a common-law copyright. (N. Y.) 846.

Trademark.

A trademark used by the seller of shoes, which indicates that they are made at a place where they are not made, and which is adopted by him to get the benefit of the reputation of shoes made at that place, is held to be so deceptive and misleading that it will not be protected in equity. (Ga.) 470.

The use of the name "Minneapolis" or "Minnesota" on flour made in Milwaukee from wheat of a different grade than that used by Minneapolis millers is held to be a wrong which the Minneapolis millers may prevent by injunction. (C. C. App. 7th C.) 162.

Tradename and goodwill.

A school carried on by the widow and children of a man who formerly conducted it, and which is claimed to be the successor of a school established nearly a century before by one of his ancestors, is held lawful as against another member of the same family who conducts a school under the family name in another part of the state. (N. C.) 243.

Gift.

Delivery of a deposit book with intent to give the deposits represented thereby is held a sufficient delivery of deposits in a savings bank, without any assignment or transfer in writing. (Ohio) 858.

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Husband's estate.

The right of a husband to use and rent his wife's real estate existing under statutes in force at the time of the marriage and the acquisition of the property is held vested and beyond the power of the legislature to take away. (Ky.) 853.

Deed to defraud wife.

A secret unrecorded deed made on the eve of marriage to prevent a homestead right of the wife from vesting in the land is held fraudulent, although such right, if vested, might have been defeated by the husband's removal from the premises. (N. D.) 258.

Assignment for creditors.

The preference of an usurious debt in an assignment for the benefit of creditors is held to make the assignment void. (Miss.) 707.

Homestead of infants.

A sale of a homestead descended to infants by order of the probate court is held to be allowable for their benefit under constitutional provision giving them an interest in the rents and profits during their minority and vesting in them the entire estate on the death of both parents. (Ark.) 714.

Trusts.

The right of the author of a trust to make the interest of the beneficiary unassignable and free from subjection to claims of his creditors is sustained. (Cal.) 544.

A person creating a trust, reserving a life interest, is denied the power to keep such interest free from the claims of subsequent creditors, and a statute prohibiting the beneficiary of a trust for the profits of lands is held inapplicable to a trust for the benefit of the grantor. (N. Y.) 895.

Wills.

The effect of failing to provide for children in a will is held, under Michigan statutes, to be that in case of afterborn children the intent must appear from the will itself in order to prevent them from taking as in case of intestacy, but as to the children previously born the intent need not appear from the will itself. (Mich.) 820.

Lien of judgment.

On setting aside a mere money judgment, it is held that the statutory lien cannot be continued so as to attach again to the judgment finally rendered. (Neb.) 222.

Subrogation to tax lien.

A sheriff's claim of subrogation to a tax lien as against a prior mortgagee to whom the premises had been conveyed absolutely in part

payment of the debt, which was more than the value of the property, is denied, where he had accounted for, but failed to collect, the taxes,

when there was personal property out of which he might have collected them. (Ky.) 851.

VIII. CIVIL REMEDIES.

The effect of contributory negligence on a right of action accruing in another state is held to depend on the law of the place of injury, and not of the forum. (Ky.) 614.

The taking of the testimony of the plaintiff at her own home against defendant's objection is held, at most, an irregularity which would not defeat the judgment, where the judge and jury were present when the evidence was taken. (Wis.) 568.

Evidence.

An attempt to procure false testimony or to corrupt jurors is held provable to raise a presumption against the guilty party. (Pa.) 805.

Evidence of what a person said after receiving injuries that resulted in his death, tending to show that it was due to his own fault, is held admissible in an action by his administrator. (Ohio) 860.

A family record in a Bible is held incompetent proof of the age of a person, when the entries do not appear to have been made contemporaneously with the facts recorded, and there is no proof as to when or by whom they were written, or of the writer's knowledge of the facts, or that the persons named therein ever acknowledged that the record was authentic. (N. J.) 449.

An indorsement on a certificate of deposit directing payment to the order of a certain person for account of the indorser is held to be a restrictive indorsement which cannot be varied by parol evidence. (Neb.) 439.

Presumptions.

The presumption of negligence on the part of a carrier is held authorized when a passenger is injured through some defect in the carrier's appliances or by some act or omission of a carrier's servant, which might have been prevented by a high degree of care. (Me.) 836.

A presumption of negligence is held inadmissible when an injury is shown without anything to show what caused it, as in case of a person who was found unconscious in a tunnel on a mimic railway run for amusement, without anything to show how he left the car. (Md.) 478.

Damages.

The damages for mining coal when done by a tenant in good faith but without right are held to be the value of the coal in place. (Ohio) 681.

Only nominal damages are held allowable to a railroad company for telegraph poles and wires along its right of way, when they do not interfere with the use of the railroad right of way. (Tenn.) 408.

Application of payments.

A payment of bonds by a railroad contractor

to a subcontractor is applied *pro rata* to the lienable and nonlienable expenditures under the subcontract. (C. C. App. 6th C.) 458.

Ejectment.

Ejectment for the possession of land dedicated for use as a street is held maintainable by a city, although it does not own the fee. (Cal.) 835.

Garnishment.

Garnishment of a debt due to a nonresident creditor who is not personally served in the state and does not voluntarily appear is held void for want of due process of law. (Ala.) 881.

Injunctions.

An injunction against prosecutions for violations of a statute or ordinance is denied, even when the constitutionality or validity of the enactments is contested. (Ga.) 772.

An injunction against a bawdy house on the ground that it is obnoxious to the community and depreciates property is denied because there is an adequate remedy under the criminal law. (Ky.) 219.

An injunction against excluding representatives from the right to vote in the supreme lodge of a benevolent society is granted, but an injunction against the exercise of the duties of the offices by persons irregularly elected is held not to be the proper remedy. (Md.) 720.

Mandamus.

Mandamus to the governor is held to be beyond the power of the courts, although it may be issued against the lieutenant governor and speaker of the assembly during a recess of the legislature. (N. Y.) 281.

Limitation of actions.

Payments made by the maker of a note are held insufficient to interrupt the running of the statute of limitations as to an indorser. (Mo.) 581.

The running of the statute of limitations in favor of a surety is held unaffected by payments made by the principal debtor or his absence from the state. (Ind.) 612.

Prohibition.

A justice of the peace attempting to exercise jurisdiction of an action under a statute which has been repealed is held to be exceeding his legitimate powers and subject to prohibition. (W. Va.) 414.

Set off.

A set-off of judgments is denied where all the property of one of the debtors, including his judgment against the other, is less than the statute exempts from seizure. (N. D.) 852.

IX. CRIMINAL LAW AND PRACTICE.

Absence of a judge from the courtroom in a felony case for about twenty minutes, during which the trial goes on, with a member of the bar presiding, is held fatal to the prosecution. (Miss.) 569.

Evidence.

A box of sand containing footprints made by a witness with the shoes of an accused person is held admissible on evidence that they are identical with those made in the sand of a desert, which are claimed to have been made by the accused. (Cal.) 157.

The burden of proving an alibi is held to be upon the defendant after the state has made out a prima facie case,—at least to the extent of raising a reasonable doubt of guilt. (S. D.) 530.

Coercion of jury.

A jury are deemed coerced when they agree after eighty-four hours deliberation, when they had been kept without beds or cots, part of the time in a small room, and had reason to believe that still further detention in this way would be the penalty of their failure to agree. (N. Y.) 644.

Suspension of sentence.

A suspension of sentence without conditions expressed in the judgment is held in Ohio to be subject to the power of the court at any time during the same term, acting on its own motion, to order the execution of the sentence. (Ohio) 472.

But in Illinois the indefinite suspension of a sentence without recognizance, after a plea of 41 L. R. A.

guilty, is held to be such a loss of the power of the court that it cannot subsequently impose a sentence. (Ill.) 478.

Shooting.

Persons charged with shooting firearms within a town without reasonable excuse are held entitled to show that they shot at a rabbit in a corn patch and had suffered from the depredations of rabbits. (S. C.) 503.

Bigamy.

Bigamous cohabitation is held to continue so long as the parties live together ostensibly as husband and wife. (Ala.) 760.

Giving free transportation.

Giving free transportation to an official is held to be indictable under the North Carolina statute. (N. C.) 246.

Possession as a crime.

A statute making the possession of any record of any lottery drawing or a ticket an offense unless it is held for the purpose of evidence of a violation of the law is held applicable to one who had possession of such articles without knowing what they were, and the statute thus construed is held constitutional. (Md.) 551.

Fines.

The fines collected for offenses committed against the state, which are set apart for a literary fund by the Virginia Constitution, are held not to include a pecuniary forfeiture imposed upon an express company for charging greater rates than it is authorized to charge. (Va.) 436.

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ing of Utah Const. art. 8, § 9, as the question whether an order is appealable depends on its effect on the rights of the parties rather than the stage of the litigation. *Ogden City v. Bear Lake & R. Waterworks & Irrig. Co.* (Utah) 805

2. The amount in dispute for the purpose of determining jurisdiction on appeal is that claimed in the petition, where a nonsuit is granted, although the sum allowed by the jury on a former trial was much smaller, and the action is for killing a minor whose earnings at the rate received at the time of his death would not have amounted to the sum claimed, before his majority. *Hennessy v. Bavarian Brew. Co.* (Mo.) 885

3. A decision that a regulation is reasonable upon its face as matter of law, without regard to the facts in proof, is subject to review, although, if the court had decided the question as it should have done, as a question of fact, there could have been no appeal. *Moore v. District of Columbia* (D. C. App.) 208

4. An objection that footprints made in a box of sand were not made under conditions similar to those made in a desert is not raised by a general objection to the proof of the footprints in the box, without any specific objection to the dissimilarity of the conditions. *People v. Searcey* (Cal.) 157

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7. It is error to suggest to a jury as a reason for agreeing, that failure to agree is "almost to confess incompetency," as personal considerations should never be permitted to influence their conclusions. *People v. Sheldon* (N. Y.) 644

8. A jury must be deemed coerced so that a judgment of conviction based on their verdict will be reversed, when they agreed after they had been out for eighty four hours without beds or cots, during forty of which they had been confined in a small room, and from the remarks of the court and the treatment they had received they had every reason to believe that a still longer confinement on chairs

and hard benches was in store for them, while the judge had also told them after the foreman had reported that their agreement was impossible, that a failure to agree was "almost to confess incompetency." *Id.*

9. Allowing the plaintiff in an action for personal injuries to exhibit her actual condition to the jury by lying on a lounge, with her physician attending her, when her testimony is taken, and allowing her daughter to weep, is not ground of reversal. *Selleck v. Janesville* (Wis.) 563

10. Reference by the court to the "crime charged," in its instructions, will not be regarded as having misled the jury from the fact that a witness incidentally stated that accused had been arrested upon another charge than that for which he was on trial. *State v. Thornton* (S. D.) 580

11. The fact that there was no competent evidence to sustain a verdict for plaintiff when a motion for nonsuit was made at the close of plaintiff's evidence is immaterial, where defendant has introduced evidence which supplies the deficiency. *Gagnon v. Dana* (N. H.) 589

12. A question as to the competency of evidence which cannot affect the decree will not be considered on appeal, where there is ample proof, unassailed, to justify the findings and decree. *Hague v. Nepht Irrig. Co.* (Utah) 811

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13. A decision by the Kansas City court of appeals is not binding on the Missouri supreme court upon subsequent appeal to it after retrial in the circuit court. *Hennessy v. Bavarian Brew. Co.* (Mo.) 385

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ASSUMPSIT.

One who voluntarily and knowingly deals with parties combined to monopolize trade and arbitrarily control prices cannot accept and retain the goods and have a right of action against the seller for the money paid, or any part of it, either upon the ground that the combination was illegal or that its prices were unreasonable, however urgent the need of dealing with such combination may have seemed for preservation of business interests, as such need cannot change the voluntary character of the payment. *Dennehy v. McNutta* (C. C. App. 7th C.) 609

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1. A bank account kept by a person as administrator cannot be applied by the bank to the payment of a check drawn by him individually. *First Nat. Bank of Belmont v. First Nat. Bank of Barnesville* (Ohio) 584

2. Presentation for payment of a check by a bank which is the indorsee for collection does not justify the drawee bank in relaxing its vigilance in determining whether or not the name of the drawer is genuine. *Id.*

3. An indorsement for collection is notice to the drawee that the indorsee is not the owner of the paper, but only the agent of the owner authorized to receive payment for him. *Id.*

4. An indorsement of a check, draft, or bill of exchange, "For collection," by one other than the payee, guarantees the genuineness of the names of the indorsers, but not that of the drawer. *Id.*

5. The drawee of a check, draft, or bill of exchange is held to know the signature of the drawer, and makes payment in case of forgery at his own peril, unless the rule is modified by local custom. *Id.*

6. A depositor's procurement of a rubber stamp which will make a fac simile of his signature, of which the bank has no notice, does not, in the absence of his negligence, make him liable for the loss occasioned by payment of his deposit on forged checks made by one who had unlawfully and clandestinely obtained the stamp and used it in forging checks. *Robb v. Pennsylvania Co. for Ins. on Life, etc.* (Pa.) 695

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BATHS. See **WATERS**, 5.

BAWDY HOUSE. See **INJUNCTION**, 7.

BENEVOLENT SOCIETIES. See **INJUNCTION**, 4, 5.

The representation of the 4,000 Maryland members in the Supreme Lodge, Order of the Golden Chain, extends, under Md. Laws 1894, chap. 295 (Md. Code, art. 23, § 148e), to eight members, as the law gives the right to as many representatives as will equal the number of times the membership is greater than the unit of representation, which is the number of members necessary to secure one representative, and the constitution of the organization gives each state one representative for the first 500 members, although it also proceeds to declare that there shall be two representatives for 1,500 and three for 4,500. *Supreme Lodge Order of Golden Chain v. Simering* (Md.) 790

BIBLE. See **EVIDENCE**, 12.

BICYCLES. See also **TOLLS.**

The reasonableness or unreasonableness of an ordinance or regulation prohibiting any person to ride on the streets a bicycle having handlebars of which the lower end is on a plane more than 4 inches below the top of the saddle at its center is more or less a question of fact depending on the proof as to the safety of such a vehicle when used by a person of ordinary care and skill in riding. *Moore v. District of Columbia* (D. C. App.) 208

BIGAMY.

Cohabitation with a bigamous wife in violation of Ala. Crim. Code 1896, § 4406, continues while the parties live together ostensibly as husband and wife, presenting to the community the appearance of the open and demoralizing example of living in an illicit relation, although in fact such relations have ceased because of the wife's physical incapacity. *Cox v. State* (Ala.) 760

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1. A conditional delivery of a promissory note to the payee or the agent of the payee cannot be made so as to make the subsequent signature of another person essential to its validity. *Hurt v. Ford* (Mo.) 823

2. One who writes on the back of a note an assignment with a guaranty of payment is an indorser. *Madrox v. Duncan* (Mo.) 581

3. An unrestricted guaranty of payment indorsed on a negotiable instrument is negotiable, and passes with the title to the instrument. *Commercial Bank v. Cheshire Provident Institution* (Kan.) 175

4. An indorsement on a certificate of deposit of the words, "Pay to the order of R. C. O. cash, for account" of the indorser, is a restrictive indorsement which vests no general property to the paper in the indorsee, but merely constitutes him an agent for collection. *United States Nat. Bank v. Geer* (Neb.) 439

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1. The blindness of a person does not justify his rejection as a passenger of a railroad when unaccompanied by some other person, unless he is otherwise incompetent to travel alone. *Zackery v. Mobile & O. R. Co.* (Miss.) 885

2. A person passing from a railroad station across a track to a platform, intending to take a train for which he has purchased a ticket, is a passenger within the meaning of Mass. Pub. Stat. chap. 112, § 212, relating to the liability of a railroad company for negligently causing the death of a passenger. *Young v. New York, N. H. & H. R. Co.* (Mass.) 198

3. An experienced traveler who opens a vestibule door of a sleeping car by mistake, about 6 o'clock in the morning, while the train is passing through a tunnel and the car is dark, and steps off upon the track, when he supposes he is entering the car closet, is guilty of such negligence as will preclude his recovery even if the carrier is deemed negligent. *Piper v. New York C. & H. R. Co.* (N. Y.) 724

4. The sudden jolting of a passenger car on a mixed train while the train was being made up and a passenger was attempting to enter the car at a distance from the station, without the knowledge of any person in control of the train, although the station baggage-master knew it, does not render the railroad company liable to the passenger for resulting injuries, in the absence of any invitation to get on the car at that place. *Jones v. New York C. & H. R. Co.* (N. Y.) 490

Baggage.

5. Samples of merchandise carried by a traveling salesman do not constitute baggage within the meaning of Ark. act April 19, 1895, regulating charges on excess baggage, but may be charged for by the railroad company as freight. *Kansas City, P. & G. R. Co. v. State* (Ark.) 838

Regulation of rates.

6. In order to exempt a common carrier from legislative control over its rates of fare, the exemption must be made by clear and unmistakable language inconsistent with the exercise of such power by the legislature. *Indianapolis v. Navin* (Ind.) 837

7. A railroad company is not liable for the penalty of \$500 for overcharge of freight or passenger rates under W. Va. Code 1891, chap. 54, p. 559, cl. v, for the mere charge of it by a conductor, unless the company authorized or approved the act. *Hall v. Norfolk & W. R. Co.* (W. Va.) 669

8. W. Va. Code 1891, chap. 54, § 82c, subs. 7, 8, as to classification of freight and rates of charges therefor, are repealed by W. Va. Acts 1895, chap. 17. *Norfolk & W. R. Co. v. Pinnacle Coal Co.* (W. Va.) 414

9. An intention to violate the law prohibiting free transportation of favored passengers is not essential to constitute a violation of N. C. Acts 1891, chap. 320. *State v. Southern R. Co.* (N. C.) 246

10. Circumstances and conditions which surround two persons are not dissimilar so as to relieve a railroad company from the prohibition of N. C. Acts 1891, chap. 320, § 4, against discriminating in rates between persons under substantially similar circumstances and conditions, merely because one is a high official, or a larger shipper, or a politician of power, whose influence may be of service to the company, and the other is not. *Id.*

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CASE.

Injury to another's property in the exercise of a legal right—especially one conferred by statute—does not render one liable for damages, unless they were caused by want of care and skill ordinarily exercised in like cases. *Coyne v. Mississippi & R. R. Boom Co.* (Minn.) 494

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CERTIORARI.

1. A writ of certiorari does not lie to review a decision of a question of fact upon evidence heard. *Demlin v. Dalton* (Mass.) 379

2. Certiorari will not lie to review the decision of a board of military examiners respecting the competency of a person to be a militia officer, as the proceedings of the board are not judicial. *Id.*

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CHAMPERTY.

1. Champerty is illegal, independent of statute, and the English statutes of Edw. I. and III. and 32 Hen. VIII. on this subject were merely declaratory of the common law. *Johnson v. Van Wyck* (D. C. App.) 520

2. An agreement by an attorney to prosecute a suit entirely at his own expense, in consideration of one half of the recovery, is champertous. *Id.*

3. The rule that champerty in an incidental contract will not defeat title does not apply so as to allow a recovery of land by a trustee whose title is derived through champertous conveyances which have a merely nominal consideration aside from champertous agreements to prosecute suits for the property at the expense of the various grantees. *Id.*

4. The fact that a champertous trust is in part for the benefit of the heirs of one who conveyed land in consideration of a share of the prospective recovery in champertous litigation will not make the trustee's title valid for any part of the property. *Id.*

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CHECKS. See also BANKS; ESTOPPEL, 3-5; NOTICE.

1. The fact that checks are taken in absolute extinguishment of debts does not relieve the drawer from his legal obligations to the payee as drawer, when the checks have been stolen from the payee and collected upon a forged indorsement. *Shepard & M. Lumber Co. v. Eldridge* (Mass.) 617

2. Negligence of the holder of an undorsed check payable to his own order, in intrusting it to a clerk who, he might have known, by the exercise of due care, was dishonest, and who puts it in circulation by forging an indorsement thereon, does not deprive the holder of his remedy against the drawer. *Id.*

3. Notice of the loss of a check which has been stolen and collected upon a forged indorsement is not required to be given by the payee to the drawer and drawee or to the public, if he is honestly ignorant of the facts and incorrectly but honestly assumes that the check has been collected in the regular course of business. *Id.*

CHRISTIAN SCIENCE. See PHYSICIANS, 2.

CIVIL RIGHTS. See also COMMERCE, 1.

The refusal of a waiter in an eating house to wait upon a colored patron because of his color renders the eating-house keeper liable, although he did not aid or abet the waiter in such action, to at least the minimum penalty provided by Wis. Laws 1895, chap. 223, § 1, providing that all persons shall be entitled to the equal enjoyment of the privileges of eating houses, and § 2, providing that any person

who violates the foregoing section by denying any person, except for reasons applicable alike to all persons, the full enjoyment of all such privileges, shall be liable to the person aggrieved for not less than \$5 and costs. *Bryan v. Adler* (Wis.) 658

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CIVIL SERVICE. See also CONSTITUTIONAL LAW, 5, 6; CRIMINAL LAW, 2; STATUTES, 1.

1. A law providing that appointments to municipal offices or positions shall be made according to merit and fitness, and that such merit and fitness must be ascertained by competitive examination, is within the power of the legislature. *People, Akin, v. Kitley* (Ill.) 775

2. An officer whose appointment is subject to confirmation by the city council, even though he be a subordinate in one of the principal departments of the city, is excluded from the classified service by § 11 of the Illinois civil service act of 1895, if the office had been created and was in existence when the act was passed. *Id.*

3. The words "heads of any principal department of the city," in § 11 of the Illinois civil service act of 1895, excluding such heads of departments from the classified service, refer to heads of the departments as they existed at the time when the act was passed, and do not extend to subordinates, even where the department has but one head. *Id.*

4. An ordinance which purports to change certain subordinate officers into heads of principal departments, and require their appointments to be confirmed by the city council, in order to remove them from the classified service, for which appointments must be made by examination under the Illinois civil service act of 1895, and place them in the list of those exempt from examination, which includes heads of principal departments and officers whose nominations must be confirmed by the city council, is invalid as an attempt to nullify the statute. *Id.*

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COLLATERAL INHERITANCE. See TAXES, 8, 9.

COLORED PERSONS. See CIVIL RIGHTS.

COMMERCE.

1. A state statute providing for separate but equal accommodations for the white and colored races on railroads is a valid police 41 L. R. A.

regulation, and applies both to intra and inter state travel. *Smith v. State* (Tenn.) 482

2. A state statute making a carrier which accepts anything for transportation to a point beyond its own route liable for its safe carriage to such point of destination, in the absence of a written contract to the contrary, and imposing upon the carrier the burden of proving, even in case of such contract, that the loss or injury did not occur while the thing was in its charge, is not an unconstitutional interference with interstate commerce. *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.* (Va.) 511

3. The sale of a frame for a portrait, made in another state to fill an order taken by a solicitor in the state where it was delivered, is a mere incident to the taking of the order for the portrait, and is not within the provisions of a state statute against peddling without a license, where the order for the portrait contained a provision that it should be delivered in a frame which the purchaser of the portrait should have the option of buying at wholesale price. *State v. Coop* (S. C.) 501

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COMMON LAW.

In ascertaining the rules of the common law the court may look to the decisions of other states of the Union as well as to those of the English courts. *Seymour v. McAvoy* (Cal.) 544

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CONFLICT OF LAWS.

1. The law of the state in which a contract of life insurance is made by a resident thereof will control as to the rights of his creditors and beneficiaries, instead of the law of another state in which the beneficiaries reside, or of another state in which the insurance company is located and the policy payable. *Roberts v. Winten* (Tenn.) 275

2. The effect of contributory negligence to defeat or limit a right of action for an injury received in another state is to be determined by the law of the place of the injury, and not by the law of the forum. *Louisville & N. R. Co. v. Whitlow* (Ky.) 614

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1. The Bill of Rights of the Nebraska Constitution is not an enumeration of all the powers reserved to the people of the state. *State, Smyth, v. Moores* (Neb.) 624

2. A statute inhibited by the general scope and purpose of the fundamental law is invalid, although it may not contravene any express provision of the Constitution. *Id.*

3. The exercise by the legislature for forty-five years, with the acquiescence by the people, of the power to regulate corporations by special acts, is influential in determining the construction of a constitutional provision against creating corporations by special acts. *Indianapolis v. Navin* (Ind.) 337

Delegation of power.

4. The police power may be delegated by the legislature to municipal corporations. *Chicago, B. & Q. R. Co. v. State, Omaha* (Neb.) 481

5. Authorizing civil service commissioners to make rules for the examination of persons applying for appointments to public office does not delegate to them legislative power. *People, Akin, v. Kiple* (Ill.) 775

6. Judicial power is not delegated to civil service commissioners by giving them authority to investigate complaints against officers and matters as to the enforcement of the civil service law, with the right to administer oaths and secure the attendance of witnesses by subpoena, and providing that a court may compel obedience to such subpoena. *Id.*

Ex post facto laws.

7. Changes in constitutional provisions by which a grand jury may consist of twelve instead of sixteen, and a petit jury of twelve need not all agree to find a verdict, relate to methods of procedure only, and are in no sense *ex post facto* in character as applied to crimes previously committed. *State v. Caldwell* (La.) 718

Retroactive laws.

8. A statute relieving from the imputation of usury all contracts made by a building and loan association under a charter of doubtful validity is not unconstitutional as to those contracts because it is retroactive. *Smoot v. People's Perpetual Loan & B. Asso.* (Va.) 539

Vested rights.

9. The right of a husband to the use of his wife's real estate, with power to rent it for not more than three years at a time and receive the rent, under Ky. Gen. Stat. p. 720, chap. 52, art. 2, § 1, which was in force when the parties were married and the property was acquired, is a vested right of which the legislature cannot deprive him. *Rose v. Rose* (Ky.) 353

Due process of law.

10. Due process of law is shown when an opportunity is conferred to invoke the equal protection of the law by judicial proceedings appropriate for the purpose and adequate to 41 L. R. A.

secure the end and object sought to be attained. *Chicago, B. & Q. R. Co. v. State, Omaha* (Neb.) 481

11. A person is not deprived of his liberty without due process of law by a statute making it an offense to have possession of prohibited articles, such as a record of lottery drawings, even if he did not know what the articles that he had were. *Ford v. State* (Md.) 551

12. A public office, or the prospective fees of an office, are not the property of the incumbent within the constitutional provision against depriving a man of property. *People, Akin, v. Kiple* (Ill.) 775

13. Due process of law is not furnished by garnishment of a debt due to a nonresident who is not personally served within the state and does not voluntarily appear. *Louisville & N. R. Co. v. Nash* (Ala.) 331

Confiscation.

14. The right to regulate fares on street railroads does not include the power to require passengers to be carried without reward, or for such sum as will amount to confiscation or the taking of property without compensation or due process of law. *Indianapolis v. Navin* (Ind.) 337

15. An ordinance prohibiting the owner of a dead carcass from removing it, but requiring him to pay a public contractor for its removal a fee greater than the value of the carcass, is unconstitutional as an indirect confiscation of property. *Knauer v. Louisville* (Ky.) 219

Equal privileges and immunities.

16. The permission to all members of a firm to pursue the business of plumbing where one only has procured a license, and to all members of a corporation to pursue it where the manager only has procured a license, renders Ohio act April 21, 1896, for the licensing of plumbers, unconstitutional on the ground that it does not operate equally upon all of a class pursuing the calling under like circumstances. *State v. Gardner* (Ohio) 639

Local law.

17. A general law making a police regulation applicable to part of the state only is not void for lack of equality and uniformity. *State v. Griffin* (N. H.) 177

Police power.

18. All wholesome laws as may be necessary to promote the peace, health, and well being of society, are within the legislative power. *State v. Powell* (Ohio) 854

19. Laws and regulations necessary for the protection of the health, morals, and safety of society, are within the legitimate exercise of the police powers of the state, provided they are reasonable. *Ford v. State* (Md.) 551

20. The constitutional right of an individual to hold property is subject to those reasonable regulations which are necessary for the common good and general welfare,—especially such as affect the health and morals of the people. *Id.*

21. A police regulation prohibiting acts which are in some circumstances harmless is not unconstitutional as an exercise of judicial power. *State v. Griffin* (N. H.) 177

22. Some obvious and real connection between the actual provisions of police regulations and their assumed purpose is essential to their validity. *Chicago, B. & Q. R. Co. v. State, Omaha* (Neb.) 481

23. The power of the legislature to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety is inherent in the sovereignty of the state, and cannot be bartered away by contract or otherwise. *Id.*

24. A statute authorizing an ordinance requiring railroad companies to construct and keep in repair viaducts over streets crossed by their tracks is a valid exercise of the police power of the state. *Id.*

25. Sunday laws are within the legislative power to adopt such wholesome laws as may be necessary to promote the peace, health, and well being of society, and do not violate the personal liberty of the individual secured by Ohio Bill of Rights, § 1. *State v. Powell* (Ohio) 854

26. A statute prohibiting the depositing of sawdust in the waters of a lake or any tributary thereto is a proper exercise of the police power. *State v. Griffin* (N. H.) 177

27. Reasonable regulations to protect the public against evils which may result from incapacity and ignorance may be made by the general assembly, where a pursuit directly concerns the public health and welfare, and is of a character that requires a special course of study, training, or experience in order to qualify one to pursue the occupation with safety to the public interests. *State v. Gardner* (Ohio) 689

28. The business of plumbing is so nearly related to the public health that reasonable regulations tending to protect the public against the dangers of careless and inefficient work may be made by law without infringing the constitutional right of the citizen to pursue such calling. *Id.*

29. The requirement that all physicians shall obtain a new certificate and license under Ind. act March 8, 1897, although they had been previously practising medicine and held a license under the old law, and that the validity of the old license and the fitness of the applicant might be examined by the medical board, is a valid exercise of the police power of the state. *State, Burroughs, v. Webster* (Ind.) 212

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Vested right of husband in wife's real estate. 353

CONTEMPT.

Issues in a proceeding for contempt by disobeying an order of court do not require trial by jury. *People, Akin, v. Kipley* (Ill.) 775

CONTRACTS. See also ASSUMPSIT; CHAMPERTY, 3; CONSTITUTIONAL LAW, 8; PATENTS; TRUSTS, 1.

1. An oral promise by the payee of a note to save certain makers harmless is within the statute of frauds, Mo. Rev. Stat. 1889, § 5186. *Hurt v. Ford* (Mo.) 823

2. A contract by a vendor of patent rights in violation of a statute to prevent and punish fraud in the sale of such rights is void as between the parties. *Mason v. McLeod* (Kan.) 548

3. Vendees of patent rights for whose protection a statute is enacted imposing duties upon a vendor are not *in pari delicto* so as to prevent them from obtaining relief from their contract on account of the vendor's failure to obey the statute. *Id.*

4. An agreement by a manufacturing corporation that, subject to conditions named and for the purpose of securing the continuous patronage of a purchaser as payee, the company will, in six months, pay to the purchaser a certain amount, being a rebate on a purchase that day made, to be valid and payable only on condition that the purchaser, his successors and assigns, shall have bought their supply of such goods as are produced by the company exclusively from one or more dealers named,—cannot be enforced even in equity without the performance of the condition, unless waived or excused, upon the ground that the condition is affixed as a means of carrying out the illegal purposes of a monopoly, as the condition is the sole consideration of the promise, and if illegal the promise falls with it. *Dennehy v. McNulta* (C. C. App. 7th C.) 609

Restraint of trade.

5. All agreements in general restraint of trade are against public policy and void, although agreements having such partial effect only, made in connection with the purchase of a business and its goodwill, and reasonably necessary to the enjoyment thereof, and not oppressive, may be enforced. *Lufkin Rule Co. v. Fringeli* (Ohio) 185

6. An agreement not to engage in business again in the same state for twenty-five years, made by a person selling his business to another, is a general restraint of trade, which is void. *Id.*

7. An agreement not to engage, directly or indirectly, for twenty-five years, in the state or in the United States, in the same business that is sold by such contract, with the goodwill thereof, tends to create a monopoly, and is invalid, whether it is necessary or not to the reasonable enjoyment of the goodwill so purchased. *Id.*

8. An agreement by officers of corporations not to engage in business for five years in any way to interfere with or compete with the business of a new corporation to which each of the old companies sold its business is not against public policy, although the new business is of a nature to extend over the whole country and is more general than that of either of the old companies, combining the business of installing and constructing electric plants and appliances, which one of them had carried on, with that of manufacturing and

dealing in such appliances, which the others had carried on. *Anchor Electric Co. v. Hawks* (Mass.) 189

9. The fact that a corporation as one of the contracting parties may constitute an unjust monopoly, and that its general business is illegal, cannot serve *ipso facto* to create default or liability on its contracts generally; nor can such fact be invoked collaterally to affect in any manner its independent contract obligations or rights. *Dennehy v. McNulta* (C. C. App. 7th C.) 609

NOTES AND BRIEFS.

Contracts; reasonableness of restriction of trade. 187, 190

COPYRIGHT.

1. A statutory copyright operates to divest a party of the common-law right. *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.* (N. Y.) 846

2. A book is published so as to defeat what is known as the common-law copyright, or right of first publication, if it is put within reach of the general public so that all may have access to it, no matter what limitations be put upon the use of it by the individual subscriber or lessee. *Id.*

3. A lease of the reference books of a mercantile agency to subscribers, retaining title and providing that the books shall be returned when the subscription expires, constitutes a publication which will defeat a common-law copyright. *Id.*

NOTES AND BRIEFS.

Copyright; common-law and statutory right; effect of publication. 847

CORPORATIONS. See also CARRIERS, 6; ESTOPPEL, 2; INSURANCE, 1; INTEREST; LIMITATION OF ACTIONS, 1; RECEIVERS, 3; TAXES, 3, 4.

1. The mere regulation of the maximum rate of fare to be collected by street-railroad companies in cities of a population of 100,000 or more according to the census of 1890 is not within the prohibition of Ind. Const. art. 11, § 18, against the creation of corporations by special act. *Indianapolis v. Navin* (Ind.) 337

2. The right of a creditor of a corporation to proceed individually against stockholders is merged in a decree obtained by such creditor in another state, in a court of competent jurisdiction, directing the collection of such claims by a receiver. *Castleman v. Templeman* (Md.) 387

3. An action in equity to prevent the revocation of the license of a foreign insurance company for failure to pay license fees cannot be based on the ground that the statute of limitations would prevent an action to collect the fees. *Travelers' Ins. Co. v. Fricke* (Wis.) 557

NOTES AND BRIEFS.

Corporations; foreign, conditions of doing business; revocation of license of. 558

CORRUPT PRACTICES. See OFFICERS, 1; QUO WARRANTO; STATUTES, 8; VOTERS AND ELECTIONS, 1-3, NOTES AND BRIEFS.

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COSTS AND FEES. See TRUSTS, 2.

COTENANCY. See also DAMAGES, 3, 4.

NOTES AND BRIEFS.

Cotenancy; action against cotenant for tort. 682

COURTS. See also CONSTITUTIONAL LAW, 6; JUSTICE OF THE PEACE, 2.

1. An action against an Indian belonging to a tribe and a particular reservation, brought on a contract in favor of a white man, is within the jurisdiction of a state court, in the absence of any Federal statute or treaty to the contrary. *Stacy v. Labels* (Wis.) 419

2. A county court acting as a probate court has no jurisdiction to try a question of title to property as between the personal representative of a decedent and a person claiming in hostility to the estate. *Arnegard v. Arnegard* (N. D.) 258

3. The attempt to confer general common-law and chancery jurisdiction on probate courts by the territorial act of Utah March 6, 1852, was absolutely void because it was not authorized by the organic act. *Re Christensen's Estate* (Utah) 504

4. The enactment of a local or special law on a subject not enumerated in Ind. Const. art. 4, § 22, is an expression of the opinion and judgment of the legislature that a general law cannot be made applicable; and this judgment is not subject to be reviewed by the courts. *Indianapolis v. Navin* (Ind.) 337

5. The validity of a location by the legislature of a public institution is not beyond review in the courts on the ground that it is a legislative question, under Or. Const. art. 14, § 3, which amounts to a location of such institutions at the seat of government. *State McCain, v. Metchan* (Or.) 692

Judges.

6. A judge who owns real estate in a city that is taxable for the city's bonded indebtedness is disqualified to sit in a suit to contest the validity of a contract which will involve the creation of a bonded debt of the city to a large amount, necessitating a special tax for forty years, that will directly affect the value of all real property subject to it. *Meyer v. San Diego* (Cal.) 762

7. A judge cannot delegate his judicial authority to another, and his attempt to do so, even with the consent of the parties, cannot bind the defendant on a prosecution for felony. *Ellerbe v. State* (Miss.) 569

8. The temporary relinquishment by a judge of the control of proceedings in a trial for felony by going 250 or 300 yards from the courtroom, leaving a member of the bar presiding in his absence, and being gone about twenty minutes, during which the trial goes on, amounts to a dissolution of the court which makes the trial void. *Id.*

Rules of decision.

9. A will will not be construed by the courts before necessity of action under it arises. *May v. May* (D. C. App.) 767

10. Mere difference of opinion between the

courts and the law-making power is not sufficient ground for holding a statute unconstitutional. *Chicago, B. & Q. R. Co. v. State, Omaha* (Neb.) 481

11. Departure from decisions previously made is required by the policy of the law where adherence to them would be productive of more evil than the departure therefrom and the establishment of a better and sounder rule. *Evansville v. Senhenn* (Ind.) 728

12. On questions of the requirements of the state Constitution the supreme court of the state is not at liberty to set aside or discard its own views because of different conclusions by the Federal courts. *Indianapolis v. Navin* (Ind.) 337

NOTES AND BRIEFS.

See also TRIAL.

Courts; jurisdiction as to Indians. 419
Disqualification of judge as a taxpayer. 762
Rule of decision as to validity of statutes. 339

CREDITORS' BILLS. See also ACTION OR SUIT, 3.

NOTES AND BRIEFS.

Creditors bills, what may be reached by. 544

CRIMINAL LAW. See also CONSTITUTIONAL LAW, 11; COURTS, 8; EVIDENCE, 7, 8; TRIAL, 2, 13.

1. The intent with which an act is done is immaterial, when the act is denounced as unlawful by statute. *State v. Southern R. Co.* (N. C.) 246

2. The disqualification from holding of office for five years, prescribed by § 35 of the Illinois civil service act of 1895 as a punishment for conviction under the preceding section, so far as that punishment is authorized without an indictment, is in violation of Ill. Const. art. 2, § 8, requiring indictment for criminal offenses, except where the punishment is "by fine or imprisonment otherwise than in the penitentiary." *People, Akin, v. Kipley* (Ill.) 775

3. A suspension of sentence without conditions expressed in the judgment may be set aside by the court on its own motion, and the execution of the sentence ordered at any time during the same term. *Weber v. State* (Ohio) 472

But see next case.

4. Power over a prisoner is lost upon indefinite suspension of sentence without recognition after his plea of guilty, and the court cannot subsequently sentence him. *People, Smith, v. Allen* (Ill.) 478

NOTES AND BRIEFS.

Criminal law; suspension of sentence.

472, 478

Criminal and penal liability for act of co-partner, servant, or agent:—(I.) General rules; (II.) application to particular subjects: (a) crimes against the person; (b) forgery, burglary, larceny; (c) libel; (d) violation of revenue 41 L. R. A.

laws; (e) maintenance of nuisances; (f) adulteration of food products; (g) trespass in willfully cutting trees; (h) Sabbath breaking; (i) dealing with slaves; (j) gaming on licensed premises; (k) miscellaneous offenses; (III.) violation of liquor laws: (a) conflict of authority; (b) unlawful sale generally: (1) by partner; (2) by agent or servant; (c) selling without license: (1) by partner; (2) by agent or servant; (d) selling to minors: (1) by partners; (2) by agents or servants; (e) selling to habitual drunkards; (f) selling on Sunday; (g) violation of other miscellaneous provisions; (h) evidence of: (1) presumption and burden of proof; (2) admissibility; (3) sufficiency; (i) question for jury. 650

CURATIVE ACTS. See also CONSTITUTIONAL LAW, 8; JUDGMENT, 4, 5.

NOTES AND BRIEFS.

Curative acts; to validate void judgment. 503
Validating usurious contract. 589

CURTESY.

NOTES AND BRIEFS.

As a vested right. 858

CUSTOM.

A custom to take passengers on a mixed freight and passenger train at a distance from the station is not shown by the fact that they sometimes got on there, where no direction, authority, or consent to do so is shown, except the direction of a baggageman in a single instance, and the fact that a flagman saw them board the train, while it appears that the train, when made up, always came to the station. *Jones v. New York O. & H. R. R. Co.* (N. Y.) 490

DAMAGES.

1. Only nominal damages can be given to a railroad company for the use by a telegraph line of the space occupied by its posts and wires along the railroad right of way through an agricultural section of country, when the use and occupation of the right of way for railroad purposes is not interfered with or encumbered in any way. *Mobile & O. R. Co. v. Postal Teleg. Cable Co.* (Tenn.) 408

2. Mistakes or errors of a physician or surgeon who was employed in the exercise of ordinary care will not preclude the recovery of all the damages sustained from personal injuries. *Selleck v. Janesville* (Wis.) 583

3. The measure of damages for coal mined in good faith by a tenant in common who has a contract for its purchase with the father of co-tenants, who are infants, and under a belief that the purchase will be ultimately perfected by the probate court or by the infants, at arriving at full age, is the value of the coal in place at the time it was mined. *Keys v. Pittsburg & W. Coal Co.* (Ohio) 681

4. In fixing the value of coal mined in good faith but without right, by a tenant in common, the existence of entries, tramways, etc., owned by him on other lands, as well as every other circumstance, natural or artificial,

which tends to enhance or diminish the value, should be considered. *Id.*

NOTES AND BRIEFS.

Damages; for placing telegraph line on railroad right of way. 408

For property converted. 688

DAMS. See EMINENT DOMAIN, 8; WATERS, 4.

DEAD ANIMALS. See also CONSTITUTIONAL LAW, 15.

NOTES AND BRIEFS.

Dead animals; police regulations as to. 220

DEATH.

1. The loss of services of a minor child killed by the fault of another does not give the parents at common law any right of action against the party in fault. *Gulf, O. & S. F. R. Co. v. Beall* (Tex.) 807

2. The right of the mother of an unmarried minor whose father is dead to recover damages for the death of the child under a statute giving such right to the father and mother, or the survivor of them, is not changed by the fact that she has married another man who has assumed the obligations of a natural father to his stepchild. *Hennisy v. Bavarian Brew. Co.* (Mo.) 885

3. Children have no right of action for the homicide of a stepfather on whom they were entirely dependent, although he left no widow and no other children, under a statute giving a right of action for the homicide of a "husband or parent." *Marshall v. Macon Sash, D. & L. Co.* (Ga.) 211

NOTES AND BRIEFS.

Death; parent's right of action for death of child. 386

Common-law right of action of parent for loss of services of child killed:—(I.) Rule that no action will lie: (a) different theories as to; (b) doctrine that private injury is merged in public wrong; (c) doctrine that human life is not a subject of civil damages; (d) effect when death is not instantaneous; (II.) the contrary rule; (III.) the true rule; (IV.) rule when injury consists of a breach of contract. 807

DEDICATION. See also EASEMENTS.

1. Acceptance by public authorities is necessary to create a public way by dedication. *Sater v. Gunn* (Mass.) 268

2. A man cannot dedicate for street purposes land upon which he has placed a homestead, so as to divest the rights of his wife therein. *San Francisco v. Grote* (Cal.) 385

3. Dedication of land for a highway is not shown by the fact that for eight years the land was used by the public generally for travel, without either consent or objection on the part of the owner. *Id.*

DEEDS. See also HUSBAND AND WIFE, 8.

1. The delivery of a deed to a third person to be delivered to the grantee on the death of the grantor transfers the title subject to the 41 L. R. A.

life interest of the grantor. *Arnegaard v. Arnegaard* (N. D.) 258

2. The regaining of possession of a deed by the grantor after he has made a delivery intended to be absolute, to a third person, to take effect on his death, does not prevent the deed from being operative. *Id.*

3. The acceptance by a grantee of a deed which has been delivered to a stranger relates back to the time of delivery, if the rights of third persons have not intervened. *Id.*

NOTES AND BRIEFS.

Deeds; delivery of, when complete. 268

DEEDS OF TRUST. See INSOLVENCY.

DE FACTO. See OFFICERS, 8.

DEFINITIONS. See also BIGAMY; PENALTY.

A penal statute is one which imposes a forfeiture or penalty for transgression of its provisions or doing a thing prohibited. *Hall v. Norfolk & W. R. Co.* (W. Va.) 689

DELIVERY. See BILLS AND NOTES, 1.

DEMAND. See MANDAMUS, 7.

DEMURRER. See PLEADING, 8.

DESCENT AND DISTRIBUTION. See HUSBAND AND WIFE, 2-4.

DISORDERLY HOUSE. See INJUNCTION, 7.

DIVORCE. See HUSBAND AND WIFE, 5-7; JUDGMENT, 8.

DRAINS AND SEWERS.

NOTES AND BRIEFS.

Drains and sewers; injunction by municipality against nuisance of. 325

Discharge of, into stream. 751

EASEMENTS.

The use for more than 100 years of a well-known and well defined roadway from a public road to a great pond, by hunters, fishermen, picnic parties, celebrators on public occasions, and by whomsoever choose, without objection and without obstruction, does not establish a way by prescription or dedication, where it does not appear that such use was with the express or implied permission of the owners of the land. *Sater v. Gunn* (Mass.) 268

EATING HOUSE. See CIVIL RIGHTS.

EJECTMENT.

A city may maintain ejectment for the possession of land dedicated for use as a street, although it does not own the fee. *San Francisco v. Grote* (Cal.) 385

NOTES AND BRIEFS.

Ejectment; for bed of street. 335

ELECTIONS. See VOTERS AND ELECTIONS.

ELECTRICAL USES AND APPLIANCES.

A telephone company's lineman who is injured by contact with a span wire charged with electricity by a trolley wire, an insulator of which was broken, is chargeable with negligence which will preclude his recovery of damages, where he failed to test the insulator although he had apparatus by which he could do it, and knew that there was no inspector, other than the linemen, to make such tests. *Anderson v. Inland Teleph. & Teleg. Co.* (Wash.) 410

ELECTRIC LIGHTS.

The property of an electric-light company is so far devoted to a public use when the company is engaged in furnishing light for the streets and inhabitants of a municipality that it is bound to furnish light impartially to all applicants at a reasonable price. *Cincinnati, H. & D. R. Co. v. Bowling Green* (Ohio) 422

ELECTRIC RAILWAYS. See EMINENT DOMAIN, 5, 6.

ELEVATORS. See also MASTER AND SERVANT, 7.

1. The protection of a freight elevator shaft by the usual method of a railing is, in the absence of direction by the superintendent of buildings, sufficient compliance with N. Y. consolidated act, § 487, as amended by Laws 1897, chap. 566, requiring a substantial railing or trap doors, or both, as directed and approved by the superintendent of buildings. *Malloy v. New York Real Estate Assn.* (N. Y.) 487

2. The insufficiency of a railing to comply with the statute requiring a substantial railing at an elevator shaft will not render the owner liable to a person who falls into the shaft, not because the railing is insufficient, but because it has been left out of place, and the shaft left unguarded by the negligence of a third person using the elevator. *Id.*

NOTES AND BRIEFS.

Elevators; requirements as to guards for. 487

EMINENT DOMAIN. See also CONSTITUTIONAL LAW, 14; DAMAGES, 1.

1. Injury to the interests of a person, resulting from an exercise of the police power, do not entitle him to compensation under the law of eminent domain, if no part of his lands or property is taken therefor. *State v. Griffin* (N. H.) 177

2. Overflowing land, not as a mere casual trespass, but as the effect of raising the water above high-water mark to improve navigation, is a taking of property. *Carlson v. St. Louis River Dam & I. Co.* (Minn.) 871

3. The destruction of a mill and a mill dam by village trustees in time of danger, to prevent damage to a highway and other property, even if they act with authority, is not a taking of property for a public use in the exercise of eminent domain, but rather an exer-

cise of the police power of the state. *Aitken v. Wells River* (Vt.) 566

4. A condemnation of the right of way for a telegraph line over a railroad right of way is authorized by Tenn. Acts 1895, chap. 135 (Shannon's Code, §§ 1868, 1871), conferring the right to take the property or easements of private corporations for public purposes and internal improvement. *Mobile & O. R. Co. v. Postal Teleg. Cable Co.* (Tenn.) 408

5. Poles of an electric railway, if properly placed, do not give ground of complaint to an abutting owner, whether he owns the fee of the street or not. *Snyder v. Fort Madison Street R. Co.* (Iowa) 845

6. An electric passenger railroad on a country highway constitutes an additional burden, and cannot be built without the consent of the abutting owner and payment of compensation. *Zehren v. Milwaukee Elec. R. & L. Co.* (Wis.) 575

NOTES AND BRIEFS.

Eminent domain; electric railroad as additional burden on highway. 575

ESCROW. See also BILLS AND NOTES, 1.

NOTES AND BRIEFS.

Escrow; of note in hands of agent or attorney. 824

ESTOPPEL.

1. An estoppel cannot be based on a void decree. *Re Christensen's Estate* (Utah) 504

2. The state is not estopped from insisting upon the condition prescribed for the business of a foreign corporation, by failure of officials to require compliance with the law at the proper time. *Travelers' Ins. Co. v. Fricke* (Wis.) 557

3. The receipting of subsequent bills without mention of previous checks does not estop the payee, who took the checks as payment, from setting up the forgery of indorsements thereon and collecting them, if it was not done with the intent to mislead, or with any expectation or reason to believe that the drawer would in consequence thereof do or omit to do anything with reference to the checks. *Shepard & M. Lumber Co. v. Eldridge* (Mass.) 617

4. A payee of a check which is stolen from him and put in circulation by forgery is estopped from collecting the check, if, with knowledge of these facts, he misleads the drawer to his prejudice, and thereby places him in a worse position than he otherwise would be in with reference to the assertion or protection of his rights resulting from what has been done with the check. *Id.*

5. The situation of the drawer of checks who has paid them on forged indorsements of the payee's name and holds them as vouchers is changed to his prejudice, so as to estop the payee from collecting them, when the latter has procured them as paid checks without giving notice of his intent to collect them, though stating that the indorsements are forged,—especially when in consequence of this the drawer does not give immediate notice to the drawee of the forgery. *Id.*

EVIDENCE. See also **APPEAL AND ERROR**, 9, 12; **INSURANCE**, 2.

Judicial notice.

1. Judicial notice will be taken of the fact that no ordinary man could go through a hole 15x20 inches, unless he went head first, or with both feet first, and that to do so by mere accident would be very improbable, if not impossible. *Johns v. Northwestern Mut. Relief Assn.* (Wis.) 537

2. The jury may draw such inference as common knowledge will suggest respecting negligence in lying down and going to sleep in a barn, upon hay or straw, with a lighted pipe in one's mouth. *Lillibridge v. McCann* (Mich.) 881

Presumptions and burden of proof.

3. No intendment of law or presumption of fact can be made in favor of the jurisdiction of a court when the law purporting to confer the jurisdiction is void. *Re Christensen's Estate* (Utah) 504

4. An attempt to procure false testimony or to corrupt jurors may be proved for the purpose of raising a presumption against the party who is guilty of it. *McHugh v. McHugh* (Pa.) 805

5. The presumption against suicide is not sufficient to sustain a cause of action under an insurance policy against death brought about by "some external cause or accident, and not by disease or any voluntary act," where the insured, who went to bed as usual, was found next morning in a cistern underground, back of the house, with underclothes, pants, and stockings on, but no coat, and the opening to the cistern was 15x20 inches. *Johns v. Northwestern Mut. Relief Assn.* (Wis.) 537

6. The declaration of his age made by an applicant for membership in a beneficial society to whom a certificate is issued and by whom payments are made for a series of years will be presumed correct until the contrary is proved. *Supreme Council of Golden Star Fraternity v. Conklin* (N. J. Err. & App.) 449

7. The burden of proving an alibi is upon defendant after the state has made out a prima facie case,—to the extent, at least, of raising a reasonable doubt of guilt. *State v. Thornton* (S. D.) 530

8. A person is not deprived of the presumption of innocence by a statute making it an offense to have possession of prohibited articles which are of no lawful use. *Ford v. State* (Md.) 551

9. A presumption of negligence does not arise from the fact of an injury, when the act that caused the injury is wholly unknown or undisclosed. *Benedick v. Potts* (Md.) 478

10. Injury to a person who was on a car when it entered a tunnel on a mimic railway operated as an amusement, and was not on the car when it emerged, but was found in an unconscious state in the tunnel, does not raise a presumption of the proprietor's negligence, when there was no defect in or abnormal condition affecting the means of actual transportation, and the other occupants of the car passed safely through. *Id.*

11. An inference of negligence attributable

to a carrier may arise when a passenger is injured through some defect in the carrier's appliances or some act or omission of the carrier's servant, which might have been prevented by a high degree of care. *Whalen v. Consolidated Traction Co.* (N. J. Err. & App.) 836

Documentary.

12. A Bible in which the names and dates of birth of several members of the same family are recorded, without proof of when or by whom written, or of the knowledge the writer had of the facts recorded, or that the persons whose names and dates of birth are written therein ever acknowledged it to be an authentic family record, and when the entries are not shown to have been contemporaneous with the facts stated, is not competent proof of the age of any person whose name may be recorded therein. *Supreme Council of Golden Star Fraternity v. Conklin* (N. J. Err. & App.) 449

Demonstrative.

13. A box of sand containing impressions of shoe tracks, which a witness testifies that he made with the shoes of the accused person, and that they are identical with those he found in the sand upon a desert, is admissible in evidence for the purpose of accurately describing the appearance of the tracks on the desert which are claimed to have been made by the accused. *People v. Searcey* (Cal.) 157

Parol as to writings.

14. Parol evidence may be given to show that the terms of the contract when commercial paper is indorsed in blank are different from that which the law implies. *United States Nat. Bank v. Geor* (Neb.) 439

15. A restrictive indorsement in unambiguous language cannot be contradicted or explained by evidence resting in parol. *Id.*

16. Extrinsic evidence is admissible to show that an ordinance or regulation is unreasonable, arbitrary, and oppressive in its operation. *Moore v. District of Columbia* (D. C. App.) 208

Opinions.

17. The fact that hypothetical questions to a physician are based in part upon his personal examination and knowledge does not make them objectionable. *Selleck v. Janesville* (Wis.) 563

18. Acquaintances of a person whose sanity is the subject of judicial inquiry, when able to instance expressions or acts of sanity or insanity, although not experts, may give their opinions as to the sanity or insanity of the person. *Re Christensen's Estate* (Utah) 504

Declarations.

19. Evidence of what a person said while in his right mind after the injury causing his death, tending to show that the injury was caused by his own fault or negligence, is admissible against his administrator in an action under Ohio Rev. Stat. §§ 6184, 6185, for damages caused by his death. *Helman v. Pittsburg, C. O. & St. L. R. Co.* (Ohio) 860

Relevancy.

20. Evidence that persons charged with shooting firearms without reasonable excuse, within the corporate limits of a town, shot at a rabbit in the cornpatch of one of them who

had suffered from the depredations of rabbits in his garden, is admissible as tending to show a reasonable excuse for the shooting. *Chesterfield v. Rutliff* (S. C.) 508

21. The representative character of an executrix will not prevent evidence that she has attempted to procure false testimony,—especially when she is personally interested in the litigation. *McHugh v. McHugh* (Pa.) 805

22. Evidence that a brakeman was in the habit of lowering the cage into a mine at too great speed is not admissible upon the question of his incompetency, in case of an accident caused by his turning the brake the wrong way and letting the cage fall. *Walkowski v. Penokes & G. Consol. Mines* (Mich.) 88

NOTES AND BRIEFS.

Evidence; burden of proof as to master's knowledge as element of negligence. 149

Presumption of negligence. 478

Burden and measure of proof of an alibi:—(I.) Proof by defendant beyond a reasonable doubt; (II.) proof by defendant by a preponderance of evidence; (a) general rules; (b) as affected by reasonable doubt on whole case; (III.) proof by defendant to raise a reasonable doubt; (IV.) proof by prosecution beyond a reasonable doubt; (a) general rule as to burden of proof; (b) measure of proof; (c) consideration of all the evidence; (d) how jury should be instructed; (V.) time covered by proof. 530

Entries in family Bible or other religious book as evidence:—(I.) General rule; (II.) grounds upon which admitted; (III.) cases in which admitted: (a) in general; (b) on the testimony of the party making them; (c) on the testimony of a party to the action; (d) on the testimony of a third party; (IV.) time of entry material; (V.) necessity of production of book; (VI.) necessity of proof of handwriting; (VII.) when declarant is alive; (VIII.) when excluded; (IX.) right of jury to book in retirement. 449

EXECUTORS AND ADMINISTRATORS. See also BANKS, 1; EVIDENCE, 21; JUDGMENT, 6.

1. A person is not disqualified as an executor because of large indebtedness to the estate, which he denies, making his interest antagonistic and hostile to that of the estate and beneficiaries of the will, where the statutes (Ala. Code 1896, §§ 45–48) provide not only that letters shall be issued to persons named as executors in the will, "if they are fit persons," but also specify as grounds of unfitness minority, conviction of an infamous crime, or incompetence by reason of intemperance, improvidence, or want of understanding, adding that in case of unfitness for the causes enumerated letters of administration may be granted. *Kidd v. Bates* (Ala.) 154

2. Intestate property wanted for distribution is assets for an administrator *de bonis non*, under the Connecticut statutes, even if the property has been "administered" within the common-law meaning of that term. *Chamberlain's Appeal* (Conn.) 204

3. An administrator *de bonis non* has the right, even at common law, to receive interest. 41 L. R. A.

tate property which still exists *in specie*, unchanged and unconverted, in the hands of a third person who has no legal right to it, even if he has received it from an executor whose accounts have been settled and approved. *Id.*

4. It is not the duty of the court of probate to pass upon the legal validity of claims sought to be made available through the appointment of an administrator *de bonis non*, when asked to appoint him, but only to determine that a claim is made in good faith and appears to have some foundation in fact or in law. *Id.*

5. A court of probate has incidental power to construe wills for the purpose of deciding whether a claim under them is made in good faith, and is or is not *prima facie* utterly without any foundation in law or in fact, so far as this is necessary to determine the existence of the conditions for the exercise of its power to appoint administrators *de bonis non*. *Id.*

NOTES AND BRIEFS.

Executors; disqualification of. 154

Liability for devastavit. 704

Presumption in case of stale demands against. 805

Administrators *de bonis non*; assets of. 205

EXEMPTION. See TAXES, 1.

EXPRESS COMPANY. See FINES, 2.

FARE. See CONSTITUTIONAL LAW, 14.

FINDING. See APPEAL AND ERROR, 5.

FINES.

1. A statute directing half of a forfeiture or fine to be paid to the informer does not violate Va. Const. art. 8, § 7, setting apart as a permanent literary fund "all fines collected." *Southern Exp. Co. v. Com., Walker* (Va.) 436

2. A pecuniary forfeiture under Va. Code, § 1220, for the charge by an express company of greater rates than it is authorized to charge, is not within Va. Const. art. 8, § 7, setting apart for a literary fund "all fines collected for offenses committed against the state." *Id.*

3. Va. Code, § 1220, fixing at \$100 the minimum fine for the charge by an express company of rates greater than it is authorized to charge, and failing to prescribe a maximum limit, does not violate Va. Const. art. 1, § 11, prohibiting the imposing of "excessive fines." *Id.*

NOTES AND BRIEFS.

Fines; what are. 437

FIREARMS. See EVIDENCE, 20; TRIAL, 6.

FIRE DEPARTMENT. See also MUNICIPAL CORPORATIONS, 5.

The right to maintain a fire department in a city or town is one of the rights vested in the people of municipalities, which is to be exercised without legislative interference, except as the law-making body prescribes rules to aid

the people of the municipality in exercising such right. *State, Smyth, v. Moores* (Neb.) 624

FIRE INSURANCE. See **INSURANCE.**

FIRES. See also **NEGLIGENCE, 8; PROXIMATE CAUSE.**

1. Lying down to smoke, on hay or straw, in a barn, and going to sleep, with a lighted pipe in one's mouth, may be found by the jury to constitute negligence. *Lillibridge v. McCann* (Mich.) 881

2. The owner of a building taking fire from another building which is set on fire through the negligence of another person, without any intervening cause, has a right of action against the person whose negligence started the fire. *Id.*

NOTES AND BRIEFS.

Fire; negligence in causing; liability for. 882

Liability for damage caused by. 794

FISHERIES.

NOTES AND BRIEFS.

Access to waters for. 268

FLOOD. See **WATERS, NOTES AND BRIEFS.**

FOOD.

NOTES AND BRIEFS.

Criminal liability for adulteration of, by servant, agent, or partner. 656

FOOTPRINTS. See **APPEAL AND ERROR, 4; EVIDENCE, 13.**

FOREIGN CORPORATIONS. See **CORPORATIONS, 3.**

FORGERY. See also **BANKS, 5, 6; CHECKS; ESTOPPEL, 3-5; NOTICE.**

NOTES AND BRIEFS.

Forgery; estoppel to allege. 617

Criminal liability for agent's act in. 652

FRAUD. See also **HUSBAND AND WIFE, 2-4.**

1. A sale made on the faith of a report furnished by a commercial agency cannot be rescinded for fraud, if it is not shown that the buyer ever made any statement of his standing to the agency, or referred the seller to such report. *Hiller v. Ellis* (Miss.) 707

2. One who refers to a statement by a commercial agency for his standing, for the purpose of procuring credit, is guilty of fraud which will entitle the seller to rescind, if the condition there shown is infinitely better than in truth it is, although he did not give the information to the agency. *Id.*

FREIGHT TRAIN. See **CUSTOM.** 41 L. R. A.

GAMING.

NOTES AND BRIEFS.

Criminal liability for act of servant, agent, or partner. 659

GARBAGE.

NOTES AND BRIEFS.

Injunction by municipality against nuisance of. 324

GARNISHMENT. See also **CONSTITUTIONAL LAW, 13.**

1. The situs of a debt is at the domicile of the creditor for the purpose of garnishment. *Louisville & N. R. Co. v. Nash* (Ala.) 331

2. Payment by a garnishee of a judgment which was void for want of jurisdiction over the nonresident creditor will not be a defense to an action by the latter. *Id.*

GIFT.

A delivery of a savings bank book containing entries of deposits to the credit of the one delivering it, with the intention to give the person to whom it is delivered the deposits represented by such book, accompanied with appropriate words of gift, is a sufficient delivery to constitute a valid gift of such deposits, without written assignment or transfer. *Polley v. Hicks* (Ohio) 858

NOTES AND BRIEFS.

Gift; of savings bank deposit. 858

GOLDEN CHAIN. See **BENEVOLENT SOCIETIES.**

GOODWILL.

1. The goodwill of a school, which belongs to one of the persons forming a corporation to conduct it under his name, becomes the exclusive property of his estate on the expiration of the corporation. *Bingham School v. Gray* (N. C.) 243

2. A break in the operation of a school, after it has been carried on for many years at a certain place by persons belonging to one family, does not forfeit the right of the proper representative of the family to revive the school at the same place, as against another member of the family who has, during the cessation of the school at that place, opened a school in another part of the state, which he claims to be the successor of the original school. *Id.*

NOTES AND BRIEFS.

Goodwill; in school kept by family. 243

GOVERNOR. See **MANDAMUS, 2; MUNICIPAL CORPORATIONS, 5.**

GRAND JURY.

NOTES AND BRIEFS.

Number of. 718

GUARANTY. See **BANKS, 4; BILLS AND NOTES, 2, 3; INSURANCE, 12.**

HABEAS CORPUS.

The court will not, on habeas corpus proceedings instituted by a parent to test the detention of a child in a public institution, inquire into the regularity, legality, or sufficiency of the proceedings before the judge or magistrate which resulted in the committal, where the detention is manifestly for the welfare of the child. *State, Bethell, v. Kilvington* (Tenn.) 284

HEALTH. See also CONSTITUTIONAL LAW, 18, 19, 23, 27.

NOTES AND BRIEFS.

Health; injunctions by municipality against nuisance affecting. 322

HIGHWAYS. See also DEDICATION; EJECTMENT; EMINENT DOMAIN, 5, 6; INJUNCTION, 2.

1. Poles for an electric railway must not be so placed as to interfere unnecessarily with the right of abutting owners to use and enjoy their property. *Snyder v. Fort Madison Street R. Co.* (Iowa) 345

2. A purchaser of a street railway so constructed as to make the street dangerous is liable for injury thereby caused to a traveler in the street, although he has permitted the railway company to remain in possession under an option to purchase the property, but without any agreement binding the company to remedy the defective condition of the street. *Schaefer v. Fond du Lac* (Wis.) 267

3. The negligence of private parties piling lumber in a street, either for themselves or when delivering it to the city, will not render the city liable, in the absence of notice, either express or implied. *Evansville v. Senhenn* (Ind.) 728

4. The implied duty of the owner to use reasonable care in inspecting and repairing a grate in a sidewalk in front of his premises does not cease on leasing a part only of the structure on the abutting land and its occupation by a tenant, although that part includes, by implication, the exclusive right of the tenant to use the grate as a beneficial appurtenance. *Canandaigua v. Foster* (N. Y.) 554

5. The persons "primarily liable," against whom remedies must be exhausted under a city charter before action against the city can be brought for the dangerous condition of a street, include all persons liable for the wrong, whether at common law or under a statute. *Schaefer v. Fond du Lac* (Wis.) 267

NOTES AND BRIEFS.

Highway; relative liability of city and private person for defects in. 288

Rights of abutting owners as to poles of electric railway. 345

Liability for excavation under sidewalk. 555

HOMESTEAD. See also DEDICATION, 2; HUSBAND AND WIFE, 3.

A sale of a homestead under order of a probate court, for the benefit of minor child 41 L. R. A.

dren who enjoy it as a descended or transmitted homestead from the deceased homesteader, is not in violation of Ark. Const. art. 9, § 6, giving them an interest in the rents and profits of the homestead during minority, and providing that on the widow's death all of the homestead shall be vested in them. *Merrill v. Harris* (Ark.) 714

NOTES AND BRIEFS.

Homestead; jurisdiction of probate court over. 714

HOSPITALS.

NOTES AND BRIEFS.

Injunction against, by local authorities. 324

HOUSE OF CORRECTION. See also HABEAS CORPUS.

1. The power conferred upon county judges by Tenn. Acts 1891, chap. 195, to cause children to be brought before them, and commit them to the industrial school at Nashville, if they come within any of the descriptions therein set out, contemplates a proceeding in open court and a proper investigation upon which to base a committal; and an arbitrary committal by the county judge upon his personal knowledge of the facts, without such a proceeding, is irregular. *State, Bethell, v. Kilvington* (Tenn.) 284

2. The provision of Tenn. Acts 1891, chap. 195, § 6, that no child under eight shall be committed to the industrial school at Nashville, was made to protect the institution, and cannot be enforced for the purpose of releasing from the institution and restoring to improper hands a child whose welfare would not be subserved by such release, and whose age is uncertain under the proof. *Id.*

HUSBAND AND WIFE. See also CONSTITUTIONAL LAW, 9; JUDGMENT, 3.

1. A married woman cannot form a partnership with her husband under Mo. Rev. Stat. chap. 61, § 4, making her liable for debts contracted before marriage and those contracted after marriage in her own name, as well as for her torts in which her husband took no part. *Haggett v. Hurley* (Me.) 362

Fraud on wife's property rights.

2. A secret unrecorded deed made by a man to his son on the eve of a second marriage, for the purpose of preventing the homestead right of the wife from vesting on the marriage, while an inducement to her to marry him was a proposal to build a substantial dwelling on the homestead, is fraudulent as to her homestead right, and void as to that, but is not void *in toto*. *Arnegard v. Arnegard* (N. D.) 258

3. The fact that a wife's homestead right might be divested by the removal of the family from the land will not prevent a secret deed of the land by the husband on the eve of the marriage from being fraudulent as to her homestead right. *Id.*

4. The fact that a wife will receive a portion of her husband's personal estate does not, however large that may be, prevent a secret

deed of his real estate, made on the eve of their marriage, from being fraudulent as to her. *Id.*

Divorce.

5. An equitable division of property jointly accumulated by persons living together as husband and wife can be made by the court in an action for divorce wherein the marriage is found to be void because of a prior marriage of one of the parties, and a decree of nullity is entered, although the court has no authority to grant alimony as such. *Werner v. Werner* (Kan.) 849

6. The legislature cannot grant a divorce at the instance of a party at fault, without the consent of the party not at fault. *Re Christensen's Estate* (Utah) 504

7. The communication of syphilis to a wife by her husband, who has the disease in the tertiary stage and is probably incurable, whereby she is kept in a constant state of suffering, is a ground for a divorce under 1 *Pepper & L. Dig.* p. 1638, pl. 11, allowing a divorce for cruel and barbarous treatment endangering the wife's life or rendering her condition intolerable and life burdensome. *McMahon v. McMahon* (Pa.) 802

Annulment of marriage.

8. The annulment of a marriage because the husband is constitutionally afflicted with syphilis, and in a state in which his chances of cure are very remote and doubtful, may be granted, under Mass. Pub. Stat. chap. 145, § 11, on the ground of fraud, where, with knowledge of his condition, he did not inform his wife in regard to it, and she, learning of it on the day of the marriage soon after the ceremony, refused to live with him as his wife, and filed the libel for annulling the marriage before its consummation. *Smith v. Smith* (Mass.) 800

NOTES AND BRIEFS.

Husband and wife; partnership of. 862
Equitable division of property on decreeing nullity of marriage. 849
Divorce for cruelty. 802

HYPOTHETICAL QUESTION. See EVIDENCE, 17.

ICE. See WATERS, 8.

IGNORANCE. See LOTTERIES.

IMITATIONS. See INJUNCTION, 10, 12.

INCOMPETENT PERSONS. See EVIDENCE, 18; POOR AND POOR LAWS; TAXES, 2.

INDEPENDENT CONTRACTOR. See MASTER AND SERVANT, 11.

INDIANS. See also COURTS, 1.

NOTES AND BRIEFS.

Indians; regulation of intercourse with. 419

INDICTMENT.

Allegations to show that the accused knew what the articles were that he had in his possession are not necessary in an indictment.

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under Md. Laws 1894, chap. 310, § 178, making it unlawful to have possession of any record of numbers drawn in a lottery, or of any lottery ticket, or anything in the nature thereof, unless they are held for the purpose of procuring or furnishing evidence of a violation of the law. *Ford v. State* (Md.) 551

INDORSEMENT. See BANKS, 8, 4; BILLS AND NOTES, 2, 4; EVIDENCE, 14, 15.

INDUSTRIAL SCHOOL. See HOUSE OF CORRECTION, 2.

INFANTS. See also HABEAS CORPUS; HOMESTEAD; HOUSE OF CORRECTION, 1; NEGLIGENCE, 6, 8-10; UNBORN CHILDREN.

1. An infant can impeach a decree in a suit to which he was a party, only upon a ground which would invalidate it in case of any other person, such as fraud, collusion, or error. *Harrison v. Turnbull* (Va.) 703

2. An infant is not prevented from asserting his rights by next friend against a decree settling an estate in which he is interested, whenever he sees fit to do so, by Va. Code, § 3424, allowing him to show cause against such decree within six months after he becomes of age. *Id.*

NOTES AND BRIEFS.

See also NEGLIGENCE.

Infants; effect of judgment on rights of. 704

INHERITANCE TAX. See TAXES, 8, 2.

INJUNCTION. See also ACTION ON SUIT, 1, 2.

1. All expenditure of public money at a place prohibited by the Constitution is a misapplication thereof which may be prevented by injunction, for the reason that it is against the declared will of the people. *State, Mc Cain, v. Metchan* (Or.) 693

2. A mandatory injunction to compel the removal of an electric-light pole may be granted when the pole is placed in front of the plaintiff's property without necessity therefor, for the purpose of annoying him and to injure and depreciate the value of his property. *Snyder v. Fort Madison Street R. Co.* (Iowa) 345

3. An injunction against a trespass may be granted for the inadequacy of the relief at law, where an action at law has been brought, but the insolvency of the defendant makes it impossible to collect a judgment against it for damages. *Slater v. Gunn* (Mass.) 263

To officers of lodge.

4. A court of equity has power to enjoin the members of the supreme lodge of a fraternal beneficiary association from excluding any properly qualified state representatives from the right to vote. *Supreme Lodge Order of Golden Chain v. Simering* (Md.) 720

5. An injunction against the performance of the duties of the officers of a fraternal beneficial association, to which defendants claim to have been elected, sought on the ground

that the election was invalid because persons entitled to vote were denied the right, is not the proper remedy,—especially when it does not appear that this was done in bad faith. *Id.*

Against slaughter house.

6. An equitable action by a city to compel the removal or abatement of a slaughter house affecting the comfort and convenience of the public, but not injurious to the public health, is authorized by a charter empowering the city to compel the owner of any unwholesome, noxious house or place to cleanse, remove, or abate the same from time to time "as often as may be necessary for the health, comfort, and convenience of the inhabitants of said city." *Red Wing v. Guptil* (Minn.) 821

Against bawdy house.

7. An injunction against keeping a bawdy house on certain premises cannot be granted because it is obnoxious to the neighborhood and unfavorably affects the salable value of property in the locality. *Neaf v. Palmer* (Ky.) 219

Against prosecution.

8. An injunction against criminal proceedings, whether for violations of statutes or ordinances, will not be granted even when the constitutionality of the statute or the validity or reasonableness of the ordinance involved is alleged. *Paulk v. Sycamore* (Ga.) 772

Against use of trademark or trade-name.

9. An injunction will not be granted to restrain the use of a trademark which is deceptive in falsely representing that the goods sold under such trademark are manufactured at a particular place which has a reputation for making such goods. *Coleman, B. & W. Co. v. Dannenberg Co.* (Ga.) 470

10. Owners of flouring mills in Minneapolis, Minnesota, having established a high reputation for flour bearing the names "Minneapolis" and "Minnesota" by using a superior quality of hard spring wheat and all of them using the same process and the same kind of machinery and subjecting their product to the same kind of inspection, may have an injunction against the use of such names on flour of lower grade, which is made in Milwaukee from wheat of different grade. *Pillsbury-Washburn Flour Mills Co. v. Eagle* (C. C. App. 7th C.) 162

11. The fact that one of the mills of complainants who seek an injunction against the deceptive use of the name of a city on a product made elsewhere is situated outside the city limits will not preclude relief, when that mill is for all practical purposes a part of the complainants' plant within the city. *Id.*

12. An exclusive or proprietary right in words or labels used is not necessary in order to obtain an injunction against unfair competition in trade by the deceptive use of such words or labels. *Id.*

NOTES AND BRIEFS.

Injunction; by municipal corporations against nuisances affecting public morals, peace, and good order, and health and safety:—(I.) Public morals, peace, and good order: (a) intoxicating liquors; (b) public amusements; 41 L. R. A.

(II.) public health and safety: (a) in general; (b) burial grounds, etc.; (c) hospitals, etc.; (d) garbage, etc.; (e) sewers and drains; (f) trade or business; (g) buildings and other structures. 821

Against use of stream to float logs. 497

Against state officers; by taxpayer. 698

To suspend officers of corporation. 720

Against prosecution for offense. 772

INNOCENCE. See EVIDENCE, 8.

INSANE ASYLUM. See STATE INSTITUTIONS.

INSOLVENCY.

1. An insolvent who makes a deed of trust for creditors is not liable on contracts made by the trustee in administering the trust. *Wells-Stone Mercantile Co. v. Grover* (N. D.) 252

2. Creditors who join with an insolvent debtor in his deed of trust by which a trustee is to continue the business as long as he shall deem it for the interest of the creditors to do so, with the entire management and control of the business, and, when he deems it best, to sell the property and pay the claims of the creditors from the proceeds,—are not the real proprietors of the business, so as to become liable for goods purchased by the trustee in the prosecution of the business, but their relation to him is that of beneficiary and trustee, and not that of principal and agent. *Id.*

3. An assignment for benefit of creditors will be annulled by the preference therein of an usurious debt, where there is a statutory right of action to recover back the entire interest when usury has been paid. *Hiller v. Ellis* (Miss.) 707

4. The release by a creditor of all personal claim against an assignor for creditors who makes a preference in favor of such creditor will not make the creditor a purchaser of the assignment, if the assignor was hopelessly insolvent and the release was executed to uphold the assignment, and not to procure either it or the preference. *Id.*

5. The release by creditors of personal claims against the assignor in consideration of a preference in their favor in an assignment for benefit of creditors does not entitle the assignee to hold the assigned property as a purchaser for value for the satisfaction of such claims, if he was a party to a fraudulent preference which annulled the assignment. *Id.*

NOTES AND BRIEFS.

Insolvency; effect of preferring an usurious debt in an assignment for creditors:—(I.) General doctrine stated; (II.) limitation of this note; (III.) deed of assignment rendered void; (IV.) preference of actual debt sustained, but usury rejected; (V.) preference of usurious debt sustained generally; (VI.) who may, and who may not, urge the usurious character of the debt preferred. 707

INSURANCE. See also BENEVOLENT SOCIETIES; CONFLICT OF LAWS, 1; CORPORATIONS, 8; EVIDENCE, 5, 6; TRIAL, 5.

1. The license of a foreign insurance com-

pany for the current year may be revoked by the insurance commissioner, under Wis. Rev. Stat. § 1955, on account of its failure to pay the full license fees required by § 1220 for past years during which it has done business within the state, as its failure to comply with the law is a present, existing failure. *Travelers' Ins. Co. v. Fricke* (Wis.) 557

2. An accident insurance policy is not within Pa. act May 11, 1881, providing that no application, constitution, or by-laws referred to in a life or fire insurance policy, shall be received in evidence or considered part of the policy or contract, unless correct copies are contained in or attached to the policy. *Standard L. & A. Ins. Co. v. Carroll* (C. C. App. 8d C.) 194

3. The rule that all ambiguities, obscurities, and uncertainties in a policy of fire insurance, are to be resolved most favorably to the assured, has no application whatever to plain language used in such connection as to leave no room to say reasonably that the parties might have intended either of two meanings. *Thurston v. Burnett & B. D. Farmers' Mut. F. Ins. Co.* (Wis.) 816

Conditions.

4. A proviso exempting an accident insurance company from liability for injuries to a person "in or on any such conveyance not provided for the transportation of passengers" does not include injuries received by a passenger while on a locomotive of a passenger train at the invitation of a railroad official. *Berliner v. Travelers' Ins. Co.* (Cal.) 467

5. The use of wood to make power in a steam engine, not only when moving it to the place where it is to operate a threshing machine, but also to run the machine for half an hour before any coal is used, and then continuing to use wood, together with a small quantity of coal, for about fifteen minutes and until a fire occurs,—is not permitted by an insurance policy which requires the use of "coal for fuel, with sufficient wood to kindle or start the fire." *Thurston v. Burnett & B. D. Farmers' Mut. F. Ins. Co.* (Wis.) 816

Doubling insurance.

6. A passenger does not, by riding on a railroad engine by invitation of an officer of the road, lose his character as a passenger within the meaning of an accident policy which doubles the amount of the insurance in case of injury to a passenger "in any passenger conveyance using steam," etc. *Berliner v. Travelers' Ins. Co.* (Cal.) 467

Increase of hazard.

7. A provision in an accident insurance policy for smaller indemnity in case the insured is injured while engaged in an occupation more hazardous than that specified in the application is reasonable, and will be enforced by the courts. *Standard L. & A. Ins. Co. v. Carroll* (C. C. App. 3d C.) 194

8. A person insured by an accident policy in a preferred class as a mining expert is not, while riding as a passenger on a railroad locomotive, within a proviso reducing the amount of insurance if he is injured "in any occupation or exposure classed . . . as more hazardous than that here given." *Berliner v. Travelers' Ins. Co.* (Cal.) 467

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9. An increase of the risk or hazard is not shown by the mere fact of the levy of attachments and executions upon property. *Herman v. Katz* (Tenn.) 700

Change of title or interest.

10. The word "occupants" in the provision of a policy making it void for change of interest, title, or possession, "except change of occupants without increase of hazard," is not limited to real property, but applies to personal property also. *Id.*

11. The levy of attachments and subsequent executions on property without increasing the hazard does not avoid an insurance policy which provides that it shall be void for change of interest, title, or possession, except change of occupants without increase of hazard. *Id.*

Other insurance; prorating.

12. A "standard guaranty to maintain 80 per cent insurance," stamped on the face of a policy of fire insurance, does not supersede a provision that the policy shall be void in case of other insurance, at least when that policy itself is for more than 80 per cent of the value of the property. *Cutler v. Royal Ins. Co.* (Conn.) 159

13. A provision of an insurance policy as to prorating in case of loss of property covered by several policies controls another provision that the interest of a mortgagee or trustee shall not be invalidated by any act or neglect of the mortgagor or owner of the property. *Sun Ins. Office v. Varile* (Ky.) 798

14. Insurance of a lessor's interest in the premises, on which the lessee also had procured insurance for the lessor's benefit, as his lease required him to do, will cover such part of the loss insured against as remains after the application of the policies taken by the lessee, where they fail to cover the whole loss because of a stipulation in them for prorating with all other insurance on the premises. *Id.*

Total loss.

15. The total destruction of a building within the meaning of an insurance policy means its complete destruction as a building, but not necessarily the absolute extinction of all its materials, or even that no part of it can be left standing. *Corbett v. Spring Garden Ins. Co.* (N. Y.) 318

16. Insurance on a leasehold interest against the total destruction of a building which will terminate the lease gives no right of recovery when the roof is burned off, the interior destroyed, and the woodwork, sashes, and glass gone, while the iron front is considerably damaged, but the foundation and four walls remain substantially intact, and the building can be repaired for but little more than one third its value. *Id.*

Interest of creditors.

17. Creditors of an insolvent have no right to the proceeds of his life insurance made payable to other persons, where he paid the premium therefor only by a worthless check, and never put into the insurance anything upon which the creditors could have had any claim. *Roberts v. Winton* (Tenn.) 275

NOTES AND BRIEFS.

Insurance; effect of guaranty to maintain certain per cent of insurance. 160

Effect of attachments and executions upon:
 occupancy of personal property. 700
 On life; rights of creditors to. 274
 Construction of policy. 816
 Construction of policy; effect of negligence
 of insured. 467
 Total loss; what is. 818

INTENT. See CARRIERS, 9; CRIMINAL LAW,
 1.

INTEREST. See also USURY.

Unpaid license fees of a foreign cor-
 poration bear legal interest from the date upon
 which they ought by law to have been paid.
Travelers' Ins. Co. v. Fricke (Wis.) 557

INTERNAL REVENUE.

NOTES AND BRIEFS.

Criminal or penal liability for act of agent,
 partner, or servant. 654

INTOXICATING LIQUORS.

NOTES AND BRIEFS.

Criminal liability for act of partner, servant,
 or agent. 650

JUDGE. See COURTS, 6.

JUDGMENT. See also ACTION OR SUIT,
 4; ESTOPPEL, 1; EVIDENCE, 8; GARNISH-
 MENT, 2; INFANTS; SET OFF.

1. A motion for judgment *non obstante*
verdicto cannot be made after the judgment is
 entered. *Hurt v. Ford* (Mo.) 828

2. Judgment upon the pleadings may be
 entered after the verdict has been set aside on
 a motion for judgment *non obstante verdicto*,
 which makes the necessary averments, but
 which cannot be sustained as a motion of the
 latter kind because it was not made until after
 the judgment was entered. *Id.*

Void.

3. A decree of divorce granted without
 jurisdiction of the subject-matter or of the per-
 son, or without any cause for divorce stated,
 and without proof, is absolutely void. *Re*
Christensen's Estate (Utah) 504

Validating.

4. The law-making power cannot validate
 void judgments. *Id.*

5. A judgment may be validated by the
 legislature if rendered by a court with jurisdic-
 tion of the subject-matter and the person, and
 its invalidity is due to the omission of some es-
 sential step which the legislature had a right
 to dispense with. *Id.*

As a bar.

6. A decree establishing claims against a
 decedent's estate, and ordering the sale of real
 estate to pay them, is a complete bar to an ac-
 tion against the executor for a devasavit, and
 against the claimant to compel a return of the
 property, so long as it remains in force, when
 the action is brought by heirs of decedent, who
 were parties to the former suit in person or by
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representation. *Harrison v. Turnbull* (Va.)
 709

Opening; lien.

7. A court in opening a mere money judg-
 ment has no power to order that the lien there-
 of shall continue in existence and attach to
 such judgment as may subsequently be ren-
 dered in the cause. *Farmers' Loan & T. Co.*
v. Killinger (Neb.) 222

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See also SET-OFF.

Non obstante verdicto. 824

Power of legislature to validate. 505

Effect of fraudulent decree. 704

Continuing lien of judgment opened or set
 aside to permit a defense:—(I.) Distinction be-
 tween opening and setting aside or vacating
 judgment; (II.) power to continue lien on
 opening judgment; (III.) the Pennsylvania
 and Ohio rules; (IV.) effect of continuance of
 lien; (V.) the second or final judgment; (VI.)
 the final enforcement or collection. 222

JURISDICTION. See EVIDENCE, 8;
 JUDGMENT, 8, 5; JUSTICE OF THE PEACE,
 1.

JURY. See also APPEAL AND ERROR, 6-8,
 EVIDENCE, 2; NEW TRIAL, 1; TRIAL, 1-8;
 14.

1. The fact that some names on the jury
 panel were not on the last assessment roll of
 the county, as the law provides they should be,
 does not, of itself, sustain a challenge to the
 panel. *People v. Searcey* (Cal.) 157

2. The omission of a township in select-
 ing the jury list from the wards and town-
 ships of the county, which by Cal. Code Civ.
 Proc. § 206, is to be in proportion to their in-
 habitants, is not shown by the fact that the
 list does not include the names of any persons
 in a town which is within the township but
 constitutes only a part of it. *Id.*

JUSTICE OF THE PEACE. See also
 PROHIBITION, 2.

1. A justice of the peace has no jurisdic-
 tion of any cause of action unknown at com-
 mon law and not authorized by statute. *Nor-*
folk & W. R. Co. v. Pinnacle Coal Co. (W. Va.)
 414

2. The exclusion of the justices of the
 peace of a single town from the exercise of any
 criminal jurisdiction, by N. Y. Laws 1896,
 chap. 22, relieving them of the duty to enforce
 the criminal law, denying them compensation
 for such business, and virtually prohibiting all
 peace officers from obeying the writs of such
 justices in criminal cases,—is a violation of N.
 Y. Const. art. 6, which provides for justices of
 the peace, without expressly saying what a
 justice of the peace shall be. *People, Burby,*
v. Howland (N. Y.) 838

NOTES AND BRIEFS.

Justice of the peace; character of court of;
 constitutional office. 888

LAKE. See CONSTITUTIONAL LAW, 26.

LANDLORD AND TENANT. See also HIGHWAYS, 4; INSURANCE, 14, 16.

1. The partial destruction of a building is within the provision of Ky. Stat. § 2297, that a mere agreement of a lessee to repair will not bind him to restore buildings destroyed by fire or other casualty. *Sun Ins. Office v. Varble* (Ky.) 792

2. A landlord is liable for injury to his tenant from the fall of a porch which, to his knowledge at the time of the lease, had drawn away from the house, and which he attempted to repair, but negligently left unsafe. *Willcox v. Hines* (Tenn.) 278

3. A landlord is liable to his tenant for such defects and dangers as are in existence when the lease is made, provided he knows of them or ought to know of them, and provided also that the tenant does not know of them, and could not know of them, both parties in the matter exercising reasonable care and diligence. *Id.*

NOTES AND BRIEFS.

Landlord's liability for defects in premises. 555

LARCENY.**NOTES AND BRIEFS.**

Criminal liability for agent's act in. 652

LAW OF PLACE. See CONFLICT OF LAWS.**LEGISLATURE.** See HUSBAND AND WIFE, 6.**LIBEL.****NOTES AND BRIEFS.**

See also EVIDENCE.

Libel; criminal liability for agent's act in. 658

LIBERTY.**NOTES AND BRIEFS.**

What is. 625

LICENSE. See also CORPORATIONS, 8; INSURANCE, 1; INTEREST.**NOTES AND BRIEFS.**

License of peddlers. 501

Requiring payment for preceding year. 558

LIENS. See also JUDGMENT, 7; PAYMENT, 1; TAXES, 7.

1. An agreement by a contractor for payment in securities, which when accepted would waive a lien, does not before payment prevent an inchoate lien under Ky. act 1888, creating mechanics' liens, but providing that they shall not attach unless a statement is furnished for filing within a time specified. *Central Trust Co. v. Richmond, N. I. & B. R. Co.* (C. C. App. 6th C.) 458

2. The waiver of a lien by a contractor will not affect subcontractors' liens under Ky. act 1888, which gives liens to "all persons who perform labor or furnish labor or materials . . . by contract . . . or by subcontract thereunder," independent of that of the main contractor. *Id.*

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3. A provision for payment to a contractor in instalments is not binding on subcontractors so as to affect their rights to a lien under a statute giving them liens independent of that of the main contractor. *Id.*

4. The distribution among subcontractors of the original contract price, which is the limit of aggregate liens, should be made upon the basis of the entire lienable claim of each subcontractor, and payments by the owner to each of them must be applied thereon up to the amount of his share, when made in the progress of the work, although no lien therefor had been perfected. *Id.*

5. The price for which railroad bonds were sold by a contractor when indorsed by another railroad company in consideration of the stock of the company which issued them is, for the purpose of determining the extent of subcontractors' liens, to be deemed their value to the contractor, where he took the stock and bonds in payment, although the indorsement was afterwards adjudged to be invalid and the stock had no market value. *Id.*

6. The money value of a contract for railroad construction, calling for payment in bonds and stock is, for the purpose of fixing the limit of subcontractors' liens, the market value of the bonds and shares when actually delivered in pursuance of the contract. *Id.*

7. The time when the last labor was performed by the claimant, and not by other lienors, is that from which to compute the time for filing his claim under the Kentucky lien act of 1883, § 4, requiring a statement "within sixty days after the last day of the last month in which any labor was performed." *Id.*

LIEUTENANT GOVERNOR. See MANDAMUS, 8.**LIFE INSURANCE.** See INSURANCE, 17.**LIGHTS.** See RAILROADS, 8, NOTES AND BRIEFS.**LIMITATION OF ACTIONS.** See also CORPORATIONS, 8.

1. A foreign corporation having its residence in another state is not entitled to the benefit of the statute of limitations. *Travelers' Ins. Co. v. Fricke* (Wis.) 557

2. The absence from the state of a principal debtor does not suspend the running of the statute of limitations in favor of his surety. *Moisingo v. Ross* (Ind.) 612

3. A partial payment by a principal debtor will not suspend the running of the statute of limitations in favor of his surety. *Id.*

4. Payments by the maker of a note will not interrupt the running of the statute of limitations as to an indorser, under Mo. Rev. Stat. § 6796, which provides that nothing contained in the two preceding sections (which require an acknowledgment or promise to be in writing, subscribed by the party to be charged, and that a person shall not be bound by an acknowledgment or promise of a joint obligor) "shall alter, take away, or lessen the effect of the payment of any principal or interest made by any person." *Maddox v. Duncan* (Mo.) 581

NOTES AND BRIEFS.

Payments by maker to interrupt statute as to indorser. 582

LOCAL SELF-GOVERNMENT. See FIRE DEPARTMENT; MUNICIPAL CORPORATIONS, NOTES AND BRIEFS.

LOGS. See WATERS, 2, NOTES AND BRIEFS.

LOTTERY. See also CONSTITUTIONAL LAW, 11; INDICTMENT.

Ignorance of the fact that the articles which a person has in his possession are policy books and slips, which it is an offense for him to have under Md. Laws 1894, chap. 810, § 178, does not constitute any defense. *Ford v. State* (Md.) 551

MANDAMUS.

1. Mandamus to state officers whose terms expire pending the proceeding cannot be enforced against their successors unless they are substituted as parties, and this may be done under N. Y. Code Civ. Proc. § 1930. *People, Broderick, v. Morton* (N. Y.) 381

2. A mandamus will not issue to compel the performance of an act by the governor of the state. *Id.*

3. Mandamus to the Lieutenant governor and speaker of the assembly may be issued when the legislature is not in session. *Id.*

4. The duty of railroad companies to construct or repair viaducts within a city may be enforced by mandamus. *Chicago, B. & Q. R. Co. v. State, Omaha* (Neb.) 481

5. The operation of a street railway can be enforced by mandamus where a company which has acquired the right and commenced to perform the service attempts to discontinue it. *State, Grinsfelder, v. Spokane Street R. Co.* (Wash.) 515

6. One who lives adjacent to a street railway and owns considerable property there, which he has improved, relying upon the facilities afforded by the line, has a material individual interest which entitles him to be a relator in mandamus to enforce the operation of the line. *Id.*

7. A prior demand for the operation of a street railway is not absolutely necessary to sustain a proceeding for mandamus to compel its operation. *Id.*

NOTES AND BRIEFS.

Mandamus; to governor and other state officers. 281

To compel operation of carrier's line. 515

In case of discretion. 817

MANUFACTURES. See TAXES, 3.

MARRIAGE. See HUSBAND AND WIFE.

MARSHALING ASSETS AND SECURITIES.

Claims having a common security take *pro rata* on their full amount without deduction. 41 L. R. A.

tion for payments made by the debtor on account of his personal liability. *Central Trust Co. v. Richmond, N. I. & B. R. Co.* (C. C. App. 6th C.) 458

MASTER AND SERVANT. See also CIVIL RIGHTS; TRIAL, 12.

1. The fall of an additional staging constructed on the main staging in a building by an employee of the builder, at the request of an employee of a manufacturer who had come to put up ornamental work made on the builder's order, does not render the manufacturer liable to his employee who was injured by the fall of the staging, where he was told when sent to do the work that the builder would see to the staging, although he was assured by his foreman that it would be entirely safe. *Channon v. Sanford Co.* (Conn.) 200

2. Failure to equip freight cars with self-couplers constitutes negligence *per se*. *Greenlee v. Southern R. Co.* (N. C.) 899

3. An extension of time procured from the Interstate Commerce Commission by railroad companies for placing self-couplers upon freight cars merely relieves the companies from the penalty provided in the Act to Regulate Commerce, but does not relieve them from the legal liability to employees for failure to provide suitable appliances in general use. *Id.*

Incompetence of servant.

4. A master who has used due care in employing a servant, and has properly instructed him, has no further duty until he receives notice of conduct which denotes incompetency. *Walkowski v. Penokes & G. Consoel Mines* (Mich.) 88

5. Incompetence which will render an employer liable for the act of an employee injuring a coemployee is not shown by the mere fact that, after operating the machinery correctly for seven months, he, at the time of the injury, forgot and turned it the wrong way. *Id.*

6. An employer is not chargeable with notice that one employed to manage the brake controlling the passenger cage connected with a mine has become incompetent, from the fact that the engineer thought that he ran the cage too fast, if there is nothing to show that the information had reached the employer. *Id.*

7. Due care in employing a boy seventeen years old to manage the brake controlling the passenger cage connected with a mine is shown by the facts that the machinery is simple and easily managed, and that the employer makes due inquiry as to the applicant's experience and ability, and receives satisfactory replies before employing him. *Id.*

8. Negligence is not shown by the mere fact of employing a boy seventeen or eighteen years old to manage the brake controlling the passenger cage connected with a mine. *Id.*

Assumption of risk.

9. A brakeman's knowledge that cars are not furnished with self couplers does not make him assume the risk by continuing in the service and coupling the cars in the course of his duty. *Greenlee v. Southern R. Co.* (N. C.) 398

Contributory negligence.

10. Contributory negligence of a brakeman in coupling cars will not preclude a recovery for injury caused by the absence of self-couplers, which constituted continuing negligence of the master, and existed subsequently to his negligence. *Id.*

Independent contractor.

11. The negligence of an independent contractor or his employee, in blasting out a ledge of rock which extends close up to the wall of a building on adjoining property is not chargeable to his employer, who engaged him to excavate the lot preparatory to building thereon. *Berg v. Parsons* (N. Y.) 391

NOTES AND BRIEFS.

Relation of servant while working for third person. 202

Negligence of railroad company as to employees. 400

Knowledge as an element of an employer's liability to an injured servant:—(I.) Introductory; (II.) actual knowledge; (III.) constructive knowledge; (IV.) rule when the dangerous condition is due to the act of a stranger or of a fellow servant, or to the operation of some abnormal physical force; (V.) imputed knowledge of probable future events; (VI.) circumstances charging an employer with knowledge of the condition of his instrumentalities; (VII.) duty of active inspection of instrumentalities when first used; (VIII.) duty of active inspection of instrumentalities while in use; (IX.) employer's duty to know the character and capacity of his servants; (X.) employer's duty as to the supervision of appliances not owned by him, but used by his servants; (XI.) assignability of the duty of inspection; (XII.) employer's liability qualified by the servant's duty to acquaint himself with his environment; (XIII.) whose knowledge is imputed to the employer; (XIV.) duties of a master after learning of a danger to which his servant is exposed; (XV.) knowledge as an element of liability under statutes; (XVI.) pleading; (XVII.) burden of proof; opinions as evidence; (XVIII.) instructions. 38

Liability for negligence of independent contractor. 391

Criminal and penal liability for act of servant. 650

MAXIMS.

1. Damnum absque injuria. *Barnard v. Shirley* (Ind.) 787

2. Expressio unius est exclusio alterius. *Spier v. Baker* (Cal.) 196

3. He who comes into equity must come with clean hands. *Coleman, B. & W. Co. v. Dannenberg Co.* (Ga.) 470

4. Ignorance of the law excuses no one. *State v. Southern R. Co.* (N. C.) 246

5. One should be prevented from reaping an advantage from his own wrong. *Mason v. State, McCoy* (Ohio) 291

6. Res ipsa loquitur. *Benedick v. Potts* (Md.) 478

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7. Respondeat superior. *Berg v. Parsons* (N. Y.) 391

8. Sic utere tuo ut alienum non laedas. *State v. Griffin* (N. H.) 177

MECHANIC'S LIEN. See LIENS.

MERCANTILE AGENCY. See COPY-RIGHT, 3; FRAUD AND FRAUDULENT CONVEYANCES.

MERGER. See CORPORATIONS, 2.

MERRY-GO-ROUND.

NOTES AND BRIEFS.

Injunction against, by municipality. 323

MILITIA. See CERTIORARI, 2.

MILL. See EMINENT DOMAIN, 3.

MIMIC RAILWAY. See EVIDENCE, 10.

MINES. See MASTER AND SERVANT, 6-8.

MONOPOLY. See CONTRACTS, 7, 9.

MORTGAGE. See INSURANCE, 13; TAXES, 7.

MOTION. See JUDGMENT, 1.

MUNICIPAL CORPORATIONS. See also BICYCLES; CIVIL SERVICE, 4; CONSTITUTIONAL LAW, 4, 15; EJECTMENT; FIRE DEPARTMENT; HIGHWAYS, 3, 5; INJUNCTION, 6; RAILROADS, 1, 3; STATUTES, 6; STREET RAILWAYS, 1.

1. The legislature may select any means for the administration of a municipal government which it thinks best adapted to that end, and may provide for the election of municipal officers by the people, or authorize any officers or persons to fill the offices by appointment. *People, Akin, v. Kipley* (Ill.) 775

2. Ordinances, to be valid, must be reasonable and must spring from an honest exercise of legislative discretion. *Id.*

3. The authority of a public corporation is limited to such powers as are expressly granted to it, and such as may become necessary to their exercise. *Ogden City v. Bear Lake & R. Waterworks & Irrig. Co.* (Utah) 305

Local self-government.

4. The right of local self-government in cities and towns was not surrendered upon the adoption of the Constitution of Nebraska, and cannot be taken away by the legislature. *State, Smyth, v. Moores* (Neb.) 624

5. The attempt to confer authority upon the governor to appoint fire and police commissioners in cities of the metropolitan class, which is made by Neb. Laws 1897, chap. 10 (Neb. Comp. Stat. chap. 12a), is void as an unlawful attempt to deprive the people of such cities of the right of local self-government. *Id.*

Requiring lights on railroad tracks.

6. The kind of light that shall be employed by a railroad company to light its track

in a city or village may be prescribed by ordinance. *Cincinnati, H. & D. R. Co. v. Bowling Green* (Ohio) 422

7. The daily period for which electric lights are required to be furnished by a railroad company at crossings is prescribed with sufficient definiteness by an ordinance requiring the lights during the number of hours of each day that the common council requires for electric lamps to light streets. *Id.*

8. The fact that the particular kind of lamp and attachments which an ordinance requires to be used by a railroad company for lighting its track is subject to patents the exclusive right to use which in that place is owned by a corporation does not make the ordinance unreasonable as subjecting the railroad company to extortion, as the municipality has authority to fix the rates to be charged for lights, and can compel them to be furnished at a reasonable price. *Id.*

Lease or transfer of waterworks.

9. The right to lease or otherwise transfer its waterworks system or its water right, used in supplying its inhabitants with water, is not conferred upon a city by a charter provision authorizing it in general terms to lease, convey, and dispose of property, real and personal, for its benefit. *Ogden City v. Bear Lake & R. Waterworks & Irrig. Co.* (Utah) 805

Destruction of property.

10. A village is not liable for the acts of its trustees in destroying property to avert an imminent public injury, as they are not its servants or agents within the principle of *respondet superior*. *Aitken v. Wells River* (Vt.) 566

NOTES AND BRIEFS.

See also RAILROADS; WATERS.

Municipal corporations; right of local self-government. 625

Right to transfer waterworks of. 807

Liability for destruction of property by officers of. 567

NAME. See GOODWILL; TRADENAME.

NEGLIGENCE. See also CARRIERS, 2-4; CONFLICT OF LAWS, 2; ELECTRICAL USES AND APPLIANCES; ELEVATORS; EVIDENCE, 9-11, 23; FIRE, 1; LANDLORD AND TENANT, 2, 3; MASTER AND SERVANT; TRIAL, 7-10.

1. There can be no actionable negligence where there is no duty. *O'Leary v. Brooks Elevator Co.* (N. D.) 677

2. Gratuitous lenders of brackets for use in a staging are not liable for injury to a servant of the borrower, caused by a defect in the brackets of which the lender did not know, even though he should have known of it. *Gagnon v. Dana* (N. H.) 889

3. The negligence of a railroad company in keeping oil on a station platform is not concurrent with the careless act of a man who starts a fire by dropping a match. *Stone v. Boston & A. R. Co.* (Mass.) 794

Toward licensees or trespassers.

4. An owner owes no duty of protection 41 L. R. A.

to a trespasser upon his land, when such trespass is unknown to him and is not in any manner induced by his negligence. *O'Leary v. Brooks Elevator Co.* (N. D.) 677

5. A landowner is ordinarily under no obligation to a mere licensee or trespasser to keep his premises in a safe condition; and this is the rule even if the licensee or trespasser is an infant of tender years. *Delaware, L. & W. R. Co. v. Reich* (N. J. Err. & App.) 831

6. An invitation is not extended to children to enter on private premises, by erecting thereon for beneficial use a structure which happens to be attractive to them. *Id.*

7. A turntable located upon the private property of a railroad company near a public street, though entirely unprotected and unguarded so that children of all ages congregate there to play upon it, does not make the railroad company liable to answer for injury received by a child while playing upon it. *Id.*

8. The protruding ends of wire which was wound around the knuckle of a shaft or tumbling rod to keep wedges in place, at a place 6 or 8 feet from a driveway to a grain elevator, along which there was a railing, and which was partly boarded up, but not so that people could not pass through, do not render the owner of the premises liable to a child who was injured while trespassing on the premises, although children sometimes went there to play and tramps sometimes resorted there. *O'Leary v. Brooks Elevator Co.* (N. D.) 677

9. A child is not relieved from the responsibility of its negligence when trespassing, because the trespass was committed under the control or coercion of a parent or guardian. *Id.*

Imputed.

10. Negligence of the parent or guardian having custody and control of an infant, in exposing it to danger, will not be imputed to the child so as to preclude its right of action against a third person by whose negligence it is injured. *Evansville v. Senhenn* (Ind.) 728

NOTES AND BRIEFS.

Negligence; as to condition of article loaned. 389

Toward licensee or trespasser. 678

By parents, imputed to children. 728

As to turntable on which children play. 833

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

NEGROES. See CIVIL RIGHTS; COMMERCE, 1.

NEW TRIAL.

1. An obvious effort of the court to drive the members of the jury into an agreement requires a new trial, if they agree. *People v. Sheldon* (N. Y.) 644

2. Refusal of an instruction presenting a question raised by the pleadings and the evidence is sufficient ground for setting aside a verdict. *Hurt v. Ford* (Mo.) 823

NOTARY.

A woman is ineligible to the office of notary public under Ohio Const. art. 15, § 4, requiring an officer to be an elector, and art. 6, § 1, requiring an elector to be a male citizen. *State, Monnett, v. Adams* (Ohio) 727

NOTES AND BRIEFS.

Notaries; eligibility of women to be. 727

NOTICE. See also **MASTER AND SERVANT**, 6.

A payee of checks is not charged with knowledge that they have been stolen or embezzled and collected upon forged indorsements by his clerk, either because the clerk had that knowledge or because the means of such knowledge were in books of account from which the discovery would have been made if monthly trial balances had been made by an honest clerk. *Shepard & M. Lumber Co. v. Eldridge* (Mass.) 617

NOTES AND BRIEFS.

Notice; by means of knowledge. 618

NUISANCES. See also **INJUNCTION**, 6, **NOTES AND BRIEFS.**

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Nuisances; criminal or penal liability for maintenance of, by servant, agent, or partner. 655

OFFICE. See **CRIMINAL LAW**, 2.

OFFICERS. See also **CIVIL SERVICE**; **CONSTITUTIONAL LAW**, 12; **MANDAMUS**; **MUNICIPAL CORPORATIONS**, 5; **TRIAL**, 1.

1. The ousting of a person from office, declaring the office vacant and his election thereto void, under Ohio act April 8, 1896, § 7, to prevent corrupt practices at elections, is not a punishment, but operates upon the election to the office, and is therefore not in conflict with Ohio Const. art. 6, § 4, giving to the general assembly the power to make a person ineligible to office for conviction of bribery, perjury, or other infamous crime. *Mason v. State, McCoy* (Ohio) 291

2. The trial of charges against officers for their removal is not within the constitutional provision for trial by jury. *People, Akin, v. Kipley* (Ill.) 775

3. The official acts of a *de facto* officer cannot be collaterally attacked. *Cleveland v. McCanna* (N. D.) 852

NOTES AND BRIEFS.

See also **CIVIL SERVICE.**

Officers; removal of. 775

Restricting exercise of constitutional office. 838

OIL. See **NEGLIGENCE**, 2.

ORDINANCE. See **EVIDENCE**, 16.

PANEL. See **JURY**, 1.
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PARENT AND CHILD. See **DEATH**, **NOTES AND BRIEFS.**

PARTIAL PAYMENT. See **LIMITATION OF ACTIONS**, 3, 4.

PARTIES. See **ACTION OR SUIT**, 1-4.

PARTNERSHIP. See also **HUSBAND AND WIFE**, 1.

A partner is not liable for the penalty imposed by Ala. Code, § 8296, for "wilfully and knowingly" cutting trees of another person, when this is done without his consent or knowledge, by his copartner. *Williams v. Hendricks* (Ala.) 650

NOTES AND BRIEFS.

Partnership; criminal and penal liability for act of partner. 650

PASS. See **CARRIERS**, 9, 10.

PASSENGERS. See **CARRIERS**.

PATENTS. See also **CONTRACTS**, 2, 3.

A regulation of the sale of patent rights by Kan. Laws 1889, chap. 182, requiring the vendor of such rights to file copies of his patent with the clerk of court, with an affidavit that the patent is genuine and unrevoked and that he is authorized to sell, and providing that the words "given for a patent right" shall be inserted in any written obligation taken from a vendee,—is a reasonable police regulation which does not violate the Federal Constitution or infringe upon the exclusive right secured to a patentee by Federal law. *Mason v. McLeod* (Kan.) 548

NOTES AND BRIEFS.

Patent; state regulation of transfers of rights in. 548

PAYMENT. See also **ASSUMPSIT**; **LIENS**, 3; **LIMITATION OF ACTIONS**, 3, 4.

1. Partial payments to a subcontractor by the principal contractor should be applied on that portion of the claim which may not be covered by the subcontractor's lien, for the purpose of fixing the amount of the lien. *Central Trust Co. v. Richmond, N. I. & B. R. Co.* (C. C. App. 6th C.) 458

2. Payments made according to stipulation, of 90 per cent of the estimates, which are subject to correction, of the amount due under a contract to a subcontractor, do not absolutely discharge 90 per cent of the liability for work done up to that time, so as to prevent a subcontractor's lien therefor, but are to be applied merely as partial payments on what is due the subcontractor. 12

PEDDLERS. See also **COMMERCE**, 2.

NOTES AND BRIEFS.

Peddlers; who are; requirement of license. 501

PENALTY. See also CARRIERS, 7; CRIMINAL LAW, NOTES AND BRIEFS; PARTNERSHIP.

A penalty is in the nature of punishment for the nonperformance of an act or for the performance of an unlawful act, and involves the idea of punishment, whether enforced by a civil or criminal action or procedure. *Hall v. Norfolk & W. R. Co. (W. Va.)* 669

PHYSICIANS. See also CONSTITUTIONAL LAW, 39; DAMAGES, 2.

1. One already practising medicine by virtue of a license issued under the old law is not entitled to a new certificate and license as a matter of course under the Indiana law of March 8, 1897, but the board of registration and examination can inquire whether his former license was rightfully obtained, and also whether he is a fit person to practise medicine. *State, Burroughs, v. Webster (Ind.)* 212

2. The practice of Christian Science, consisting of prayer for divine assistance, the encouragement and direction of the thoughts of the patient, without recommending or administering any drug or medicine, or giving him any course of physical treatment, is not a violation of R. I. Gen. Laws, chap. 165, prohibiting the practice of medicine or surgery in any of its branches without a certificate from the state board of health. *State, Swarts, v. Mylod (R. I.)* 428

NOTES AND BRIEFS.

Physicians; requiring license; law requiring new license. 212

PLEADING.

1. An allegation of the ownership of a water right is not insufficient because it fails to state how the ownership was acquired, whether by appropriation, adverse user, or purchase. *Hagus v. Nephi Irrig. Co. (Utah)* 311

2. A general denial is sufficient to raise a defense of the statute of frauds. *Hurt v. Ford (Mo.)* 828

3. A demurrer does not distinctly specify the objection under Hill's (Or.) Ann. Laws, § 68, by stating that there is "a defect of parties plaintiff and defendant." *State, McCain, v. Metcahan (Or.)* 692

NOTES AND BRIEFS.

Pleading; as to master's knowledge as element of liability. 145

PLUMBERS. See CONSTITUTIONAL LAW, 16, 28.**POLES.** See EMINENT DOMAIN, 6; STREET RAILWAYS, 1.**POLICE POWER.** See CONSTITUTIONAL LAW; EMINENT DOMAIN, 3.**PONDS.** See EASEMENTS; WATERS, 3.**POOR AND POOR-LAWS.**

An action by a county for indemnity 41 L. R. A.

out of the funds belonging to a lunatic may be brought against the lunatic and her guardian, when, by the latter's neglect, the county has been compelled to provide for her as a pauper. *McNairy County v. McCain (Tenn.)* 862

NOTES AND BRIEFS.

Poor; liability of estate of person on implied contract to pay for his support as a poor person. 862

POSSESSION. See CONSTITUTIONAL LAW, 11; TRIAL, 2.**PRESCRIPTION.** See EASEMENTS.**PRIMARIES.** See VOTERS AND ELECTIONS, 4-7.**PRINCIPAL AND AGENT.**

NOTES AND BRIEFS.

Criminal and penal liability for act of agent. 650

PROHIBITION.

1. Prohibition is no longer a matter of sound discretion, but a matter of right, and lies in all proper cases, whether there is other remedy or not, in view of W. Va. Code, chap. 110, § 1, providing that it shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject-matter in controversy, or, having such jurisdiction, exceeds its legitimate powers. *Norfolk & W. R. Co. v. Pinnacle Coal Co. (W. Va.)* 414

2. A justice of the peace cannot take jurisdiction of a cause of action after the repeal of the statute which conferred jurisdiction upon him in such class of actions, under the pretense of deciding whether such statute has been in fact repealed or not; and he may be restrained by prohibition from entertaining such an action. *Id.*

NOTES AND BRIEFS.

Prohibition; against excess of power of court. 415

PROXIMATE CAUSE.

1. A wind existing at the time a building is set on fire is not an intervening cause of the burning of another building to which the fire is carried. *Lillibridge v. McCann (Mich.)* 381

2. Negligence in storing oil upon a station platform and permitting it to remain there in violation of statute is not the proximate cause of damage by a fire which is started by the careless dropping of a match by a man who comes to the platform to deliver goods, and who is in no sense a servant, agent, or guest of the railroad company. *Stone v. Boston & A. R. Co. (Mass.)* 794

NOTES AND BRIEFS.

Proximate cause; of damage by fire. 383

Of loss by fire. 794

PUBLICATION. See COPYRIGHT, 2.

QUO WARRANTO.

A proceeding under the Missouri corrupt practices act of March 31, 1893, brought by the attorney general on the initiative of the defeated candidate, who by § 10 is required to specify the charges under the act, is not a proceeding by quo warranto instituted by the attorney general *ex officio*, but is a special proceeding subject to the limitations and restrictions of the statute. *State, Crow, v. Bland* (Mo.) 297

RAILROADS. See also CONSTITUTIONAL LAW, 24; DAMAGES, 1; EMINENT DOMAIN; LIENS, 5, 6; MANDAMUS, 4; MASTER AND SERVANT, 2, 3, 9, 10; MUNICIPAL CORPORATIONS, 6-8; NEGLIGENCE, 7.

1. Failure to include lessees of railroads in an ordinance requiring the owners of the roads to repair a viaduct over streets does not make the ordinance void, where the charter authorizes the city to require such repairs by the railroad companies "owning or operating" separate lines of track. *Chicago, B. & Q. R. Co. v. State, Omaha* (Neb.) 481

2. An ordinance requiring the reconstruction by two railroad companies of specific portions of a viaduct previously erected by them jointly with the city is a valid exercise of the power given by the charter of Omaha (Neb. Comp. Stat. chap. 12a, § 48). *Id.*

3. A railroad company may be required by ordinance to light a road which it operates, at its intersection with certain streets in a city or village, although it is neither the owner nor the lessee of the track. *Cincinnati, H. & D. R. Co. v. Bowling Green* (Ohio) 422

NOTES AND BRIEFS.

Railroads; compelling roads to light their tracks in city. 422

RATES. See CARRIERS, 6-8; CORPORATIONS, 1.

RECEIVERS. See also APPEAL AND ERROR, 1.

1. A receiver will not be appointed to take possession of property and charge of business in the hands of a defendant, unless the plaintiff's right is sufficiently probable, or when it is not probable that such property will be lost or will sustain injury during the suit if it is left in defendant's hands, or that the business will be mismanaged. *Ogden City v. Bear Lake & R. Waterworks & Irrig. Co.* (Utah.) 805

2. A receiver appointed in another state may by comity be allowed to sue on a demand due him, when the suit will not injuriously affect the interests of the citizens of the state in which the suit is brought or violate its policy or laws. *Castleman v. Templeman* (Md.) 367

3. A receiver to whom a court of competent jurisdiction orders the payment of assessments by stockholders has no authority to consent to a decree in another state for the payment of such obligations to the creditor in whose suit he was appointed. *Id.*

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4. The adoption by receivers of a street-railway company of the use of metal safes for receiving fares, into which the passengers are required to put their fare while the conductor presses a button which rings a bell and registers the fare, is a detail in the management of the road which is within the discretion of the receivers, and will not be controlled by the court. *Morley v. Snow* (Mich.) 817

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Receivers; comity as to powers of, in other state. 368

Discretion of court as to control of. 817

REFERENDUM. See STATUTES, 1.

RELEASE. See INSOLVENCY, 4, 5.

RELIGION. See SUNDAY.

REPLEVIN.

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For property severed from realty. 682

RESTAURANT. See CIVIL RIGHTS.

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REVOCATION. See CORPORATIONS, 3; INSURANCE, 1.

SAFETY.

NOTES AND BRIEFS.

Injunctions by municipality against nuisance affecting. 322

SALE. See FRAUD AND FRAUDULENT CONVEYANCES, 1.

SAWDUST. See CONSTITUTIONAL LAW, 26.

SCHOOLS. See also GOODWILL; HOUSE OF CORRECTION, 2; TRADENAME.

1. School children may be suspended from a public school by the board of education in charge, although the children have not been guilty of any violation of the rules of school, if their father or mother enters the school during school hours and, in the presence of the assembled scholars, uses offensive or insulting language to a teacher, in undertaking to call in question or interfere with the discipline of the teacher over one of the children. *Cartersville Bd. of Edu. v. Puras* (Ga.) 593

2. The exclusion of women from the principalships of grammar schools for boys, or mixed or combined grammar schools, is within the discretion of the Philadelphia board of education, which is empowered to determine the qualifications of teachers and classify or grade them. *Com., Scott, v. Board of Public Education* (Pa.) 498

3. Teachers are not included in the provision of Pa. Const. art. 10, § 8, that "women twenty-one years of age and upwards shall be

eligible to any office of control or management under the school laws." *Id.*

4. The power of the sectional boards of school directors to elect principals of grammar schools under Pa. act May 25, 1871 (P. L. 1157), applicable to Philadelphia, is subject to the prior acts on the same subject which authorize the board of education to provide the qualifications of all teachers, and grade and classify them into principals and others, and to classify each grade. *Id.*

NOTES AND BRIEFS.

Schools; regulation as to selection of teachers. 499

Right to exclude, suspend, or expel pupils from school for misconduct of pupil or parent:—(I.) Where the parent's action affects the child; (II.) for misconduct of pupil; (III.) for absence and tardiness; (IV.) for connection with secret societies; (V.) for failure to participate in certain studies and exercises; (VI.) for refusal to perform manual labor; (VII.) controlling conduct of pupil after the relation of teacher and pupil has ceased; (VIII.) questions of pleading and practice. 593

SELF-COUPERS. See MASTER AND SERVANT, 2, 8.

SET-OFF AND COUNTERCLAIM.

Mutual judgments cannot be set off one against the other in such a manner as to defeat the exemption laws, where all the property of one of the judgment debtors, including his judgment against the other, is less than the amount of property which the statute exempts from seizure. *Cleveland v. McCanna* (N. D.) 852

NOTES AND BRIEFS.

Set-off; of judgments; effect of exemption. 852

SHOOTING. See EVIDENCE, 20; TRIAL, 6.

SIDEWALK. See HIGHWAYS, 4.

SIGNATURE. See BANKS, 6.

SITUS. See GARNISHMENT, 1.

SLAVES.

NOTES AND BRIEFS.

Slaves; criminal liability for dealing of partner, agent, or servant with. 658

SPEAKER OF ASSEMBLY. See MANDAMUS, 3.

STAMP. See BANKS, 6.

STARE DECISIS. See COURTS, 11.

STATE. See also ESTOPPEL, 2.

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State; admission of, as recognition of its government. 625

STATE INSTITUTIONS. See also COURTS, 5.

An insane asylum maintained by the 41 L. R. A.

state is a public institution of the state, within the meaning of Or. Const. art. 14, § 8, locating such institutions at the seat of government. *State, McCain, v. Metchan* (Or.) 692

STATUTE OF FRAUDS. See CONTRACTS, 1.

STATUTES. See also CORPORATIONS, 1; COURTS, 4; DEFINITION.

1. An unconstitutional provision for disqualifying a person convicted under civil service law from holding office can be eliminated without invalidating its other provisions. *People, Akin, v. Kipley* (Ill.) 775

2. The words "for other purposes," in the title of a statute, have no effect under Cal. Const. art. 4, § 24, providing that a statute shall have but one subject, which shall be expressed in the title, and provisions on other subjects shall be void. *Spier v. Baker* (Cal.) 196

3. Provisions as to political conventions, and nominations thereby and voting therein, and as to expenditures by candidates and the placing of names on official ballots, are void when made in a statute providing for general primary elections. *Id.*

4. A statute to operate only in cities which adopt it by vote of the people is not unconstitutional as special legislation. *People, Akin, v. Kipley* (Ill.) 775

5. Penal statutes must be construed strictly. *Hall v. Norfolk & W. R. Co.* (W. Va.) 669

6. Legislation making municipalities liable to actions where no liability existed at common law should be construed most favorably to such corporations and against the claimant for damages. *Schaefer v. Fond du Lac* (Wis.) 287

7. The clearly expressed prohibition of free transportation of favored passengers in N. C. Acts 1891, chap. 320, cannot be modified by any practical construction put upon the law by the carrier and officials who have received passes. *State v. Southern R. Co.* (N. C.) 246

8. Strict construction should be given to the Missouri corrupt practices act of 1898, which provides not only for the forfeiture of office, but for punishment of violations of the law as felonies and misdemeanors. *State, Crow, v. Bland* (Mo.) 297

NOTES AND BRIEFS.

See also CURATIVE ACTS.

Statutes; special acts as to corporations. 338

STEAM ENGINE. See INSURANCE, 5.

STEPPATHER. See DEATH, 2, 8.

STREET RAILWAYS. See also CONSTITUTIONAL LAW, 14; CORPORATIONS, 1; ELECTRICAL USES AND APPLIANCES; EMINENT DOMAIN, 5; HIGHWAYS, 1, 2; INTERJUNCTION, 2; MANDAMUS, 5-7; RECEIVERS, 4.

1. A municipal corporation has no power

to make a contract with a street-railroad company which will prevent the legislature from regulating its rates of fare. *Indianapolis v. Navin* (Ind.) 387

2. A street-railway company which has received from the state, and entered upon the enjoyment of, a franchise for its business, cannot cease to operate the line without the consent of the granting power. *State, Grinsfelder, v. Spokane Street R. Co.* (Wash.) 515

8. The absence of any grant or privilege or franchise to operate a street railway will not relieve a company which has occupied the streets for such purpose for several years, without objection, from the duty to continue the service. *Id.*

NOTES AND BRIEFS.

Street railways; compelling operation of. 515

SUBCONTRACTOR. See LIENS; PAYMENT, 1.

SUBROGATION. See TAXES, 7.

SUCCESSION TAX. See TAXES, 8, 9.

SUICIDE. See EVIDENCE, 5.

SUNDAY. See also CONSTITUTIONAL LAW, 25.

The prohibition of baseball playing on Sunday by Ohio Rev. Stat. § 7082a, does not require or prohibit any religious observance, and therefore does not violate the right of conscience in matters of religion secured to the individual by the Ohio Bill of Rights, § 7. *State v. Powell* (Ohio) 854

NOTES AND BRIEFS.

Sunday; criminal liability for Sabbath breaking by agent or servant. 658, 670

Prohibiting ball playing upon. 855

SUSPENSION OF SENTENCE. See CRIMINAL LAW, 8, 4.

SYPHILIS. See HUSBAND AND WIFE, 7, 8.

TAXES.

1. Remission or abatement of taxes is within the prohibition of a constitution against exemptions. *State, Richards, v. Armstrong* (Utah) 407

2. Authority to remit or abate the taxes of any insane, idiotic, infirm, or indigent person to an amount not exceeding \$10 for the current year, given to a board of equalization by Utah Rev. Stat. § 2579, is in violation of Utah Const. art. 18, § 2, requiring all property not exempt under the laws of the United States or under that Constitution to be taxed in proportion to value. *Id.*

8. A corporation is not engaged in "carrying on manufacture," within the meaning of an exemption from taxes, when its business is that of purchasing, slaughtering, and selling sheep and lambs, although it utilizes the hides, wool, tallow, and offal, as well as the carcasses

of the animals, and prepares and sells them as refrigerated mutton, rendered tallow, pulled wool, untanned hides, and fertilizer made of the offal, including the blood and legs. *People, New England Dressed Meat & W. Co., v. Roberts* (N. Y.) 228

4. No distinction between dividends earned in a state and those earned out of it can be made in the assessment of a foreign corporation under N. Y. Laws 1896, chap. 908. *Id.*

5. The determination of the state controller that an assessment for taxes should be canceled on the ground that the property was not subject to assessment is not *res judicata*, and does not estop his successor from assessing the same property or franchise in subsequent years. *Id.*

6. A tax cannot be assessed on nonresident trustees for property held by them outside of the state, under Me. Rev. Stat. chap. 6, § 14, cl. 6, as amended by Me. Laws 1889, chap. 175, providing for the assessment of trustees in the place where the person to whom the income is payable is an inhabitant, notwithstanding the fact that they derive their title from a devise under a Maine will through confirmation by a Maine probate court to which they have agreed to render accounts. *Augusta v. Kimball* (Me.) 475

LIEN.

7. A lien for taxes on property mortgaged for more than it is worth, and afterward conveyed absolutely to the mortgagee in part payment of the debt, cannot be subsequently asserted by the sheriff for previous years during which he failed to collect but accounted for the taxes, when the owner had personal property on the premises from which collection could have been made, as his right of subrogation, if any, is subject to the prior equity of the mortgagee. *Allen v. Perrins* (Ky.) 351

SUCCESSION TAX.

8. A tax on the succession to property of a deceased person is not a tax upon the property itself, but on the right of succession thereto. *Kochersperger v. Drake* (Ill.) 446

9. A statute creating classes of the property of deceased persons for the purpose of a succession tax, although it exempts some classes from taxation and provides different rates for other classes, but is uniform as to all property in the same class, does not violate Ill. Const. 1870, art. 9, requiring property to be taxed according to value, since no person can take property by inheritance or devise except by statute, and the power of the state to regulate the question includes the power to create classes of such property. *Id.*

NOTES AND BRIEFS.

Tax; on trust property held for nonresidents. 475

On inheritance or succession; exemptions. 446

Exemptions, prohibited; contract for remission or abatement. 407

Exemption of manufacturing corporations; what is manufacture. 228

TELEGRAPHS. See also DAMAGES, 1; EMINENT DOMAIN, 4.

NOTES AND BRIEFS.

Telegraph; use of railroad right of way; exclusive right; compensation. 404

TELEPHONES. See ELECTRICAL USES AND APPLIANCES.

TERRITORIES. See COURTS, 3.

TIMBER. See PARTNERSHIP.

TOLL ROADS.

Toll from a bicycle rider traveling along a turnpike upon his wheel cannot be collected under authority to collect toll for every carriage drawn by one or more beasts, and to stop any person driving any carriage of burden or pleasure who attempts to pass without paying the toll specified. *Gloucester & S. Turnpike Co. v. Leppes* (N. J. Sup.) 457

NOTES AND BRIEFS.

Toll roads; charge for bicycles. 457

TORT. See CASE.

TRADEMARK. See INJUNCTION, 9, 10, 12.

TRADE NAME. See also GOODWILL.

1. The use of the name "William Bingham School," by the widow and children of William Bingham, does not give cause for complaint to one who conducts a school called the "Bingham School" in another part of the same state. *Bingham School v. Gray* (N. C.) 248

2. The incorporation of a school under the name of the proprietor does not confer the exclusive right to use that name for a school, or prohibit other persons bearing the same name from using it in connection with other schools which they may establish. *Id.*

NOTES AND BRIEFS.

Trade name; use of family name for private school. 248

TRANSFER TAX. See TAXES, 8, 9.

TRESPASS. See PARTNERSHIP; WATERS 8.

NOTES AND BRIEFS.

On banks to float logs. 496
Criminal liability for act of servant, agent, or partner. 657

TRIAL. See also BICYCLES; CONTEMPT; OFFICERS, 2.

1. The right to trial by jury does not extend to a proceeding to oust a person from office, as there is no property right involved in the inquiry. *Mason v. State, McCoy* (Ohio) 291

2. The constitutional right of trial by jury is not infringed by a statute making the mere possession of prohibited articles, even without knowing what they were, an offense. *Ford v. State* (Md.) 551

3. The constitutional provision for trial
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by jury does not apply to special summary jurisdictions unknown to the common law and not providing for that mode of trial. *People, Akin, v. Kipley* (Ill.) 775

4. Taking the testimony of the plaintiff at her own home, to which the presiding judge and the jurors go for that purpose, against the defendant's objection, although it cannot be regarded as done in open court, does not deprive the court of jurisdiction or nullify the judgment, but is, at most, an irregularity. *Selleck v. Janesville* (Wis.) 563

Questions of law or fact.

5. The construction of the words "using coal for fuel, with sufficient wood to kindle or start the fire," when used with reference to steam engines on insured premises, is solely for the court. *Thurston v. Burnett & B. D. Farmers' Mut. F. Ins. Co.* (Wis.) 816

6. The reasonableness of an excuse for shooting firearms within the limits of a municipality is a question of fact for the jury, and not for the court. *Chesterfield v. Raliff* (S.C.) 503

7. Whether the consequences of a negligent act ought to have been foreseen is a question for the jury. *Lillibridge v. McCann* (Mich.) 381

8. The question of the negligence of a depositor in keeping a rubber stamp which will make a fac simile of his signature, and which is unlawfully obtained and used in forging checks, is a question for the jury. *Robb v. Pennsylvania Co. for Ins. on Lives, etc.* (Pa.) 695

9. Negligence of a conductor in seizing a passenger to save himself as he stumbled is a question for the jury in an action by the passenger, although the cause of the stumbling is not shown. *Whalen v. Consolidated Traction Co.* (N. J. Err. & App.) 886

10. The negligence or carelessness of a railroad company, and the unfitness or gross negligence or carelessness of its servants or agents, should be submitted to the jury on evidence that a train running at extraordinary speed struck a person as he was attempting to get on a somewhat crowded platform from which passengers were accustomed to take trains, which was across the track from a station, and which was narrow and insufficient for the accommodation of the passengers accustomed to use it. *Young v. New York, N. H. & H. R. Co.* (Mass.) 193

Instructions.

11. If there is any evidence sufficient to warrant the jury in drawing the inference that a certain fact exists pertinent to the issues, the trial judge must, if requested, instruct the jury what the law arising from such fact is, even though he may be of the opinion that such fact is not established by a preponderance of the whole evidence. *Evansville v. Senhenn* (Ind.) 728

12. An instruction that the relation of master and servant did not exist between plaintiff and defendant at the time of an injury to the former should be given where such relation did not in fact exist at such time although it had previously existed, and the accident is

alleged to have happened because of defects in brackets gratuitously loaned by defendant to plaintiff's employer at the time for use in a staging. *Gagnon v. Dana* (N. H.) 889

18. The use by the court of the expression, "where the state makes out such a case as would sustain a verdict of guilty," will not justify an understanding by the jury that guilt may be found upon a preponderance of evidence, if they are expressly told that to convict they must be satisfied of guilt beyond a reasonable doubt. *State v. Thornton* (S. D.) 580

Verdict.

14. The old rule permitting coercion of a jury in order to secure a verdict has been swept away, and under our present method the independence of a jury is respected. *People v. Sheldon* (N. Y.) 644

NOTES AND BRIEFS.

Trial; validity of proceedings in course of a trial outside of the courtroom. 563

Temporary absence of judge, when fatal to trial:—(I.) Scope of note; (II.) when court consists of single judge; (III.) when court consists of more than one judge. 569

Coercion of jury. 646

Question of negligence on. 288

TROLLEY. See ELECTRICAL USES AND APPLIANCES.

TROVER.

NOTES AND BRIEFS.

For property severed from realty. 632

TRUSTS. See also CHAMPERTY, 3, 4; TAXES, 6.

1. A trustee is liable on contracts made by him in the discharge of the trust, unless he lawfully restricts his liability in the contract itself. *Wells-Stone Mercantile Co. v. Grover* (N. D.) 252

3. A trustee under a will, who files a bill for the construction of certain clauses in the will, will not be allowed his costs out of the trust fund; if the prayer of a cross bill by the beneficiaries that their action in removing him, which, under the will, they had the power to do, and he had no power to resist, be ratified, is granted, and no construction of the will made. *May v. May* (D. C. App.) 767

Removal of trustee.

3. A provision in a will creating a trust, giving the beneficiaries power to remove the trustee and appoint another without aid of the courts, for what they may deem good and sufficient cause, is valid, and will be given effect by the courts. *Id.*

4. Power of removal of a trustee, given the beneficiaries by the will creating the trust, must not be exercised wantonly, capriciously, or arbitrarily, and its exercise may be reviewed by a court of equity. *Id.*

5. Failure of one of the beneficiaries of a trust to participate in the removal of the trustee under a power contained in a will creating it, required to be exercised by all the beneficia-

ries, will not render the removal invalid, where such beneficiary is represented by another under a power of attorney, and subsequently ratifies it and all action in the premises. *Id.*

6. Deep seated and irreconcilable dissension between the beneficiaries of a trust and the trustee, not superinduced for the mere purpose of getting rid of the latter, is sufficient to justify his removal under a power given the beneficiaries by will, even if his conduct is otherwise unobjectionable. *Id.*

Spendthrift trusts.

7. The interest of the beneficiary under a trust may be made by the author of the trust unassignable and free from subjection to the claims of the beneficiary's creditors. *Seymour v. McAvoy* (Cal.) 544

8. No interest which can be subjected to the claims of other creditors is given to a testator's widow and unmarried daughter while the widow lives and the daughter remains unmarried, by a will creating a trust under which the trustee is to pay for the widow's support during life and for the daughter's support until her marriage, where he is not directed to pay any money to either of them until the daughter's marriage, although the daughter is given an interest to one fourth of the property contingent upon her marriage, and a right to another fourth contingent upon her surviving her mother. *Id.*

9. A person cannot place his property in trust with remainder over, reserving to himself the beneficial interest for his life, subject to the expenses of the trust, and thereby put his life interest beyond the reach of subsequent creditors. *Schenck v. Barnes* (N. Y.) 395

10. A trust created by a debtor under which he is the beneficiary is not affected by 1 N. Y. Rev. Stat. p. 780, § 63, which prohibits a person beneficially interested in a trust for the receipt of rents and profits of lands, from assigning, or in any manner disposing of such interest. *Id.*

NOTES AND BRIEFS.

Trusts; created for benefit of grantor for life; rights of creditors as to. 396

For support; rights of creditors of beneficiary. 544

Removal of trustee; when authorized. 767

TURNTABLE. See also NEGLIGENCE, 7.

NOTES AND BRIEFS.

Turntables; liability for injury to child on. 832

UNBORN CHILDREN. See also WILLS, 2.

Unborn heirs of a person against whose estate an action is brought to establish claims to which living heirs of the same class are made parties will be regarded as parties by representation, and will be bound by the decree rendered as effectually as if they had actually been parties to the action. *Harrison v. Turnbull* (Va.) 708

USAGE. See CUSTOM.

USURY. See also **INSOLVENCY**, 8.

The device of an agreement to pay interest on a loan from the time application is made for it, when the loan is not consummated until some time afterwards, cannot be resorted to for the purpose of preventing the reservation of interest in advance at the highest legal rate from the date to the maturity of the notes from being usurious. *Hiller v. Ellis* (Miss.) 707

NOTES AND BRIEFS.

See also **INSOLVENCY**.

Usury; by building association; statute curing taint of. 589

VAULT. See **HIGHWAYS**, 4.

VIADUCTS. See **CONSTITUTIONAL LAW**, 24; **MANDAMUS**, 4; **RAILROADS**, 1, 2.

VOTERS AND ELECTIONS. See also **QUO WARRANTO**; **STATUTES**, 8.

1. The expenditure to secure the nomination and election of a candidate, of more money than the law permits, if it is done without his knowledge or consent, will not avoid his election under the Missouri corrupt practices act of 1893. *State, Crow, v. Bland* (Mo.) 297

2. Procuring the withdrawal of a candidate, and the substitution of the name of the candidate of another party as the nominee of the former party also, although it is done by the payment of money and by giving other valuable inducements, and results in procuring additional votes for the fusion candidate, does not constitute a bribery of voters within the meaning of the Missouri corrupt practices act of 1893. *Id.*

3. A petition in a proceeding under the Missouri corrupt practices act of March 31, 1893, by the attorney general on the application of the defeated candidate, is demurrable if it does not clearly state charges which are made actionable by the act, although it alleges that the defendant is usurping the office. *Id.*

4. The power of the legislature to require an oath of a bona fide, present intention to support the nominees selected by the delegates there elected, as a test of the right to vote at a primary election, presents a matter demanding most serious consideration, but is not decided in this case. *Spier v. Baker* (Cal.) 196

5. A primary election provided for by statute is an election "authorized by law," within the meaning of Cal. Const. art. 2, § 1, prescribing the qualifications of electors at all elections authorized by law. *Id.*

6. The restriction of the right to vote at the primary elections by Cal. act March 13, 1897, § 22, to those whose names appear upon the great or precinct registers, or the supplements thereto, used at the last general election, is unconstitutional, as it excludes various classes of electors who have a constitutional right to vote. *Id.*

7. The qualifications as to residence of voters at primary elections prescribed by Cal. act March 13, 1897, do not comply with the Constitution, as the only condition they pro-

vide is thirty days' residence in the county prior to the election, whereas the Constitution requires residence in the state for one year, in the county ninety days, and in the precinct thirty days, and that naturalized citizens must have been such ninety days. *Id.*

NOTES AND BRIEFS.

Elections; legislative regulation of; corrupt practices act. 292, 298

WARRANTS. See **ACTION OR SUIT**, 1.

WATERS. See also **CONSTITUTIONAL LAW**, 26; **EASEMENTS**; **EMINENT DOMAIN**, 2, 3; **MUNICIPAL CORPORATIONS**, 9.

1. The right of passage on a navigable stream is a common and paramount one, but must be exercised with due regard to the rights of riparian owners and with ordinary care and skill. *Oynes v. Mississippi & R. R. Boom Co.* (Minn.) 494

2. Floating logs in a navigable stream, if they are driven in an ordinarily careful and prudent manner, will not render the party driving them liable for damage to riparian owners. *Id.*

3. The right to cross the unimproved land of another person bordering on a great pond, for the purpose of cutting and carrying away ice from the pond, is not conferred by the ordinance of 1641-49, adopted by the Massachusetts Bay Colony, making it "free for any man to fish and fowl there," and to "pass and re-pass on foot through any man's propriety for that end, so he trespass not on any man's corn or meadow." *Slater v. Gunn* (Mass.) 268

4. Raising the waters of a river beyond the natural, usual, and ordinary high-water mark, for the purpose of improving the navigation, gives a riparian owner whose lands are thereby overflowed a right to damages, although the water is raised by dams constructed under legislative authority. *Carlson v. St. Louis River Dam & I. Co.* (Minn.) 871

5. The discharge of mineral water from an artesian well, which has been used in a public bath house in bathing and cleansing persons afflicted with infectious, syphilitic, or other similar disorders, by causing it to flow through a tile drain or otherwise into a stream which constitutes the only available drainage therefor unless a sewer is built to a river more than a mile distant, which would cost from \$3,500 to \$4,000 exclusive of the cost of the right of way, which the owners of the land refuse to grant,—cannot be prevented by injunction at the suit of an owner of land through which such stream runs, even if he is damaged thereby. *Barnard v. Shirley* (Ind.) 737

Appropriation.

6. The use for domestic and irrigation purposes of larger quantities of water than are necessary therefor does not prevent the subsequent appropriation of the excess by the owner of a mill for manufacturing purposes. *Hague v. Nephi Irrig. Co.* (Utah) 811

7. The appropriation of more water than is necessary for the beneficial use intended does not prevent the excess from being appropri-

ated by a subsequent appropriator for a useful purpose. *Id.*

8. A change of the place of diversion of water can be made only when it is done so as not injuriously to affect the rights of other appropriators. *Id.*

Rates.

9. A schedule of maximum rates in a contract by city with a water company does not bind consumers to the payment of such maximum rates, if they are unreasonable. *Griffin v. Goldsboro Water Co.* (N. Y.) 240

10. Discrimination in rates charged to consumers by a water company is unlawful, as the business is affected with a public use. *Id.*

NOTES AND BRIEFS.

Public right of access to water:—For fishing; for general purposes. 268

Adverse use of stream; place of diversion; for what may be appropriated. 812

Right to use stream for floating logs:—Stream floatable in natural state; what streams are floatable; necessity; artificial channel; construction of statutes; manner of use; as public highways; correlative rights of log and riparian owners; regulations; conflict with other navigation; conflicting rights of floatage; log-driving companies. 871

Liability for injuries to riparian owner by running logs in stream:—Trespass on banks; flooding land; other injuries; excessive floods; contributory negligence; statutes; injunction. 494

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Correlative rights of upper and lower proprietors as to use and flow of water in stream:—(I.) General statement of the right; (II.) right to use; (III.) right to flow; (IV.) use for sewer; (V.) right to relief. 737

Statutory protection of water used for supplying municipality. 177

Prohibiting pollution of. 178

Unlawful discrimination in rates; reasonableness of rates. 240

WILLS. See also COURTS, 9; EXECUTORS AND ADMINISTRATORS, 5; TRUSTS, 8, 8.

1. The intention to make no provision for a child already born need not be shown by the will itself, under How. (Mich.) Ann. Stat. § 5810, giving such child the right to share as in case of intestacy if "it shall appear that such omission was not intentional but was made by mistake or accident." *Carpenter v. Snow* (Mich.) 820

2. The intention of a testator that no provision should be made for a child afterwards born, which must "be apparent from the will," under How. (Mich.) Ann. Stat. § 5809, in order to prevent such child from taking as in case of intestacy, is not shown by a provision which gives all property of every kind and nature to testator's wife. *Id.*

NOTES AND BRIEFS.

Wills; effect of failure to provide for child; as to children afterwards born. 820

WOMEN. See NOTARY; SCHOOLS, 2, 2.

L. R. A. CASES AS AUTHORITIES.

CASES IN 41 L. R. A.

41 L. R. A. 33, WALKOWSKI v. PENOKEE & G. CONSOL. MINES, 115 Mich. 629, 73 N. W. 895.

Master's duty in selection of servants.

Annotation in 41 L. R. A. 33, referred to particularly in Bell v. Globe Lumber Co. 107 La. 734, 31 So. 994, holding railway company liable for negligence of engineer employed without due care.

Duty of warning employees.

Cited in note (44 L. R. A. 34) on duty of master to instruct and warn servant as to perils of employment.

Duty of observing rules of employment.

Cited in note (43 L. R. A. 306, 320) on duty of master and servant as to rules promulgated for safe conduct of business.

Assumption of risk.

Cited in notes (49 L. R. A. 34) on contributory negligence in entering or remaining in employment; (47 L. R. A. 165) on *volenti non fit injuria*, as defense to actions by injured servants.

Burden of explaining accident.

Cited in footnote to Spees v. Boggs, 52 L. R. A. 933, which holds employer not bound to explain cause of elevator injuring employee.

Violation of statutory duty.

Cited in notes (57 L. R. A. 836) on statutory liability of employers for defects in condition of their plant; (48 L. R. A. 71) on liability of employer for injuries received by servants owing to want of blocking at switches.

Who are fellow servants.

Cited in footnote to Wellston Coal Co. v. Smith, 55 L. R. A. 99, which holds miner intrusted with duties of mine boss not fellow servant of other miners.

Cited in notes (50 L. R. A. 435, 436) on what servants are deemed to be in same common employment, apart from statutes, where no questions as to vice principalship arise; (54 L. R. A. 52, 55, 75, 102, 166) on vice principalship as determined with reference to character of act which caused injury; (51 L. R. A. 568) on vice principalship considered with reference to superior rank of negligent servant.

Action by servant against third party.

Cited in note (46 L. R. A. 45, 50) on right of servant to recover damages from persons other than his master for injuries received in performance of duties.

41 L. R. A. 154, *KIDD v. BATES*, 120 Ala. 79, 74 Am. St. Rep. 17, 23 So. 735.

Qualifications of executors.

Approved on later appeal in 124 Ala. 673, 27 So. 491, sustaining dissolution of injunction against coexecutor on unsubstantiated charges of fraud.

Cited in *Re Van Vleck*, 123 Iowa, 90, 98 N. W. 557, holding court not bound to appoint executor nominated in will, where he has converted part of property to his own use, and otherwise placed himself in hostility to provisions of will.

Construction of devise.

Approved in *Barr v. Weaver*, 132 Ala. 218, 31 So. 488, holding devise of "such portion as entitled to under laws" measured by statute of dower and descent.

41 L. R. A. 157, *PEOPLE v. SEARCEY*, 121 Cal. 1, 53 Pac. 359.

41 L. R. A. 159, *CUTLER v. ROYAL INS. CO.* 70 Conn. 566, 40 Atl. 529.

41 L. R. A. 162, *PILLSBURY-WASHBURN FLOUR MILLS CO. v. EAGLE*, 30 C. C. A. 386, 58 U. S. App. 490, 86 Fed. 608.

Injunction against trade names.

Approved in *Heller & M. Co. v. Shaver*, 102 Fed. 888, and *Shaver v. Heller & M. Co.* 65 L. R. A. 881, 48 C. C. A. 53, 108 Fed. 826, sustaining injunction against use of term "American," designating washing compound, for unfair competition; *California Fruit Cannery Assn. v. Myer*, 104 Fed. 83, granting injunction against use of word "California" in designating fruit grown elsewhere; *Atwater v. Castner*, 32 C. C. A. 80, 50 U. S. App. 394, 88 Fed. 645, sustaining preliminary injunction restraining use of geographic name as trademark, where locality gained its name from trade using it; *Colgate v. Adams*, 88 Fed. 900, granting injunction restraining use of name "Cashmere" in designating soap manufactured by another; *La Republique Francaise v. Saratoga Vichy Springs Co.* 65 L. R. A. 832, 46 C. C. A. 420, 107 Fed. 461, granting injunction against use of geographic name "Vichy" in designating mineral waters artificially produced elsewhere; *La Republique Francaise v. Schultz*, 42 C. C. A. 235, 102 Fed. 155, holding use of geographical name "Vichy (Grand Grille)" for artificial mineral water, unfair competition; *Illinois Watch Case Co. v. Elgin Nat. Watch Co.* 35 C. C. A. 240, 94 Fed. 609, refusing injunction restraining use of geographic name "Elgin" as trademark, without intention to defraud; *Williams v. Mitchell*, 45 C. C. A. 268, 106 Fed. 171, holding injunction proper to restrain use of descriptive name "Carbons" when used for deception; *Draper v. Sherrett*, 116 Fed. 208, granting injunction against use of words "French Tissue," designating medicinal paper, when used in unfair competition; *Russia Cement Co. v. Katzenstein*, 109 Fed. 316, granting injunction restraining use of trade name by retailer in designating inferior article manufactured by same company.

Cited in *American Washboard Co. v. Saginaw Mfg. Co.* 50 L. R. A. 615, 43 C. C. A. 239, 103 Fed. 286, denying injunction against use of word "Aluminum," where no injury shown; *Bauer v. Siegert*, 56 C. C. A. 490, 120 Fed. 84, holding

geographical name cannot be usurped by manufacturer, who so dresses his goods as to palm them off for those of another manufacturer having established reputation under same name; Chickering v. Chickering & Sons, 56 C. C. A. 479, 120 Fed. 73, holding one may not use own name to designate goods in manner calculated to confuse them with those of another manufacturer having established reputation.

Cited in footnote to Fuller v. Huff, 51 L. R. A. 332, which sustains right to enjoin use of term "health food" for foods previously known as "sanitarium foods."

Distinguished in Anheuser-Busch Brewing Asso. v. Fred Miller Brewing Co. 87 Fed. 865, granting injunction restraining use of geographical name when adopted for unfair competition.

Enjoining use of distinctive trade bottle.

Approved in Van Hoboken v. Mohns, 112 Fed. 530, granting injunction against refilling distinctive gin bottles with inferior article; Charles E. Hires Co. v. Consumers' Co. 41 C. C. A. 74, 100 Fed. 812, granting injunction restraining use of peculiar bottle, for deception.

Parties to actions.

Cited in Louisville & N. R. Co. v. Smith, 63 C. C. A. 7, 128 Fed. 7, holding railroad company having right of action of equitable nature against number of land owners interfering in same manner with right of way entitled to have right determined as to all in one suit.

41 L. R. A. 175, COMMERCIAL BANK v. CHESHIRE PROVIDENT INST. 59 Kan. 361.

Acts ultra vires.

Approved in Ward v. Joslin, 186 U. S. 149, 46 L. ed. 1098, 22 Sup. Ct. Rep. 807, Affirming 44 C. C. A. 458, 105 Fed. 226, holding *ultra vires*, guaranty of paper by loan and trust company not in due course of business; Morissette v. Howard, 62 Kan. 467, 63 Pac. 756, holding corporation may dispose of property with view of discontinuing, when necessary, stockholders consenting thereto.

41 L. R. A. 177, STATE v. GRIFFIN, 69 N. H. 1, 76 Am. St. Rep. 139, 39 Atl. 260.

Legislative police regulations.

Approved in State v. Dow, 70 N. H. 288, 53 L. R. A. 316, 47 Atl. 734, sustaining statute prohibiting trout fishing for trade purposes; Gooch v. Exeter, 70 N. H. 414, 85 Am. St. Rep. 637, 48 Atl. 1100, sustaining statute creating town board of police commissioners authorized to employ officers and fix pay; State v. Aldrich, 70 N. H. 392, 85 Am. St. Rep. 631, 47 Atl. 602, sustaining statute prohibiting bicycle riding on sidewalks by persons over twelve years of age.

Liability for polluting stream.

Cited in footnotes to Weston Paper Co. v. Pope, 56 L. R. A. 899, which sustains liability for pollution of stream by discharge from strawboard works, though business skilfully conducted; People v. Hulbert, 64 L. R. A. 265, which sustains right of upper riparian owner to bathe in lake from which municipality takes its water supply.

41 L. R. A. 185, LUFKIN RULE CO. v. FRINGELI, 57 Ohio St. 596, 63 Am. St. Rep. 736, 49 N. E. 1030.

Contracts in restraint of trade.

Cited in footnotes to Clark v. Needham, 51 L. R. A. 785, which holds void, lease of manufacturing machinery with agreement against lessor engaging in business for five years; Tuscaloosa Ice Mfg. Co. v. Williams, 50 L. R. A. 175, which holds void, contract by owner of ice machine to abandon manufacture of ice in certain town for five years, giving other party monopoly of business; Anchor Electric Co. v. Hawks, 41 L. R. A. 189, which sustains contract by officers of different corporations not to engage for five years in any competing business; Trenton Potteries Co. v. Oliphant, 46 L. R. A. 255, which sustains vendor's agreement not to engage in competitive business for fifty years within United States, except specified states and territories; Swigert v. Tilden, 63 L. R. A. 608, which sustains contract by seller of good will of business not to be connected with competing business for ten years; Bancroft v. Union Embossing Co. 64 L. R. A. 298, which sustains contract by one selling right to manufacture and sell machine invented by him to make, or transfer to others right to make, such machines; Steichen v. Fehleisen, 51 L. R. A. 412, which holds individual partners not bound by firm agreement not to re-engage in certain business for specified period; Pohlman v. Dawson, 54 L. R. A. 913, which holds agreement on sale of business, not to engage in barber business in any manner, violated by working as employee in other shop.

41 L. R. A. 189, ANCHOR ELECTRIC CO. v. HAWKS, 171 Mass. 101, 68 Am. St. Rep. 403, 50 N. E. 509.

Contracts in restraint of trade.

Approved in Garst v. Harris, 177 Mass. 74, 58 N. E. 174, sustaining contract prohibiting sale of proprietary medicine by retailer below stipulated price; Harrison v. Glucose Sugar Ref. Co. 58 L. R. A. 919, 53 C. C. A. 489, 116 Fed. 309, granting injunction restraining violation of covenant not to engage in competing business for five years within 1,500 miles; National Enameling & Stamping Co. v. Haberman, 120 Fed. 417, sustaining contract in restraint of competition, unlimited as to time and covering entire country; Bancroft v. Union Embossing Co. 72 N. H. 406, 64 L. R. A. 300, footnote p. 298, 57 Atl. 97, upholding validity of contract of inventor not to engage for twenty years in business of manufacturing machine sold, where customers limited and scattered; Swigert v. Tilden, 121 Iowa, 658, 63 L. R. A. 612, 100 Am. St. Rep. 374, 97 N. W. 82, holding agreement of vendor of shirt factory not to engage in same business within limited territory for ten years, not invalid; Trentman v. Wahrenburg, 30 Ind. App. 313, 65 N. E. 1057, holding agreement of dealer in building material, upon sale of business, not to engage in same business in county, nor purchase commodity of other persons than vendee, for five years, reasonable restriction.

Cited in footnotes to Lufkin Rule Co. v. Fringeli, 41 L. R. A. 185, which holds void, agreement by seller not to engage in same business for twenty-five years in United States; Tuscaloosa Ice Mfg. Co. v. Williams, 50 L. R. A. 175, which holds void, contract by owner of ice machine to abandon manufacture of ice in certain town for five years, giving other party monopoly of business; Clark v. Needham, 51 L. R. A. 785, which holds void, lease of manufacturing machinery with agreement against lessor engaging in business for five years; Trenton Pot-

teries Co. v. Oliphant, 46 L. R. A. 255, which sustains vendor's agreement not to engage in competitive business for fifty years within United States, except specified states and territories; Swigert v. Tilden, 63 L. R. A. 608, which sustains contract by seller of good will of business not to be connected with competing business for ten years; Bancroft v. Union Embossing Co. 64 L. R. A. 298, which sustains contract by one selling right to manufacture and sell machine invented by him to make, or transfer to others right to make, such machines; Pohlman v. Dawson, 54 L. R. A. 913, which holds agreement on sale of business, not to engage in barber business in any manner, violated by working as employee in other shop; Steichen v. Fehleisen, 51 L. R. A. 412, which holds individual partners not bound by firm agreement not to re-engage in certain business for specified period.

41 L. R. A. 193, YOUNG v. NEW YORK, N. H. & H. R. CO. 171 Mass. 33, 50 N. E. 455.

What constitutes passenger.

Cited in footnotes to *Exton v. Central R. Co.* 56 L. R. A. 509, which holds purchaser of ticket a passenger while using depot for purpose of journey; *Phillips v. Southern R. Co.* 45 L. R. A. 163, which holds one coming to station with intent to take next train, a passenger; *Keator v. Scranton Traction Co.* 44 L. R. A. 546, which holds woman with transfer ticket, injured by breaking of trolley pole while she is approaching car, a passenger; *Chicago & E. I. R. Co. v. Jennings*, 54 L. R. A. 827, which holds one with ticket, crossing tracks on highway to board train on further track, not a passenger; *Illinois C. R. Co. v. Laloge*, 62 L. R. A. 405, which holds intending passenger resorting to station unreasonable time before train's departure not entitled to protection as passenger from assaults of strangers.

Rights of passengers.

Cited in footnote to *Chesapeake & O. R. Co. v. King*, 49 L. R. A. 102, which sustains alighting passenger's right to presume against dangerous operation of trains.

Contributory negligence.

Cited in *Judge v. Elkins*, 183 Mass. 230, 66 N. E. 708, holding person negligent in walking upon track in front of stationary electric coal car, which, if he had looked, he might have seen was about to start.

41 L. R. A. 194, STANDARD LIFE & ACCI. INS. CO. v. CARROLL, 30 C. C. A. 253, 58 U. S. App. 76, 86 Fed. 567.

What constitutes extra hazard.

Cited in footnotes to *Willey Casualty Co. v. Sheppard*, 47 L. R. A. 650, which holds barber not engaged in more hazardous occupation while hunting rabbits as incident to daily life; *Berliner v. Travelers' Ins. Co.* 41 L. R. A. 467, which holds riding on locomotive by invitation will not prevent being passenger within accident policy.

Evidence; application for insurance.

Approved in *National Acci. Soc. v. Dolph*, 38 C. C. A. 2, 94 Fed. 744, holding accident insurance contract not within statute against admissibility of application or by-law in evidence.

Distinguished in *Zimmer v. Central Acci. Ins. Co.* 207 Pa. 475, 56 Atl. 1003, holding policy against loss of life by accident is life policy within act excluding evidence of application, unless attached to policy.

41 L. R. A. 196, *SPIER v. BAKER*, 120 Cal. 370, 52 Pac. 659.

Statutes; sufficiency of title.

Distinguished in *People v. Linda Vista Irrig. District*, 128 Cal. 485, 61 Pac. 86, holding title of irrigation statute sufficient to include provision for ascertaining validity of organization of district contemplating issue of bonds.

Legislative regulation of primaries.

Approved in *Britton v. Election Comrs.* 129 Cal. 340, 61 Pac. 1115, holding unconstitutional, statute interfering with free choice of delegates by political party.

Cited in *Ladd v. Holmes*, 40 Or. 180, 91 Am. St. Rep. 457, 66 Pac. 714, sustaining statute requiring primary elections for selection of delegates to nominating conventions; *Ladd v. Holmes*, 40 Or. 188, 91 Am. St. Rep. 457, 66 Pac. 714, sustaining statute imposing restrictions upon right to vote at party primaries.

41 L. R. A. 200, *CHANNON v. SANFORD CO.* 70 Conn. 573, 66 Am. St. Rep. 133, 40 Atl. 462.

Duty to furnish safe place and implements.

Cited in *McBeath v. Rawle*, 192 Ill. 629, 61 N. E. 847, sustaining recovery for death of workman by scaffold breaking; *Roche v. Llewellyn Iron Works Co.* 140 Cal. 570, 74 Pac. 147, holding foundry company sending servant to premises of electric company to roll tubes for defective boiler entitled to assume boiler without defect making it dangerous place to work when steam turned off.

Cited in footnote to *Gagnon v. Dana*, 41 L. R. A. 389, which denies liability of gratuitous lender of brackets for injury to borrower's servants from unknown defect.

Who liable as master.

Cited in footnotes to *Stewart v. California Improv. Co.* 52 L. R. A. 205, which holds owner of steam roller liable for engineer's neglect to warn travelers, though roller hired by city; *Swackhamer v. Johnson*, 54 L. R. A. 625, which holds hirer of workmen furnished to third person not liable for their trespass in cutting stranger's timber.

Who are fellow servants.

Cited in footnote to *Murray v. Dwight*, 48 L. R. A. 673, which holds servant of truckman unloading goods at warehouse not fellow servant of warehouseman's servants.

41 L. R. A. 204, *CHAMBERLIN'S APPEAL*, 70 Conn. 363, 39 Atl. 734.

Construction of wills by probate courts.

Approved in *Mack's Appeal*, 71 Conn. 129, 41 Atl. 242, holding probate courts may determine validity of bequests, only as incident to order of distribution; *Eliot's Appeal*, 74 Conn. 601, 51 Atl. 558, holding that in absence of objection to form of proceeding in probate court to determine validity of devise, reasons of appeal from decree of that court would be given effect of complaint in equitable action.

Title of administrator de bonis non.

Cited in *Ives v. Beecher*, 75 Conn. 154, 52 Atl. 746, holding executor or administrator *de bonis non* necessary party to suit to foreclose lien of judgment rendered in favor of predecessor in title.

41 L. R. A. 208, *MOORE v. DISTRICT OF COLUMBIA*, 12 App. D. C. 537.

Reasonableness of ordinance or regulation.

Approved in *District of Columbia v. Hazel*, 16 App. D. C. 287, holding apportionment of cab stands presumed reasonable, subject to proof to contrary.

Bicycle law.

Cited in note (47 L. R. A. 289, 292) on bicycle law.

41 L. R. A. 211, *MARSHALL v. MACON SASH, DOOR & LUMBER CO.* 103 Ga. 725, 68 Am. St. Rep. 140, 30 S. E. 571.

Parent's action for death of child.

Cited in *Robinson v. Georgia R. & Bkg. Co.* 117 Ga. 169, 60 L. R. A. 556, 97 Am. St. Rep. 156, 43 S. E. 452, holding statute giving mother right of action for homicide of child will not support action for death of illegitimate child.

Cited in footnotes to *Brink v. Wabash R. Co.* 53 L. R. A. 811, which denies right to recover for nonperformance of contract to support parent, through negligent killing of son; *Hennessy v. Bavarian Brewing Co.* 41 L. R. A. 385, which sustains mother's right of action for wrongful death of child notwithstanding remarriage and stepfather's assumption of parental obligations.

41 L. R. A. 212, *STATE ex rel. BURROUGHS v. WEBSTER*, 150 Ind. 607, 50 N. E. 750.

Statutes regulating practice of medicine.

Approved in *Ferner v. State*, 151 Ind. 251, 51 N. E. 360, sustaining statute creating board of dental examiners, though not providing appeal; *People v. Reetz*, 127 Mich. 89, 86 N. W. 396, sustaining statute regulating practice of medicine; *Bragg v. State*, 134 Ala. 182, 58 L. R. A. 931, 32 So. 767, upholding constitutionality of statute prohibiting practice of medicine without certificate of qualification from board of medical examiners; *State v. Wilcox*, 64 Kan. 792, 68 Pac. 634, upholding constitutionality of statute regulating practice of medicine, surgery, and osteopathy; *Reetz v. Michigan*, 188 U. S. 503, 47 L. ed. 565, 23 Sup. Ct. Rep. 390, upholding power of state to make reasonable provisions for determining qualifications of those engaging in practice of medicine, and to punish violation of such statutes; *Parks v. State*, 159 Ind. 221, 59 L. R. A. 195, 64 N. E. 862, upholding validity of statute regulating practice of medicine, which in effect prohibits one from practising magnetic healing; *Curryer v. Oliver*, 27 Ind. App. 426, 60 N. E. 364, sustaining action for revocation of physician's license; *Parks v. State*, 159 Ind. 221, 59 L. R. A. 195, 64 N. E. 862, sustaining statute requiring license of persons holding themselves out as healers or medical practitioners; *Bragg v. State*, 134 Ala. 182, 58 L. R. A. 931, 32 So. 767, sustaining statute forbidding practice of medicine without license from medical examiners; *State Bd. of Health v. Roy*, 22 R. I. 542, 48 Atl. 802, sustaining statute permitting state board to refuse or revoke physician's certificate; *Meffert v. State Bd. of Medical Registration*, 66 Kan. 715, 72 Pac. 247, holding board of medical

examiners does not perform judicial functions in trial of charges against physician.

Cited in footnotes to *State v. Wilson*, 52 L. R. A. 679, which holds one prosecuted for unlawful practice of medicine required to prove compliance with statute; *Scholle v. State*, 50 L. R. A. 411, which sustains statute requiring license for physicians, except certain classes of persons; *Mathews v. Murphy*, 54 L. R. A. 415, which holds void, statute authorizing state health board to revoke physician's license for unprofessional conduct, without fixing standard; *State ex rel. Kellogg v. Currans*, 56 L. R. A. 253, which sustains requirement of examination of graduate of foreign medical college not required of graduates of college in state; *State v. Bair*, 51 L. R. A. 776, which sustains statute requiring examination before state board of examiners practise for five years, or certificate from medical school, as condition to right to practise medicine.

Jurisdiction of appeal from medical examiners.

Approved in *Re Coffin*, 152 Ind. 440, 53 N. E. 458, holding circuit court proper tribunal of appeal from decision of state board of medical examiners refusing to license.

Separation of powers.

Cited in *Ellis v. Steuben County*, 153 Ind. 92, 54 N. E. 382, holding statute requiring exercise of judgment by county surveyor in re-allotment of county drains not unconstitutional as imposing judicial functions on ministerial officers.

Class legislation.

Distinguished in *Dixon v. Poe*, 159 Ind. 498, 60 L. R. A. 310, 95 Am. St. Rep. 309, 65 N. E. 518, holding statute prohibiting issue of checks or tokens, by merchants to coal miners which may be payable otherwise than in money, invalid as class legislation.

41 L. R. A. 219, *NEAF v. PALMER*, 103 Ky. 406, 45 S. W. 506.

Injunction for suppression of criminal acts.

Cited in footnotes to *Blagen v. Smith*, 44 L. R. A. 522, which sustains right to injunction against maintenance of house of ill fame; *Weakley v. Page*, 46 L. R. A. 552, which sustains right of person specially injured to have house of ill fame abated as nuisance; *State v. O'Leary*, 52 L. R. A. 299, which denies state's right to injunction to suppress gambling house.

Enjoining prosecution under ordinance.

Cited in footnote to *Paulk v. Sycamore*, 41 L. R. A. 772, which denies injunction against prosecution for violation of statute or ordinance.

41 L. R. A. 219, *KNAUER v. LOUISVILLE*, 20 Ky. L. Rep. 193, 45 S. W. 510, 46 S. W. 701.

41 L. R. A. 222, *FARMERS' LOAN & T. CO. v. KILLINGER*, 46 Neb. 677, 65 N. W. 790.

Followed without discussion in *Baker v. Killinger*, 46 Neb. 682, 65 N. W. 791.

Effect of opening judgment.

Cited in *McAnulty v. National Life Asso.* 6 Lack. Legal News, 129, holding opening of default judgment against corporation does not vacate it so as to

bar further prosecution of action, where corporation dissolved since entry of default.

41 L. R. A. 228, *PEOPLE ex rel. NEW ENGLAND DRESSED MEAT & WOOL CO. v. ROBERTS*, 155 N. Y. 408, 50 N. E. 53.

Followed without discussion in *People ex rel. Schwarzschild & S. Co. v. Roberts*, 156 N. Y. 690, 50 N. E. 1121.

What constitutes manufacturing.

Approved in *People ex rel. L. E. Waterman Co. v. Morgan*, 48 App. Div. 400, 63 N. Y. Supp. 76, holding domestic corporation exempt from taxation as manufacturer when producing fountain pen from purchased parts; *Hernischel v. Texas Drug Co.* 26 Tex. Civ. App. 4, 61 S. W. 419, holding wholesale drug company engaged in bottling drugs purchased not "factory" within ordinance requiring fire escapes; *Re White Star Laundry Co.* 117 Fed. 571, holding laundry not within statute giving Federal courts jurisdiction, for adjudication of bankruptcy over corporations "engaged principally in manufacturing," etc.; *People ex rel. Eastern Bermudez Asphalt Paving Co. v. Morgan*, 61 App. Div. 379, 70 N. Y. Supp. 516 (dissenting opinion), majority holding corporation exempt from taxation as manufacturing when producing paving compound from asphalt, sand, etc.

Cited in footnote to *Columbia Iron Works v. National Lead Co.* 64 L. R. A. 645, which holds building, sale, and repairing of vessels employed in commerce within statute permitting institution of bankruptcy proceedings against corporations engaged principally in manufacturing and mercantile pursuits.

Taxation of capital stock and franchises.

Cited in note (57 L. R. A. 45, 107) on taxation of corporate franchises in United States; (58 L. R. A. 549, 587, 604) on taxation of capital stock of corporations in United States; (64 L. R. A. 40, 55, 65) on taxation of manufacturing corporations in United States.

Assessment of property for purposes of taxation.

Approved in *People ex rel. Journeay & B. Co. v. Roberts*, 37 App. Div. 3, 55 N. Y. Supp. 317, holding that comptroller cannot arbitrarily reject testimony as to value of foreign corporation's assets in determining tax; *Rockefeller v. Taylor*, 28 Misc. 462, 59 N. Y. Supp. 1038, holding that town assessors may properly incur expense of defending assessment when attacked.

Cited in *People ex rel. Eckerson v. Zundel*, 157 N. Y. 518, 52 N. E. 570, holding assessors not bound by judgment against predecessors on former assessment.

Interpretation of official duty.

Cited in *People ex rel. State Charities v. New York Soc. for Prevention of Cruelty to children*, 161 N. Y. 271, 55 N. E. 1063, dissenting opinion by Martin, J., who holds public officers not relieved from plain duty by predecessor's erroneous interpretation.

41 L. R. A. 231, *PEOPLE ex rel. BRODERICK v. MORTON*, 156 N. Y. 136, 66 Am. St. Rep. 547, 50 N. E. 791.

Application denied on second mandamus to reinstate in *Re Broderick*, 25 Misc. 536, 56 N. Y. Supp. 99.

Judicial supervision of acts of state officials.

Approved in *People ex rel. Smith v. Hoffman*, 166 N. Y. 476, 54 L. R. A. 601,

60 N. E. 187, holding governor not proper party to certiorari to review determination of military board of examination; *Hartigan v. West Virginia University*, 49 W. Va. 17, 38 S. E. 698, holding courts cannot review action of state board of regents removing professor.

Cited in *State ex rel. State Pub. Co. v. Smith*, 23 Mont. 49, 57 Pac. 449, holding mandamus lies against governor to control exercise of ministerial duty; *State ex rel. Trauger v. Nash*, 66 Ohio St. 617, 64 N. E. 558, sustaining mandamus compelling governor to perform ministerial act, though not controlling discretion in performance thereof.

Referred to in *State ex rel. Higdon v. Jelks*, 138 Ala. 122, 35 So. 60, for discussion of question whether courts have right by mandamus to compel action by governor in any case.

Coercing judicial action.

Approved in *Gough v. Satterlee*, 32 App. Div. 39, 52 N. Y. Supp. 492, holding private individuals cannot by contract require courts to decide irrelevant issues; *Re Atty. Gen.* 32 Misc. 8, 66 N. Y. Supp. 129, holding expression "order shall be granted" means "may be," as legislature cannot coerce judicial action.

Cited in *Re Davies*, 168 N. Y. 102, 56 L. R. A. 860, 61 N. E. 118, sustaining statute requiring granting of attorney general's application for order of examination "to secure" testimony.

Abatement of mandamus by change of officers.

Cited in *People ex rel. Cunliffe v. Cram*, 30 Misc. 564, 63 N. Y. Supp. 1027, holding mandamus proceeding not abated by appointment of new dock board; *People ex rel. Hatch v. Lantry*, 88 App. Div. 584, 85 N. Y. Supp. 193, Reversing 40 Misc. 429, 82 N. Y. Supp. 261, holding where mandamus proceedings against head of municipal department, for reinstatement of employee, is abated by retirement of defendant, successor in office cannot be substituted as defendant before further demand for reinstatement.

Jurisdiction in mandamus.

Cited in note (58 L. R. A. 866) on original jurisdiction of court of last resort in mandamus case.

41 L. R. A. 240, *GRIFFIN v. GOLDSBORO WATER CO.* 122 N. C. 206, 30 S. E. 319.

Discrimination by public service companies.

Cited in *Mobile v. Bienville Water Supply Co.* 130 Ala. 385, 30 So. 445, granting injunction preventing discriminations in terms and rates for water service; *Wiemer v. Louisville Water Co.* 130 Fed. 252, holding water company cannot refuse to furnish water to person engaged in street sprinkling, on ground that he is not inhabitant of city; *Snell v. Clinton Electric Light, H. & P. Co.* 196 Ill. 631, 58 L. R. A. 286, 89 Am. St. Rep. 341, 63 N. E. 1082, holding lighting company cannot make discriminations in conditions for supplying electricity; *Snell v. Clinton Electric Light, H. & P. Co.* 196 Ill. 631, 58 L. R. A. 286, 89 Am. St. Rep. 341, 63 N. E. 1082, holding electric lighting company charging consumer for "transformer," when same furnished free to other patrons, guilty of unjust discrimination; *Solomon v. Wilmington Sewerage Co.* 133 N. C. 150, 45 S. E. 536, refusing to dissolve before trial, special injunction against sewer corporation

threatening to cut plaintiff's connection, in default of payment of unreasonable and discriminative rates.

Actions for breach of municipal contract.

Approved in *Gorrell v. Greensboro Water Supply Co.* 124 N. C. 334, 46 L. R. A. 516, 70 Am. St. Rep. 598, 32 S. E. 720, sustaining action by citizen damaged by fire through breach of municipal contract for water supply; *Guardian Trust & D. Co. v. Greensboro Water Supply Co.* 115 Fed. 190, holding citizen may sue in tort or on contract when damaged by breach of municipal contract for water supply.

Cited in note (61 L. R. A. 114) on establishment and regulation of municipal water supply.

Evidence of value of water works plant.

Cited in *Kennebec Water District v. Waterville*, 97 Me. 207, 60 L. R. A. 804, 54 Atl. 6, holding, upon condemnation proceedings to acquire plant of water company, proof of actual cost of the property, with allowance for depreciation, is competent evidence of present value.

41 L. R. A. 243, *BINGHAM SCHOOL v. GRAY*, 122 N. C. 699, 30 S. E. 304.

Use of personal name in trade.

Cited in footnotes to *Lamb Knit-Goods Co. v. Lamb Glove & Mitten Co.* 44 L. R. A. 841, which denies right to use own name so as to deceive public as to business rightfully engaged in by another; *Nolan Bros. Shoe Co. v. Nolan*, 53 L. R. A. 384, which sustains right of one using family name as trade name to prevent deceptive use of name by other member of same family; *Ranft v. Reimers*, 60 L. R. A. 291, which holds seller of good will of business entitled to resume business under own name.

41 L. R. A. 246, *STATE v. SOUTHERN R. CO.* 122 N. C. 1052, 30 S. E. 133.

Later appeal in 126 N. C. 1073, 35 S. E. 619, dismissing appeal for lack of jurisdiction.

Followed without discussion in *State v. Raleigh & A. Air Line R. Co.* 122 N. C. 1074, 30 S. E. 1005.

Discrimination by carriers.

Cited in *State v. Southern R. Co.* 125 N. C. 670, 34 S. E. 527, sustaining statute making it indictable offense to furnish free transportation; *McNeill v. Durham & C. R. Co.* 135 N. C. 720, 67 L. R. A. 229, 47 S. E. 765 (dissenting opinion), majority reversing 132 N. C. 513, 95 Am. St. Rep. 641, 44 S. E. 34, and holding pass issued to editor in exchange for advertising within statute imposing penalty for "unjust discrimination," and that person riding thereon not passenger for hire.

41 L. R. A. 252, *WELLS-STONE MERCANTILE CO. v. GROVER*, 7 N. D. 460, 75 N. W. 911.

Liability of trustee.

Cited in *Scott v. Jones*, 9 N. D. 551, 84 N. W. 479, holding trustee not liable for loss under terms of trust deed; *Wells-Stone Mercantile Co. v. Aultman, M. & Co.* 9 N. D. 522, 84 N. W. 375, holding that trustee may require beneficiaries to refund dividends to reimburse himself for necessary expenses.

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total loss to be such injury as destroys identity and specific character of building, as such.

Cited in note (56 L. R. A. 790, 793) on constructive total loss of insured building.

Distinguished in *McCready v. Hartford F. Ins. Co.* 61 App. Div. 586, 70 N. Y. Supp. 778, holding total loss not established when remnant of structure justifies rebuilding.

41 L. R. A. 321, *RED WING v. GUPTIL*, 72 Minn. 259, 71 Am. St. Rep. 485, 75 N. W. 234.

Abatement of public nuisance.

Cited in footnotes to *St. Louis v. Galt*, 63 L. R. A. 778, which sustains ordinance requiring cutting of weeds on city lots; *State v. Hyman*, 64 L. R. A. 637, which holds prohibition against use of room in tenement or dwelling house for manufacture of clothing, except by immediate member of family, within police power.

Cited in notes (42 L. R. A. 825) on injunctions by municipalities against nuisances on highways and streets; (51 L. R. A. 657, 660) on right of municipality to maintain suit to enjoin or abate nuisance.

41 L. R. A. 331, *LOUISVILLE & N. R. CO. v. NASH*, 118 Ala. 477, 72 Am. St. Rep. 181, 23 So. 825.

Effect of judgment against garnishee.

Cited in footnote to *Balk v. Harris*, 45 L. R. A. 257, which holds debtor garnished outside of state not protected in paying debt after returning to domicile.

Cited in note (47 L. R. A. 134) on effect of judgment against garnishee to merge or satisfy liability of principal debtor.

Garnishment proceedings against nonresidents.

Approved in *Louisville & N. R. Co. v. Steiner*, 128 Ala. 354, 30 So. 741, holding garnishment not applicable to debt of foreign corporation neither made nor performed within state; *Central R. Co. v. Brinson*, 109 Ga. 355, 77 Am. St. Rep. 382, 34 S. E. 597, holding debt subject to garnishment is one due and payable at creditor's domicile; *Kress v. Porter*, 132 Ala. 581, 31 So. 377, holding situs of property levied on determines validity of attachment against nonresident neither served nor appearing; *Boyle v. Musser-Sauntry Land, Logging & Mfg. Co.* 88 Minn. 464, 97 Am. St. Rep. 538, 93 N. W. 520, holding judgment not subject to attachment by garnishment in court of another state having no jurisdiction of judgment creditor, and referring particularly to annotation in 41 L. R. A. 331; *Stewart v. Northern Assur. Co.* 45 W. Va. 742, 44 L. R. A. 105, footnote p. 101, 32 S. E. 218, which holds judgment against garnishee on contract utterly void at domicile of nonresident debtor not personally served, no protection.

Cited in footnotes to *Pennsylvania R. Co. v. Rogers*, 62 L. R. A. 178, which holds nonresident summoned as garnishee while temporarily within state not subject to further proceedings unless he has property within state; *Swedish American Nat. Bank v. Bleecker*, 42 L. R. A. 283, which denies jurisdiction of garnishment of foreign insurance company for loss occurring in other state, where defendant served by publication, and company by service on insurance commissioner; *Tootle v. Coleman*, 57 L. R. A. 120, which holds right to garnish debtor

not limited to situs of chose in action; *Strause Bros. v. Ætna Ins. Co.* 48 L. R. A. 452, which holds debt of insurance company for loss in other state without situs, where company has agent, for garnishment purposes, in third state; *Hawley v. Hurd*, 52 L. R. A. 195, which sustains discrimination between banks in and out of state as to attachment of negotiable paper.

What constitutes due process.

Cited in note (50 L. R. A. 581) on what service of process is sufficient to constitute due process of law.

41 L. R. A. 333, *KANSAS CITY, P. & G. R. CO. v. STATE*, 65 Ark. 363, 67 Am. St. Rep. 933, 46 S. W. 421.

Carrier's liability for loss of baggage.

Cited in footnote to *Illinois C. R. Co. v. Matthews*, 60 L. R. A. 846, which holds carrier liable for loss of or damage to samples in possession of traveling salesman, checked as baggage.

41 L. R. A. 335, *SAN FRANCISCO v. GROTE*, 120 Cal. 59, 65 Am. St. Rep. 155, 52 Pac. 127.

Right of ejectment.

Approved in *Fresno Street R. Co. v. Southern P. R. Co.* 135 Cal. 203, 67 Pac. 773, holding right of ejectment not sustained by proof of right of way over highway, based upon mere incorporeal franchise or easement under grant of county board of supervisors; *Southern P. Co. v. Hyatt*, 132 Cal. 246, 54 L. R. A. 526, 64 Pac. 272, holding ejectment lies against wrongful possession of any part of railroad company's right of way.

Cited in footnotes to *Cahill v. Cahill*, 60 L. R. A. 706, which holds possessory rights only will not sustain ejectment without showing legal title; *Bork v. United New Jersey R. & Canal Co.* 64 L. R. A. 836, which sustains right of owner to maintain ejectment against steam railroad constructed in street without legislative authority.

What constitutes dedication.

Cited in *Los Angeles v. Kysor*, 125 Cal. 465, 58 Pac. 90, holding dedication for park not established by designation on recorded map, in absence of acceptance.

41 L. R. A. 337, *INDIANAPOLIS v. NAVIN*, 151 Ind. 139, 156, 51 N. E. 80, 47 N. E. 525.

Municipal control of public utilities.

Approved in *Coverdale v. Edwards*, 155 Ind. 381, 58 N. E. 495, sustaining right of municipality to impose restrictions upon use and duration of lighting franchise.

Cited in footnotes to *Pingree v. Michigan C. R. Co.* 53 L. R. A. 274, which denies power of legislature to fix rates of carrier upon which previous legislature conferred exclusive power to fix its rates; *Re Janvrin*, 47 L. R. A. 319, which sustains action empowering court to fix maximum water rates on petition of party aggrieved; *State ex rel. Bump v. Omaha & C. B. R. & Bridge Co.* 52 L. R. A. 315, which holds void, ordinance requiring sale of tickets to residents of city as condition of extending street railway franchise.

Cited in note (50 L. R. A. 144) on privilege of using streets as a contract with in constitutional provision against impairing obligation of contracts.

Population as basis of classification.

Approved in *Campbell v. Indianapolis*, 155 Ind. 203, 57 N. E. 920, sustaining statute concerning schools in cities of 100,000 inhabitants, though but one such when adopted; *Ladd v. Holmes*, 40 Or. 175, 91 Am. St. Rep. 457, 66 Pac. 714, sustaining law regulating primaries in cities having 10,000 inhabitants at "last state or Federal census;" *Harmon v. Madison County*, 153 Ind. 72, 54 N. E. 105, sustaining statute making salaries dependent upon amounts turned into county treasury, though not graded directly according to population.

Exercise of legislative discretion.

Cited in *Carolina Grocery Co. v. Burnet*, 61 S. C. 211, 58 L. R. A. 689, 39 S. E. 381, holding applicability of general law judicial, and not legislative, question; *Re Bank of Commerce*, 153 Ind. 462, 47 L. R. A. 491, 53 N. E. 950, holding neither local nor general law subject of legislative judgment when involving powers expressly withdrawn; *State ex rel. Lewis v. Smith*, 158 Ind. 577, 63 L. R. A. 131, 63 N. E. 25, referring to force attaching to construction of Constitution by session of legislature having in its personnel a considerable number of members of constitutional convention.

Disapproved in *State v. Hammond*, 66 S. C. 223, 44 S. E. 797, holding it to be judicial question whether general law can be made applicable to particular subject of legislation.

What constitutes local or special legislation.

Approved in *Schneck v. Jeffersonville*, 152 Ind. 226, 52 N. E. 212, sustaining act legalizing city bonds as not local or special legislation; *Owen County v. Spangler*, 159 Ind. 579, 65 N. E. 743, holding act making statute limiting authority to issue bonds for improvement of highway inapplicable to counties having population between 15,000 and 15,050, within constitutional provision prohibiting local or special highway legislation; *Smith v. Indianapolis Street R. Co.* 158 Ind. 435, 63 N. E. 849, holding act authorizing certain city to contract with street railway for extension of rights and franchises not violation of constitutional requirement that corporations be organized under general laws.

Conflicts between state and Federal decisions.

Approved in *Re Morgan*, 26 Colo. 440, 47 L. R. A. 62, 77 Am. St. Rep. 269, 58 Pac. 1071, holding state courts may disregard Federal decree sustaining statute, when validity under state Constitution questioned; *Central Trust Co. v. Citizens' Street R. Co.* 82 Fed. 5, holding Federal courts not bound by state decisions where controversy involves Federal and contractual questions.

Validity of act creating office.

Cited in *Roth v. State*, 158 Ind. 266, 63 N. E. 460, holding office of policeman not within constitutional provision prohibiting legislature creating office with longer term than four years.

41 L. R. A. 345, *SNYDER v. FT. MADISON STREET R. CO.* 105 Iowa, 284, 75 N. W. 179.

Electric railway as additional servitude.

Cited in *Peck v. Schnectady R. Co.* 170 N. Y. 312, 63 N. E. 357 (dissenting opin-

ion), majority holding added burden imposed upon property rights in use of street by electric railway.

Cited in footnote to *La Crosse City R. Co. v. Higbee*, 51 L. R. A. 923, which holds electric street railroad pole in city street not additional burden.

Pleading foreign statutes.

Approved in *Green v. Equitable Mut. L. & Endowment Asso.* 105 Iowa, 635, 75 N. W. 635, holding foreign statutes need not be pleaded when merely evidence of ultimate facts.

41 L. R. A. 349, *WERNER v. WERNER*, 59 Kan. 399, 68 Am. St. Rep. 372, 53 Pac. 127.

41 L. R. A. 351, *ALLEN v. PERRINE*, 103 Ky. 516, 45 S. W. 500.

41 L. R. A. 353, *ROSE v. ROSE*, 104 Ky. 48, 84 Am. St. Rep. 430, 46 S. W. 524.

Referred to for history of case in *Deposit Bank v. Rose*, 113 Ky. 948, 69 S. W. 967.

Legislation affecting vested rights.

Approved in *Mitchell v. Violet*, 104 Ky. 81, 47 S. W. 195, holding vested right of curtesy initiate not divested by subsequent legislation; *Phillips v. Farley*, 112 Ky. 839, 66 S. W. 1006, upholding power of legislature to take away husband's estate by the curtesy in wife's realty before birth of child; *Mundo v. Anderson*, 109 Ky. 149, 58 S. W. 520, holding married woman, awarded right by judgment to deal with own property as if single, may be bound as husband's surety, notwithstanding prohibition of married woman's act.

Cited in footnote to *Gladney v. Sydnor*, 60 L. R. A. 880, which holds right to convey or encumber homestead without wife's co-operation, a vested one which cannot be destroyed by legislature.

41 L. R. A. 362, *HAGGETT v. HURLEY*, 91 Me. 542, 40 Atl. 561.

Contracts between husband and wife.

Approved in *Pinkham v. Pinkham*, 95 Me. 76, 85 Am. St. Rep. 392, 49 Atl. 48, holding wife cannot release dower right during coverture, under statutes permitting contracts with husband.

Distinguished in *Peaks v. Hutchinson*, 96 Me. 533, 53 Atl. 38, sustaining contract between husband and wife whereby former retains title to stable erected on latter's land.

Disapproved in *Hoagland v. Henderson*, 119 Iowa, 728, 61 L. R. A. 759, footnote p. 750, 97 Am. St. Rep. 335, 94 N. W. 247, holding that husband and wife have power to enter into contract of copartnership with each other.

41 L. R. A. 367, *CASTLEMAN v. TEMPLEMAN*, 87 Md. 546, 67 Am. St. Rep. 363, 40 Atl. 275.

Rights of foreign receivers.

Approved in *Stockley v. Thomas*, 89 Md. 666, 43 Atl. 766, denying receivership for insolvent foreign insurance corporation when only asset within state consists of unenforceable assessments; *Barley v. Gittings*, 15 App. D. C. 439, holding foreign receiver may be permitted to sue or intervene as matter of privilege;

Small v. Smith, 14 S. D. 623, 86 Am. St. Rep. 807, 86 N. W. 649, permitting foreign receiver of foreign corporation to sue for assets, no rights of resident creditors intervening.

Cited in *Southern Bldg. & L. Asso. v. Price*, 88 Md. 164, 42 L. R. A. 208, 41 Atl. 53, holding creditor may proceed by attachment notwithstanding appointment of foreign receiver; *Linville v. Hadden*, 88 Md. 598, 43 L. R. A. 224, 41 Atl. 1097, holding creditor of foreign corporation may proceed by attachment, excepting as to citizens of state appointing receiver.

41 L. R. A. 371, *CARLSON v. ST. LOUIS RIVER DAM & IMPROV. CO.* 73 Minn. 128, 72 Am. St. Rep. 610, 75 N. W. 1044.

Use of streams for floating logs.

Approved in *Gravel v. Little Falls Improv. & Nav. Co.* 74 Minn. 419, 77 N. W. 217, holding public right of navigation does not permit erections necessarily producing "log jams" and overflow of lands; *Charnley v. Shawano Water Power & River Improv. Co.* 109 Wis. 569, 53 L. R. A. 902, 85 N. W. 507, holding lawful, unauthorized dam erected by riparian owner without injuring stream used for floating logs, and referring particularly to annotation in 41 L. R. A. 371; *Smith v. Atkins*, 110 Ky. 123, 53 L. R. A. 791, footnote p. 790, 96 Am. St. Rep. 424, 60 S. W. 930, denying right of one navigating stream to fasten booms to trees on bank.

Cited in footnotes to *Brewster v. J. & J. Rogers Co.* 58 L. R. A. 495, which denies right to discharge water stored along stream to aid drive of logs, so as to overflow banks to injury of riparian owners; *Nester v. Diamond Match Co.* 52 L. R. A. 950, which holds one running logs down streams estopped to maintain action for obstruction by one whose booms and dams used.

Cited in notes (41 L. R. A. 494, 497) on liability for injuries to riparian owner by running logs in stream; (42 L. R. A. 318) on what waters are navigable.

Liability for damming stream.

Cited in note (59 L. R. A. 827, 829) on liability for damming back water of stream.

41 L. R. A. 379, *DEVLIN v. DALTON*, 171 Mass. 338, 50 N. E. 632.

When certiorari lies.

Approved in *Sears v. Worcester*, 180 Mass. 289, 62 N. E. 269, denying certiorari to quash levy of assessment exceeding adjudged betterment by half a cent.

Cited in footnote to *People ex rel. Smith v. Hoffman*, 54 L. R. A. 597, which holds military examining board a judicial body whose determination is reviewable by certiorari.

41 L. R. A. 381, *LILLIBRIDGE v. McCANN*, 117 Mich. 84, 72 Am. St. Rep. 553, 75 N. W. 288.

Liability for unforeseen consequences.

Cited in footnotes to *Texas & P. R. Co. v. Carlin*, 60 L. R. A. 462, which sustains liability for negligence likely to produce injury, though particular injury not anticipated; *Hoffman v. King*, 46 L. R. A. 672, which denies liability of one negligently starting fire, for damage to lands of remote proprietors to which fire spreads; *Osborne v. Van Dyke*, 54 L. R. A. 367, which holds one unlawfully beating another liable for injury by unintentional blow on bystander.

Proximate cause of fire.

Cited in footnote to *Owen v. Cook*, 47 L. R. A. 646, which holds one starting back fire to protect own property not liable for loss which would have resulted from original fire.

41 L. R. A. 385, *ZACKERY v. MOBILE & O. R. CO.* 75 Miss. 746, 65 Am. St. Rep. 617, 23 So. 434.

Carrier's duty to blind passenger.

Cited in footnote to *Southern R. Co. v. Hobbs*, 63 L. R. A. 68, which holds carrier liable to partially blind passenger carried beyond her station without having reasonable opportunity to alight, despite conductor's promise to assist her.

41 L. R. A. 385, *HENNESSY v. BAVARIAN BREWING CO.* 145 Mo. 104, 68 Am. St. Rep. 554, 46 S. W. 966.

Statutory rights of action for personal injury.

Cited in *Cole v. Mayne*, 122 Fed. 840, holding that under statute giving right of action to widow and lineal heirs, for death of minor, children cannot maintain suit for death of father, if latter leaves widow.

Cited in footnotes to *McGarr v. National & P. Wensted Mills*, 60 L. R. A. 122, which holds mother caring for family entitled to sue for loss from negligent injuries to minor child; *Brink v. Wabash R. Co.* 53 L. R. A. 811, which denies right to recover for nonperformance of contract to support parent, through negligent killing of son.

Distinguished in *Sharp v. National Biscuit Co.* 179 Mo. 558, 78 S. W. 787, holding measure of damages for killing of minor child is compensation for net loss of services, comfort, society, and love of child.

Effect of appellate court decisions.

Approved in *Bealey v. Smith*, 158 Mo. 522, 81 Am. St. Rep. 317, 59 S. W. 984, holding circuit court bound by decision of court of appeals unless facts essentially differ on retrial; *Paddock v. Missouri P. R. Co.* 155 Mo. 534, 56 S. W. 453; *State ex rel. Funkhouser v. Spencer*, 166 Mo. 275, 65 S. W. 981; *Brummell v. Harris*, 162 Mo. 403, 63 S. W. 497,—holding circuit court bound by decision of court of appeals on retrial of same cause; *Paddock v. Missouri P. R. Co.* 155 Mo. 534, 56 S. W. 453, holding supreme court not bound by decision of Kansas City court of appeals upon appeal after retrial.

Cited in footnote to *Illinois C. R. Co. v. Benz*, 58 L. R. A. 691, which holds decision on reversal and remanding of action for personal injuries removed to Federal court, not law of case if action dismissed and new one begun.

Amount in dispute as determining jurisdiction.

Approved in *Kane v. Kane*, 146 Mo. 607, 48 S. W. 446, holding supreme court without appellate jurisdiction where judgment for defendant on petition not demanding specific amount.

41 L. R. A. 389, *GAGNON v. DANA*, 69 N. H. 264, 76 Am. St. Rep. 170, 39 Atl. 982.

When relation of master and servant exists.

Cited in footnotes to *Stewart v. California Improv. Co.* 52 L. R. A. 205, which

holds owner of steam roller liable for engineer's neglect to warn travelers, though roller hired by city; *Murray v. Dwight*, 48 L. R. A. 673, which holds servant of truckman unloading goods at warehouse not fellow servant of warehouseman's servants.

What constitutes waiver of exception.

Approved in *Burnham v. Concord R. Co.* 69 N. H. 282, 45 Atl. 563, holding exception to refusal of nonsuit for deficiency of evidence waived by proceeding with trial, if either party subsequently supplies deficiency.

41 L. R. A. 391, *BERG v. PARSONS*, 156 N. Y. 109, 66 Am. St. Rep. 542, 50 N. E. 957.

Liability for independent contractor's negligence.

Approved in *Hauser v. Metropolitan Street R. Co.* 27 Misc. 539, 58 N. Y. Supp. 286, holding company not liable for injury to horse falling through street excavation improperly guarded by independent contractor; *Burke v. Ireland*, 166 N. Y. 314, 59 N. E. 914, Reversing 47 App. Div. 444, 62 N. Y. Supp. 453, holding owner not liable for collapse of building erected under competent supervising architect and contractor; *Uppington v. New York*, 165 N. Y. 233, 53 L. R. A. 555, footnote p. 551, 59 N. E. 91, denying city's liability for failure to select best possible route or adopt best possible plan for sewer.

Cited in *Deyo v. Kingston Consol. R. Co.* 94 App. Div. 581, 88 N. Y. Supp. 487, holding railroad company contracting with fireworks manufacturer for exhibition not liable as master for negligence of latter's employee; *Duerr v. Consolidated Gas Co.* 86 App. Div. 23, 83 N. Y. Supp. 714, holding owner liable for act of independent contractor done under direction of former's engineer; *Hoff v. Shockley*, 122 Iowa, 726, 64 L. R. A. 541, footnote p. 538, 101 Am. St. Rep. 289, 98 N. W. 573, holding property owner not liable for injuries to traveler by obstructions placed in street, without danger signals, by independent contractor for construction of building; *Hesketh v. New York C. & H. R. R. Co.* 37 App. Div. 89, 55 N. Y. Supp. 898 (dissenting opinion), majority holding company bound to utmost care in using new signal device erected by construction company.

Cited in footnote to *Boomer v. Wilbur*, 53 L. R. A. 172, which denies owner's liability for injury by fall of bricks through negligence of independent contractor repairing chimney.

Distinguished in *Deming v. Terminal R. Co.* 169 N. Y. 12, 88 Am. St. Rep. 521, 61 N. E. 983, Affirming 49 App. Div. 496, 63 N. Y. Supp. 615, holding company liable for independent contractor's failure to properly guard or light embankment in highway; *O'Rourke v. Feist*, 42 App. Div. 137, 59 N. Y. Supp. 157, Affirming 24 Misc. 762, 53 N. Y. Supp. 1110, holding apartment-house owner liable for damage from rain while independent contractor repairing roof; *Duerr v. Consolidated Gas Co.* 86 App. Div. 21, 83 N. Y. Supp. 714, intimating, without deciding, that owner making artificial accumulation of water is liable for damage from its precipitation upon premises of another in unnatural manner.

Liability for injury by blasting.

Cited in *Sullivan v. Dunham*, 161 N. Y. 299, 47 L. R. A. 720, 76 Am. St. Rep. 274, 55 N. E. 923, holding owner liable for death of traveler injured on highway by blast upon abutting premises.

Cited in footnote to *Smith v. Day*, 49 L. R. A. 108, which holds assumption of risk from blasting near by, assumed by one going to sleep on boat at wharf.

Negligence in guarding excavation.

Approved in *Dwyer v. McLaughlin*, 31 Misc. 512, 64 N. Y. Supp. 380, holding question of negligence in guarding excavation, for jury.

41 L. R. A. 395, *SCHENCK v. BARNES*, 156 N. Y. 316, 50 N. E. 967.

Rights of creditors in trust property.

Approved in *Re Baudouine*, 96 Fed. 538, holding surplus income of trust subject to creditor's claims when without directions for accumulation.

Cited in *Raymond v. Harris*, 84 App. Div. 548, 82 N. Y. Supp. 689, holding beneficiary under trust created by herself may make valid mortgage upon interest; *Marshall v. United States Trust Co.* 42 Misc. 310, 86 N. Y. Supp. 617, upholding creditor's right to follow debtor's life estate in mortgaged property, after trustee's purchase at foreclosure sale with trust fund, net income of which was payable to debtor.

Cited in footnotes to *Scott v. Keane*, 42 L. R. A. 359, which holds trust by conveyance and reconveyance for grantor's benefit void as against his creditors; *Seymour v. McAvoy*, 41 L. R. A. 544, which sustains right of author of trust to make beneficiary's interest unassignable and free from creditors' claims; *Murphy v. Delano*, 55 L. R. A. 727, which holds income of spendthrift trust not within reach of creditors by void agreement of trustees to pay certain portion of income absolutely to beneficiary; *Re Qua v. Graham*, 52 L. R. A. 641, which holds annuity in wife's will in lieu of other interest, accepted by husband, not trust beyond reach of creditors; *Hutchinson v. Maxwell*, 57 L. R. A. 384, which denies power to create equitable life estate free from debts of beneficiary.

Distinguished in *Ullman v. Cameron*, 92 App. Div. 94, 87 N. Y. Supp. 148, holding testamentary trust giving beneficiary right to principal fund upon contingency named entitles creditor to subject property to payment of debt of beneficiary.

Review by court of appeals.

Approved in *Steinway v. von Bernuth*, 167 N. Y. 499, 60 N. E. 757, and *Coatsworth v. Lehigh Valley R. Co.* 156 N. Y. 459, 51 N. E. 301, holding court of appeals cannot review abstract questions.

Cited in *Blaschko v. Wurster*, 156 N. Y. 446, 51 N. E. 363 (concurring opinion), holding certified questions on appeal should be material to controversy.

41 L. R. A. 399, *GREENLEE v. SOUTHERN R. CO.* 122 N. C. 977, 65 Am. St. Rep. 734, 30 S. E. 115.

Master's duty as to safety of appliances.

Approved in *Elmore v. Seaboard Air Line R. Co.* 132 N. C. 875, 44 S. E. 620, on Second Rehearing, Reversing First Rehearing, 131 N. C. 573, 42 S. E. 989, Affirming Original Opinion, 130 N. C. 506, 41 S. E. 786, and holding that where law requires railroad to use automatic coupler, allowing same to be out of repair for unreasonable time is continuing negligence, and cuts off defense of contributory negligence; *Lloyd v. Hanes*, 126 N. C. 362, 35 S. E. 611, holding it negligence *per se* for employer not to furnish approved safety appliances in general use; *Harden v. North Carolina R. Co.* 129 N. C. 355, 55 L. R. A. 785, footnote p. 784,

85 Am. St. Rep. 747, 40 S. E. 184, holding owner of interstate railroad liable for injury to employee from use of old style couplers; *Troxler v. Southern R. Co.* 124 N. C. 191, 44 L. R. A. 314, footnote p. 313, 70 Am. St. Rep. 580, 32 S. E. 550, holding failure to furnish automatic car coupler for freight cars continuing negligence; *Fleming v. Southern R. Co.* 131 N. C. 479, 42 S. E. 905, denying that May, 1898, is time fixed as beginning of liability of railroad companies for injuries to employees through failure to equip cars with automatic couplers.

What constitutes assumption of risk.

Cited in *Coley v. North Carolina R. Co.* 129 N. C. 415, 57 L. R. A. 843, 40 S. E. 195, holding use of machinery obviously defective no bar to recovery unless amounting to reckless indifference; *Davis Coal Co. v. Pollard*, 158 Ind. 618, 92 Am. St. Rep. 319, 62 N. E. 492, holding employee continuing work does not assume risks arising from master's omission to furnish statutory appliances; *Walker v. Carolina C. R. Co.* 135 N. C. 741, 47 S. E. 675, and *Orr v. Southern Bell Teleph. & Teleg. Co.* 132 N. C. 693, 44 S. E. 401, holding that master's failure to furnish reasonably safe appliances is continuing negligence, and servant injured in attempting to perform work with tool furnished does not assume risk; *Ausley v. American Tobacco Co.* 130 N. C. 40, 40 S. E. 819 (dissenting opinion), majority holding risk assumed by undertaking work with knowledge of defective machinery; *Coley v. North Carolina R. Co.* 128 N. C. 537, 57 L. R. A. 824, 39 S. E. 43, holding doctrine of "assumption of risk" of defective appliance inapplicable to engineer by statute.

41 L. R. A. 403, *MOBILE & O. R. CO. v. POSTAL TELEG. CABLE CO.* 101 Tenn. 62, 46 S. W. 571.

Exercise of right of eminent domain.

Approved in *Ryan v. Louisville & N. Terminal Co.* 102 Tenn. 119, 45 L. R. A. 307, 50 S. W. 744, holding company chartered to facilitate public convenience, etc., charged with public use authorizing exercise of right of eminent domain; *Postal Teleg. Cable Co. v. Chicago, I. & L. R. Co.* 30 Ind. App. 660, 66 N. E. 919, holding telegraph company authorized to exercise power of eminent domain may acquire right of way along railroad right of way, if use shown not inconsistent with that of railroad.

Cited in footnotes to *Ft. Worth & R. G. R. Co. v. Southwestern Teleg. & Teleph. Co.* 60 L. R. A. 145, which sustains right to condemn telegraph line over railroad right of way; *Diamond Jo Line Steamers v. Davenport*, 54 L. R. A. 859, which authorizes condemnation for public wharf of land used by carrier as landing place; *Denver Power & Irrig. Co. v. Colorado & S. R. Co.* 60 L. R. A. 383, which denies power of reservoir company to condemn land devoted to purpose of railroad unless public necessity requires.

Damages on condemnation of telegraph right of way.

Cited in *Mobile & O. R. Co. v. Postal Teleg. Cable Co.* 76 Miss. 746, 45 L. R. A. 226, 26 So. 370, holding diminution by use is measure of damages on condemnation of right of way for telegraph line.

Distinguished in *Cleveland, C. C. & St. L. R. Co. v. Ohio Postal Teleg. Cable Co.* 68 Ohio St. 306, 62 L. R. A. 946, footnote p. 941, 67 N. E. 890, holding measure of damage for taking part of railroad right of way for telegraph is decrease in value in use of right of way for railroad purposes.

41 L. R. A. 407, *STATE ex rel. RICHARDS v. ARMSTRONG*, 17 Utah, 166, 53 Pac. 981.

41 L. R. A. 410, *ANDERSON v. INLAND TELEPH. & TELEG. CO.* 19 Wash. 575, 53 Pac. 657.

Liability for injury from electric wires.

Approved in *Jackson & Suburban Street R. Co. v. Simmons*, 107 Tenn. 405, 64 S. W. 705, holding that telephone lineman must exercise active diligence to discover defective insulation; *Wagner v. Portland*, 40 Or. 404, 67 Pac. 300, holding omission to adopt suitable rules for removal of cut electric wires, with view to keeping place to work safe, not in itself negligence.

Cited in footnotes to *Mitchell v. Raleigh Electric Co.* 55 L. R. A. 398, which sustains telephone company employee's right to presume that electric light wires properly insulated; *Boyd v. Portland General Electric Co.* 52 L. R. A. 509, which holds want of sufficient assistance to promptly replace wires broken by severe storm not excuse, as matter of law, for delay.

Safety of place and tools, and assumption of risk.

Distinguished in *Johnson v. Tacoma Mill Co.* 22 Wash. 92, 60 Pac. 53, holding carpenter making repairs in mill entitled to recover for injury from stepping into barrel of hot water having top level with ground; *Morton v. Moran Bros. Co.* 30 Wash. 368, 70 Pac. 968, holding master liable for injury to land laborer stepping into hole in lower deck of vessel while descending ladder to make repairs, where foreman knew of danger, but failed to give warning; *Goldthorpe v. Clark-Nickerson Lumber Co.* 31 Wash. 473, 71 Pac. 1091, holding employee using defective appliance under orders from vice principal does not assume risk, where danger not apparent; *McDannald v. Washington & C. River R. Co.* 31 Wash. 590, 72 Pac. 481, holding conductor thrown against cattle guard in dangerous proximity to track did not assume risk, where danger not known to him.

41 L. R. A. 414, *NORFOLK & W. R. CO. v. PINNACLE COAL CO.* 44 W. Va. 574, 30 S. E. 196.

Effect of exceeding statutory jurisdiction.

Approved in *Hall v. Vernon*, 47 W. Va. 301, 49 L. R. A. 467, 81 Am. St. Rep. 791, 34 S. E. 764, holding void, decree of partition of oil and gas owned by co-owners by assignment of gas and oil under sections of surface; *Ritchie v. Sayers*, 100 Fed. 530, holding void, decree of sale by court having jurisdiction of cause, rendered without requiring statutory bond.

Writ of prohibition.

Approved in *Hassinger v. Holt*, 47 W. Va. 351, 34 S. E. 728, granting prohibition against judicial interference with ministerial duty of board of education; *Board of Education v. Holt*, 51 W. Va. 437, 41 S. E. 337, granting prohibition restraining enforcement of injunction against exercise of lawful powers by board of education; *Simmons v. Thomasson*, 50 W. Va. 660, 41 S. E. 335, granting prohibition preventing enforcement of default judgment rendered without notice or appearance; *Yates v. Taylor County Court*, 47 W. Va. 383, 35 S. E. 24, granting prohibition restraining enforcement of judgment upon appeal from judgment by justice without jurisdiction; *Charleston v. Beller*, 45 W. Va. 50, 30 S. E.

152, granting prohibition preventing enforcement of unauthorized judgment for costs.

Cited in *Hartigan v. West Virginia University*, 49 W. Va. 49, 38 S. E. 698 (dissenting opinion), majority denying writ of prohibition preventing execution of resolution removing professor.

Cited in note (51 L. R. A. 71, 109) on superintending control and supervisory jurisdiction of superior over inferior or subordinate tribunals.

Distinguished in *Ward v. Evans*, 49 W. Va. 186, 38 S. E. 524, denying prohibition for error of judgment by justice having jurisdiction, though amount too small for appeal; *King v. Doolittle*, 51 W. Va. 95, 41 S. E. 145, denying prohibition where full remedy supplied by right of appeal.

41 L. R. A. 419, *STACY v. LABELLE*, 99 Wis. 520, 67 Am. St. Rep. 879, 75 N. W. 60.

41 L. R. A. 422, *CINCINNATI, H. & D. R. CO. v. BOWLING GREEN*, 57 Ohio St. 336, 49 N. E. 121.

Followed without discussion in *Railway Co. v. Clyde*, 45 Ohio St. 572, 63 N. E. 1132.

Compelling railroad to light track.

Approved in *Cleveland, C. C. & St. L. R. Co. v. St. Bernard*, 15 Ohio C. C. 594, sustaining statute authorizing municipality to require lighting of railroad tracks; *Cleveland, C. C. & St. L. R. Co. v. St. Bernard*, 19 Ohio C. C. 300, holding that statute and ordinance contemplates lighting track without reference to location of lamps.

Cited in *Cleveland, C. C. & St. L. R. Co. v. St. Bernard*, 15 Ohio C. C. 599, holding light required on track must not be of such power as to obscure head lights.

Duties of electric light companies.

Cited in *Snell v. Clinton Electric Light, H. & P. Co.* 196 Ill. 631, 58 L. R. A. 286, footnote p. 284, 89 Am. St. Rep. 341, 63 N. E. 1082, denying right to require, as condition of furnishing electricity to building wired by third person, payment for transformer furnished free for building wired by company.

41 L. R. A. 428, *STATE ex rel. SWARTS v. MYLOD*, 20 R. I. 632, 40 Atl. 753.

Regulation of practice of medicine.

Cited in *State v. Taft*, 20 R. I. 645, 40 Atl. 758, holding "metaphysical healing" for reward not within statute requiring registration and license of medical practitioner; *Nelson v. State Bd. of Health*, 108 Ky. 781, 50 L. R. A. 387, 57 S. W. 501, and *Hayden v. State*, 81 Miss. 299, 95 Am. St. Rep. 471, 33 So. 653, holding osteopathy not within statute requiring certificate for practising medicine; *State v. Beck*, 21 R. I. 291, 45 L. R. A. 271, 43 Atl. 366, holding physicians and surgeons exempt from statutory restrictions upon practice of dentistry; *Kansas City v. Baird*, 92 Mo. App. 210, holding ordinance imposing penalty upon "every physician" treating certain diseases, and failing to report same, not applicable to "Christian Scientist."

Cited in footnotes to *Parks v. State*, 59 L. R. A. 190, which sustains requirement that magnetic healer procure license; *State v. Liffing*, 46 L. R. A. 334,

which denies necessity of certificate from medical board for practice of osteopathy; *State v. Biggs*, 64 L. R. A. 140, which denies right to require license for treatment of diseases by baths, physical culture, manipulation of muscles, bones, spine, and solar plexus, and advice as to diet.

Distinguished in *People v. Gordon*, 194 Ill. 569, 88 Am. St. Rep. 165, 62 N. E. 858, holding osteopathy or magnetic healing within statute requiring license for practising medicine.

Medical attendance as necessary sustenance.

Cited in footnote to *Justice v. State*, 59 L. R. A. 601, which holds refusal to permit administration of medicine to minor children while sick not deprival of necessary sustenance.

41 L. R. A. 432, *SMITH v. STATE*, 100 Tenn. 494, 46 S. W. 566.

Rights of colored passengers.

Cited in footnote to *Bowie v. Birmingham R. & Electric Co.* 50 L. R. A. 632, which sustains rule of street railway company requiring colored and white passengers to occupy different ends of car.

Police power.

Approved in *Harbison v. Knoxville Iron Co.* 103 Tenn. 441, 56 L. R. A. 320, 76 Am. St. Rep. 682, 53 S. W. 955, sustaining statute requiring payment in money of all merchandise or other orders issued for wages; *Leeper v. State*, 103 Tenn. 532, 48 L. R. A. 174, 53 S. W. 962, sustaining statute enforcing use of uniform text books in public schools.

41 L. R. A. 436, *SOUTHERN EXP. CO. v. COM.* 92 Va. 59, 22 S. E. 809.

Affirmed in 168 U. S. 705, 42 L. ed. 1212, 18 Sup. Ct. Rep. 947.

Cruel or unusual punishments.

Cited in *State v. Laredo Ice Co.* 96 Tex. 467, 73 S. W. 951, refusing to hold fines imposed by statute for violation of anti-trust law within constitutional prohibition against "excessive" fines.

Cited in notes (35 L. R. A. 563, 564, 577, 579) on cruel and unusual punishments; (45 L. R. A. 137) on effect of excessive sentence.

Raising question of constitutionality on appeal.

Approved in *Adkins v. Richmond*, 98 Va. 92, 47 L. R. A. 584, 81 Am. St. Rep. 702, 34 Atl. 967, holding unconstitutionality of law may be assigned on appeal, though not previously specially pleaded.

Constitutional appropriation of fines.

Disapproved in *Ex parte McMahon*, 26 Nev. 246, 66 Pac. 294, holding statute appropriating only portion of fines received under game law to educational purposes not in conflict with constitutional provision setting apart all fines to such use.

41 L. R. A. 439, *UNITED STATES NAT. BANK v. GEER*, 53 Neb. 67, 73 N. W. 266.

41 L. R. A. 446, *KOCHERSPERGER v. DRAKE*, 167 Ill. 122, 47 N. E. 321.

Writ of error from United States Supreme Court dismissed in 170 U. S. 303, 42 L. ed. 1046, 18 Sup. Ct. Rep. 942.

Validity of inheritance tax law.

Cited in *Walker v. People*, 192 Ill. 108, 61 N. E. 489, holding validity of inheritance tax law settled; *Dixon v. Ricketts*, 26 Utah, 226, 72 Pac. 947, holding inheritance tax, being imposed upon right of succession, and not upon property, is not in conflict with constitutional provision requiring uniformity.

Cited in footnote to *Ferry v. Campbell*, 50 L. R. A. 92, which holds succession tax void for want of notice of proceedings to fix amount of tax.

Classification for taxation purposes.

Approved in *Billings v. People*, 189 Ill. 482, 59 L. R. A. 813, footnote p. 807, 59 N. E. 798, sustaining inheritance tax statute though discriminating between lineal and collateral heirs; *Black v. State*, 113 Wis. 223, 90 Am. St. Rep. 853, 89 N. W. 522, holding inheritance tax law unconstitutional in discriminating between estates of \$10,000 and those of less amount; *Billings v. People*, 189 Ill. 482, 59 L. R. A. 813, footnote p. 807, 59 N. E. 798, sustaining transfer tax on lineal descendants, to whom life estate given with remainder to lineal descendants, but exempting lineal descendants taking fee.

Cited in footnote to *Drew v. Tift*, 47 L. R. A. 525, which requires uniformity and equal application in exemption from inheritance tax.

Cited in note (60 L. R. A. 340) on constitutional equality in United States in relation to corporate taxation.

What estates subject to tax.

Approved in *Ayers v. Chicago Title & T. Co.* 187 Ill. 57, 58 N. E. 318, holding "estates in expectation" subject to inheritance tax; *Plummer v. Coler*, 178 U. S. 122, 44 L. ed. 1003, 20 Sup. Ct. Rep. 829, sustaining inheritance tax law though property involved consists, wholly or in part, of Federal securities.

Right of inheritance.

Approved in *Storrs v. St. Luke's Hospital*, 180 Ill. 375, 72 Am. St. Rep. 211, 54 N. E. 185, holding that right to file bill contesting will does not pass by descent or inheritance; *Chicago Title & T. Co. v. McGlew*, 90 Ill. App. 63, holding distribution of estate entirely regulated by statute; *Sayles v. Christie*, 187 Ill. 432, 58 N. E. 480, sustaining special adoption act giving adopted child right to inherit.

41 L. R. A. 449, *SUPREME COUNCIL, G. S. F. v. CONKLIN*, 60 N. J. L. 565, 38 Atl. 659.

41 L. R. A. 457, *GLOUCESTER & S. TURNP. CO. v. LEPPEE*, 62 N. J. L. 92, 40 Atl. 681.

Bicycle law.

Cited in note (47 L. R. A. 303) on bicycle law.

41 L. R. A. 458, *CENTRAL TRUST CO. v. RICHMOND, N. L. & B. R. CO.* 15 C. C. A. 273, 31 U. S. App. 675, 68 Fed. 90.

Later appeal in 45 C. C. A. 61, 105 Fed. 804.

What constitutes waiver of lien.

Approved in *Ohio Falls Car Mfg. Co. v. Central Trust Co.* 18 C. C. A. 390, 37 U. S. App. 523, 71 Fed. 921, holding lien waived by agreement to accept new security in form of note secured by mortgage bonds; *Reynolds v. Manhattan Trust Co.* 27 C. C. A. 629, 55 U. S. App. 96, 83 Fed. 602, holding lien for labor and material not waived by unperformed promise of payment in any form; *Farmers' & M. Nat. Bank v. Taylor*, 91 Tex. 82, 40 S. W. 876, holding mechanic's lien not waived by taking note and mortgage without intention of waiving.

Cited in footnote to *Kirchman v. Standard Oil Co.* 52 L. R. A. 318, which holds lienor not estopped to enforce lien by mistaken statement of its payment, without knowledge of other's person's intention to buy property.

Priority of liens.

Separate appeal in *Richmond & I. Constr. Co. v. Richmond, N. I. & B. R. Co.* 34 L. R. A. 627, 15 C. C. A. 291, 31 U. S. App. 704, 68 Fed. 107, holding subcontractor not entitled to principal contractor's statutory lien notwithstanding owner's consent to substitution.

Approved in *Central Trust Co. v. Louisville, St. L. & T. R. Co.* 70 Fed. 287, holding statute declaring railroad construction liens prior to others "theretofore or thereafter created," makes such liens superior only to those created after passage.

Effect of principal contract upon subcontractor's lien.

Approved in *Jones v. Great Southern Fireproof Hotel Co.* 30 C. C. A. 122, 58 U. S. App. 397, 86 Fed. 384, sustaining statute giving subcontractor lien without regard to amount unpaid principal contractor, limited only by owner's contract price.

Distinguished in *Herrell v. Donovan*, 7 App. D. C. 338, holding subcontractor's lien rights dependent upon principal contract and accounts between owner and contractor.

Interest on funds under court's control.

Approved in *Jourolmon v. Ewing*, 29 C. C. A. 44, 56 U. S. App. 149, 85 Fed. 106, holding interest allowable to date of decree upon fund in court, subject to liens of different priorities.

Cited in *Solomons v. American Bldg. & L. Asso.* 116 Fed. 677, holding lien creditor not entitled to interest after receiver appointed, when paid from general fund.

41 L. R. A. 467, *BERLINER v. TRAVELERS' INS. CO.* 121 Cal. 458, 66 Am. St. Rep. 49, 53 Pac. 918.

What constitutes passenger.

Cited in *Travelers' Ins. Co. v. Austin*, 116 Ga. 267, 59 L. R. A. 109, 94 Am. St. Rep. 125, 42 N. E. 522, holding paymaster not entitled to double indemnity as "passenger" when traveling in course of duty.

Distinguished in *Travelers' Ins. Co. v. Austin*, 116 Ga. 267, 59 L. R. A. 109, 94 Am. St. Rep. 125, 42 S. E. 522, holding railroad paymaster not "passenger" within accident policy providing for double indemnity in case of accident while traveling in that relation.

Insurance; extra hazard.

Cited in footnote to *Wilkey Casualty Co. v. Sheppard*, 47 L. R. A. 650, which

holds barber not engaged in more hazardous occupation while hunting rabbits as incident to daily life.

41 L. R. A. 470, COLEMAN, B. & W. CO. v. DANNENBERG CO. 103 Ga. 784, 68 Am. St. Rep. 143, 30 S. E. 639.

What constitutes deception.

Cited in Nolan Bros. Shoe Co. v. Nolan, 131 Cal. 277, 53 L. R. A. 386, 82 Am. St. Rep. 346, 63 Pac. 480, sustaining right to use corporate name, though use of same by individual stockholder for two years prior to incorporation may have deceived public.

41 L. R. A. 472, WEBER v. STATE, 58 Ohio St. 616, 51 N. E. 116.

Right to suspend sentence.

Cited in footnotes to People *ex rel.* Smith v. Allen, 41 L. R. A. 473, which denies power of court to subsequently sentence prisoner whose sentence indefinitely suspended without recognizance; Neal v. State, 42 L. R. A. 190, which holds void, attempt to suspend execution of sentence after pronouncing it; People *ex rel.* Boenert v. Barrett, 63 L. R. A. 82, which denies court's power to indefinitely suspend sentence after conviction.

Denied in Miller v. Evans, 115 Iowa, 103, 56 L. R. A. 102, footnote p. 101, 91 Am. St. Rep. 143, 88 N. W. 198, denying defendant's right to relief for failure to execute mittimus under judgment sentencing to imprisonment on failure to pay fine, until lapse of time of imprisonment.

41 L. R. A. 473, PEOPLE *ex rel.* SMITH v. ALLEN, 155 Ill. 61, 39 N. E. 568,

Right to suspend sentence.

Cited in People *ex rel.* Boenert v. Barrett, 202 Ill. 296, 63 L. R. A. 85, 95 Am. St. Rep. 230, 67 N. E. 23, holding suspension of sentence for over two years pending motion for new trial, accused being allowed his liberty meanwhile on own recognizance, deprives court of jurisdiction; *Re* Flint, 25 Utah, 341, 95 Am. St. Rep. 853, 71 Pac. 531, holding jurisdiction over convicted criminal lost by court suspending judgment indefinitely, and discharging defendant from custody.

Cited in footnotes to Miller v. Evans, 56 L. R. A. 101, which denies defendant's right to relief for failure to execute mittimus under judgment sentencing to imprisonment on failure to pay fine, until lapse of time of imprisonment; Neal v. State, 42 L. R. A. 190, which holds void, attempt to suspend execution of sentence after pronouncing it; People *ex rel.* Boenert v. Barrett, 63 L. R. A. 82, which denies court's power to indefinitely suspend sentence after conviction; Weber v. State, 41 L. R. A. 472, which sustains power of court to suspend sentence and set aside suspension at any time during term.

41 L. R. A. 475, AUGUSTA v. KIMBALL, 91 Me. 605, 40 Atl. 666.

Taxation of grain in elevators.

Cited in footnote to Minneapolis & N. Elevator Co. v. Traill County, 50 L. R. A. 267, which sustains statute taxing grain in elevators, etc., in proprietor's name.

41 L. R. A. 478, *BENEDICK v. POTTS*, 88 Md. 52, 40 Atl. 1067.

Presumption of negligence from fact of accident.

Cited in *Kohner v. Capital Traction Co.* 22 App. D. C. 186, 62 L. R. A. 876, holding that doctrine of *res ipsa loquitur* means that surrounding circumstances of accident contain, without further proof, sufficient evidence of negligence; State use of *Arnold v. Green*, 95 Md. 230, 52 Atl. 673, holding no recovery for death from unexplained elevator accident; *Western Maryland R. Co. v. State*, 95 Md. 652, 53 Atl. 969, holding no presumption of negligence from mere unexplained killing of passenger; *Griffen v. Manice*, 166 N. Y. 196, 52 L. R. A. 926, 82 Am. St. Rep. 630, 59 N. E. 925, sustaining finding of negligence where death resulted from breaking of elevator weights; *Fink v. Slade*, 66 App. Div. 110, 72 N. Y. Supp. 821, holding master's negligence not established by employee's injury from unexplained falling of platform on which working; *South Baltimore Car Works v. Schaefer*, 96 Md. 106, 94 Am. St. Rep. 560, 53 Atl. 665, holding inference of negligence does not arise from breaking of machinery in which there was no visible defect, and in manner never before occurring; *Paynter v. Bridgeton & M. Traction Co.* 67 N. J. L. 625, 52 Atl. 367, holding fall while alighting from street car not of itself sufficient to raise presumption of negligence of railway company.

Cited in footnote to *Springer v. Ford*, 52 L. R. A. 930, which sustains presumption of negligence from injury to passenger by unexplained breaking of elevator appliance.

Distinguished in *Tall v. Baltimore Steam Packet Co.* 90 Md. 257, 47 L. R. A. 123, 44 Atl. 1007, holding carrier not liable for unexpected assault on one passenger by another; *Fisher v. New York Dock Co.* 91 App. Div. 528, 87 N. Y. Supp. 117, holding collision of cars of dock company with stationary car from which plaintiff was unloading freight, sufficient evidence of negligence to go to jury.

41 L. R. A. 481, *CHICAGO, B. & Q. R. CO. v. STATE*, 47 Neb. 549, 53 Am. St. Rep. 557, 66 N. W. 624.

Legislative control of public welfare.

Approved on later appeal in 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513, holding public safety justifies legislature in controlling municipal agreement for maintenance of railroad crossing viaduct.

Cited in *Chicago v. Jackson*, 196 Ill. 503, 63 N. E. 1013, holding that police power may be exercised for public welfare without compensation for individual rights destroyed; *Edgerton v. Goldsboro Water Co.* 126 N. C. 99, 48 L. R. A. 446, 35 S. E. 243 (dissenting opinion), majority holding maintenance of water works not necessary municipal expense.

Cited in footnotes to *Bailey v. People*, 54 L. R. A. 839, which holds void, restriction on number which lodging-house keeper may permit to occupy one room; *Bessette v. People*, 56 L. R. A. 558, which holds void, requirement that horse-shoers practise business for four years, submit to examination, and pay license fee.

What constitutes "due process of law."

Approved in *Cummings v. Hyatt*, 54 Neb. 44, 74 N. W. 411, sustaining irrigation tax statute as not being a taking of property without "due process of law;"

Howard v. Clay County, 54 Neb. 446, 74 N. W. 953, holding no taking without "due process" when opportunity afforded for judicial determination of damages and payment thereof; Hanson v. Krehbiel, 68 Kan. 675, 64 L. R. A. 793, holding remedy by due course of law means reparation for injury, ordered by tribunal having jurisdiction, in due course of procedure, and after fair hearing; August v. Gilmer, 53 W. Va. 67, 44 S. E. 143, holding decision in summary proceeding adjudging title of purchaser at execution sale invalid, and ordering return of property to sheriff, not taking property without due process of law.

Right to consider wisdom of statute.

Cited in Henley v. State, 98 Tenn. 724, 39 L. R. A. 142, 41 S. W. 352 (dissenting opinion), majority holding courts cannot annul statute for any reason whatever unless violating some constitutional provision.

Cited in footnote to Com. *ex rel.* Elkin v. Moir, 53 L. R. A. 837, which holds wisdom, propriety, justice, or motive for passage not considered in determining validity of statute for government of cities.

Mandamus to enforce corporate duty.

Cited in State *ex rel.* Bridgeton v. Bridgeton & M. Traction Co. 62 N. J. L. 603, 45 L. R. A. 842, 43 Atl. 715, granting mandamus compelling street railway company to maintain line for public benefit, according to franchise.

41 L. R. A. 487, **MALLOY v. NEW YORK REAL ESTATE ASSO.** 156 N. Y. 205, 50 N. E. 853.

Liability for elevator accidents.

Distinguished in Weinberger v. Kratzenstein, 71 App. Div. 159, 75 N. Y. Supp. 537, Reversing 35 Misc. 77, 71 N. Y. Supp. 244, holding owner of building liable to person falling into elevator shaft by reason of breaking of defective guard chain; Baker v. Otis Elevator Co. 78 App. Div. 514, 79 N. Y. Supp. 663, holding factory owner not liable for injury to city fireman falling into elevator well while fighting fire in darkness.

Cited in footnote to Gibson v. International Trust Co. 52 L. R. A. 928, which denies liability for injury to passenger from involuntary starting of elevator by conductor grasping mechanism to prevent falling.

41 L. R. A. 490, **JONES v. NEW YORK C. & H. R. R. CO.** 156 N. Y. 187, 50 N. E. 856.

Carrier's duty towards passengers.

Cited in note (42 L. R. A. 494) on starting car before passenger is seated.

41 L. R. A. 494, **COYNE v. MISSISSIPPI & R. RIVER BOOM CO.** 72 Minn. 531, 71 Am. St. Rep. 508, 75 N. W. 748.

Right to use stream for floating logs.

Approved in Smith v. Atkins, 110 Ky. 123, 53 L. R. A. 791, footnote p. 791, 96 Am. St. Rep. 424, 60 S. W. 930, denying right of one navigating stream to fasten booms to trees on bank.

Cited in Smith v. Atkins, 110 Ky. 123, 53 L. R. A. 790, 96 Am. St. Rep. 424, 60 S. W. 930, holding person erecting boom across navigable stream not entitled to fasten same to land of riparian owner, and overflow banks to latter's damage.

Cited in footnotes to *Watkins v. Dorris*, 54 L. R. A. 199, which holds one floating logs down stream liable to abutter for injuries to land by jams; *Brewster v. J. & J. Rogers Co.* 58 L. R. A. 495, which denies right to discharge water stored along stream to aid drive of logs, so as to overflow banks to injury of riparian owners.

Cited in note (64 L. R. A. 983) on liability for injuries caused by attempted exercise of rights of navigation.

Liability for consequential injuries.

Cited in *Lund v. St. Paul, M. & M. R. Co.* 31 Wash. 293, 61 L. R. A. 508, 96 Am. St. Rep. 906, 71 Pac. 1032, holding street railroad company not liable for obstructing street for over one year, under authority of city council, to damage of property owner.

Cited in note (53 L. R. A. 635) on extent of trespasser's liability for consequential injuries resulting from trespass.

41 L. R. A. 498, *COM. ex rel. SCOTT v. BOARD OF PUBLIC EDUCATION*, 187 Pa. 70, 40 Atl. 806.

41 L. R. A. 501, *STATE v. COOP*, 52 S. C. 508, 30 S. E. 609.

Statutes affecting interstate commerce.

Approved in *Laurens v. Elmore*, 55 S. C. 479, 45 L. R. A. 250, footnote p. 249, 33 S. E. 560, holding license tax on occupations invalid, as against seller of frames on pictures made in other state.

Cited in footnotes to *Re Wilson*, 48 L. R. A. 417, which holds void as applied to sale of original packages, territorial statute requiring license for sale of coal oil; *Adkins v. Richmond*, 47 L. R. A. 583, which holds license tax on merchandise brokers void as to brokers selling goods by sample for principal in other state; *Williams v. Fears*, 50 L. R. A. 685, which sustains license tax on emigrant agent; *Brownback v. North Wales*, 49 L. R. A. 446, which holds valid as to residents, ordinance requiring license for sale of goods on street or by soliciting orders from house to house.

What constitutes peddler.

Cited in footnote to *State v. Wells*, 48 L. R. A. 99, which holds one soliciting orders for goods and carrying goods to fill previous sales, not a peddler.

41 L. R. A. 503, *CHESTERFIELD v. RATLIFF*, 52 S. C. 563, 30 S. E. 593.

41 L. R. A. 504, *Re CHRISTENSEN*, 17 Utah, 412, 70 Am. St. Rep. 794, 53 Pac. 1003.

Validity of divorce decree.

Cited on later appeal in 23 Utah, 209, 63 Pac. 896, as being the law of the case.

41 L. R. A. 511, *RICHMOND & A. R. CO. v. R. A. PATTERSON TOBACCO CO.* 92 Va. 670, 24 S. E. 261.

Affirmed in 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 335.

Carrier's liability for loss beyond line.

Approved in *Norfolk & W. R. Co. v. Reeves*, 97 Va. 292, 33 S. E. 606, holding

that common carriers may limit liability to damages from negligence prior to delivery to connecting carrier; *Central R. Co. v. Murphey*, 116 Ga. 868, 60 L. R. A. 820, 43 S. E. 265, upholding validity of statute imposing liability for loss of freight upon initial carrier failing to trace same within thirty days after request therefor.

Cited in footnotes to *Union State Bank v. Fremont, E. & M. Valley R. Co.* 59 L. R. A. 939, which sustains initial carrier's right to limit liability to own line; *Taffe v. Oregon R. & Nav. Co.* 58 L. R. A. 187, which denies initial carrier's liability under bill of lading beyond own line; *Courteeh v. Kanawha Despatch*, 55 L. R. A. 182, which denies carrier's liability for accidental destruction of property while in warehouse on pier, awaiting arrival of vessel of connecting carrier.

Cited in note (63 L. R. A. 530) on conflict of laws as to carrier's contracts.

Statutes affecting interstate commerce.

Approved in *Lacey v. Palmer*, 93 Va. 170, 31 L. R. A. 826, 57 Am. St. Rep. 795, 24 Atl. 930, sustaining statute prohibiting pool selling on races in another state.

41 L. R. A. 515, *STATE ex rel. GRINSFELDER v. SPOKANE STREET R. CO.* 19 Wash. 518, 67 Am. St. Rep. 739, 53 Pac. 719.

Compelling operation of street railway line.

Cited in footnotes to *State ex rel. Bridgeton v. Bridgeton & M. Traction Co.* 45 L. R. A. 837, which holds street railway company's duty to operate road enforceable by mandamus; *State ex rel. Knight v. Helena Power & Light Co.* 44 L. R. A. 692, which denies power to compel operation of abandoned street railway line.

Lot owner's right of action against street railway.

Distinguished in *Schwede v. Hemrich Bros. Brewing Co.* 29 Wash. 26, 69 Pac. 362, holding abutting lot owner entitled to sue for injunction against unlawful construction of railroad in street.

41 L. R. A. 520, *JOHNSON v. VAN WYCK*, 4 App. D. C. 294.

Validity of champertous contracts.

Approved in *Campbell v. Dexter*, 17 App. D. C. 463, setting aside champertous assignment upon repayment of money advanced; *Peck v. Heurich*, 167 U. S. 630, 42 L. ed. 305, 17 Sup. Ct. Rep. 927, holding void for champerty, agreement to prosecute suit to recover land in consideration of proportion of recovery.

Cited in footnote to *Irwin v. Curie*, 58 L. R. A. 830, which sustains right of person placing demands in attorney's hands to recover agreed compensation, though statute forbids such agreements.

41 L. R. A. 530, *STATE v. THORNTON*, 10 S. D. 349, 73 N. W. 196.

Burden of proving alibi.

Approved in *People v. Winters*, 125 Cal. 328, 57 Pac. 1067, holding erroneous instruction as to proof of alibi cured by charging that defendant is entitled to benefit of reasonable doubt.

Cited in *State v. McClellan*, 23 Mont. 538, 75 Am. St. Rep. 558, 59 Pac. 924, holding erroneous instruction as to proof of alibi not cured by charging that defendant is entitled to benefit of reasonable doubt.

41 L. R. A. 544, SEYMOUR v. McAVOY, 121 Cal. 438, 53 Pac. 946.

Rights of creditors in trust funds.

Cited in footnotes to Scott v. Keane, 42 L. R. A. 359, which holds trust by conveyance and reconveyance for grantor's benefit void as against his creditors; Re Qua v. Graham, 52 L. R. A. 641, which holds annuity in wife's will in lieu of other interests, accepted by husband, not trust beyond reach of creditors; Murphy v. Delano, 55 L. R. A. 727, which holds income of spendthrift trust not within reach of creditors by void agreement of trustees to pay certain portion of income absolutely to beneficiary; Hutchinson v. Maxwell, 57 L. R. A. 384, which denies power to create equitable life estate free from debts of beneficiary.

41 L. R. A. 548, MASON v. McLEOD, 57 Kan. 105, 57 Am. St. Rep. 327, 45 Pac. 76.

Statutory regulation of patent-right notes.

Approved in Eclipse Wind Engine Co. v. Zimmerman Mfg. Co. 16 Ind. App. 500, 44 N. E. 1115, and State v. Cook, 107 Tenn. 506, 62 L. R. A. 176, 64 S. W. 720, sustaining statute regulating form and negotiability of notes given for patent rights; State v. Cook, 107 Tenn. 499, 62 L. R. A. 176, footnote p. 174, 64 S. W. 720, holding statute requiring notes for patent rights to so state on their faces, within police power.

Rights under prohibited contracts.

Approved in Stansfield v. Kunz, 62 Kan. 801, 64 Pac. 614, holding that illegal contract for sale of intoxicants may be rescinded and advances recovered by vendee before consummation.

41 L. R. A. 551, FORD v. STATE, 85 Md. 465, 60 Am. St. Rep. 337, 37 Atl. 172.

Exercise of police power.

Cited in *Ex parte McClain*, 134 Cal. 113, 54 L. R. A. 780, footnote p. 779, 86 Am. St. Rep. 243, 66 Pac. 69, sustaining city's right to make mere possession of lottery ticket a misdemeanor; State v. Hyman, 64 L. R. A. 645, upholding validity of statute prohibiting use of room in tenement for manufacture of clothing, except by members of family and under permit.

Cited in footnotes to Bailey v. People, 54 L. R. A. 839, which holds void, restriction on number which lodging-house keeper may permit to occupy one room; People v. Adams, 63 L. R. A. 406, which sustains statute making possession of papers used in playing policy, penal offense.

41 L. R. A. 554, CANANDAIGUA v. FOSTER, 156 N. Y. 354, 66 Am. St. Rep. 575, 50 N. E. 971.

Lessor's liability for injuries from defective premises.

Approved in Brogan v. Hanan, 55 App. Div. 93, 66 N. Y. Supp. 1066, holding landlord and tenant jointly liable to person falling down unguarded basement steps.

Cited in Curran v. Flammer, 49 App. Div. 297, 62 N. Y. Supp. 1061, holding landlord not liable to person falling through sidewalk grating in front of leased premises; West Chicago Masonic Asso. v. Cohn, 192 Ill. 217, 55 L. R. A. 239, footnote p. 235, 85 Am. St. Rep. 327, 61 N. E. 439, Reversing 94 Ill. App. 336, denying landlord's liability for injury by defective condition of coalhole in side-

walk; *Leaux v. New York*, 87 App. Div. 404, 84 N. Y. Supp. 514, holding lessor not liable for injury to tenant's servant from fall into sewer defectively covered, where premises in proper condition at beginning of term.

Cited in footnotes to *Gardner v. Rhodes*, 57 L. R. A. 749, which denies landlord's liability for fall on ice which tenant permits to accumulate on sidewalk; *Barrett v. Lake Ontario Beach Improv. Co.* 61 L. R. A. 829, which sustains owner's liability for insufficiency of railing of leased toboggan slide; *Langenbaugh v. Anderson*, 62 L. R. A. 948, which denies liability of lessor of lot for production of oil or gas therefrom, for injury to adjoining owner's property through escape of oil by lessee's negligence.

Liability for injuring sidewalk.

Approved in *Parish v. Baird*, 160 N. Y. 307, 54 N. E. 724, holding abutting owner may recover damages for material injury to sidewalk.

Municipal liability for using space under street.

Cited in note (61 L. R. A. 585, 591) on liability of municipality for injuries to travelers caused by persons using space under street.

41 L. R. A. 557, *TRAVELERS' INS. CO. v. FRICKE*, 99 Wis. 367, 74 N. W. 372, 78 N. W. 407.

Rights of licensees.

Cited in *State ex rel. Fidelity & C. Co. v. Fricke*, 102 Wis. 116, 77 N. W. 732, holding foreign accident insurance companies required to pay license fee imposed upon life companies and additional fee for accident business.

Cited in footnotes to *Bankers' L. Ins. Co. v. Howland*, 57 L. R. A. 374, which denies insurance commissioners' power to question foreign company's mode of computing reserve set forth in statement for license; *Wallace v. Reno*, 63 L. R. A. 338, which authorizes revocation of liquor license by legislature or municipal officers, with or without notice to licensee.

Taxation of corporate franchises.

Cited in note (57 L. R. A. 72) on taxation of corporate franchises in United States.

Right of foreign corporation to plead statute of limitations.

Cited in *State v. National Acci. Soc.* 103 Wis. 217, 79 N. W. 220, holding foreign insurance corporation not entitled to benefit of statute of limitations; *Burns v. White Swan Min. Co.* 35 Or. 308, 57 Pac. 637, holding foreign corporation "person without state," entitled to plead statute of limitations; *Williams v. Metropolitan Street R. Co.* 68 Kan. 27, 64 L. R. A. 799, footnote p. 794, 74 Pac. 600, holding foreign corporation "out of state," within provision as to running of statute of limitations.

Practical construction of statutes and contracts.

Cited in *State ex rel. Fidelity & C. Co. v. Fricke*, 102 Wis. 112, 77 N. W. 732, denying mandamus to compel issuance of corporation license without payment of certain arrearages, notwithstanding practical construction of statute by state officers that same not required; *State v. National Acci. Soc.* 103 Wis. 219, 79 N. W. 220 (dissenting opinion), majority holding insurance company liable in action of assumpsit for license fees for past years, not then exacted because of misconstruction of statute by state officers; *Hurley Water Co. v. Vaughn*, 115

Wis. 475, 91 N. W. 971, holding, where construction of water works statute is in doubt, practical construction given to it for twenty years is important; *Hart v. Hart*, 117 Wis. 654, 94 N. W. 890, refusing to charge partnership with taxes and insurance on property belonging to member of firm according to understanding of such member, where contract to contrary perfectly plain.

Interest upon litigated claims.

Approved in *Laycock v. Parker*, 103 Wis. 188, 79 N. W. 327, holding interest allowable on claim from time of demand before action.

41 L. R. A. 563, *SELLECK v. JANESVILLE*, 100 Wis. 157, 69 Am. St. Rep. 906, 75 N. W. 975.

Physical exhibition of injury.

Approved in *Arkansas River Packet Co. v. Hobbs*, 105 Tenn. 35, 58 S. W. 278, holding proper, exhibition and exercise of injured limb before jury two years after accident.

Hypothetical questions to medical experts.

Approved in *Crouse v. Chicago & N. W. R. Co.* 102 Wis. 204, 78 N. W. 446, holding proper question as to cause of condition described in detail; *Werner v. Chicago & N. W. R. Co.* 105 Wis. 309, 81 N. W. 416, holding proper, question based upon assumed truth of all facts in evidence.

Distinguished in *Schaidler v. Chicago & N. W. R. Co.* 102 Wis. 570, 78 N. W. 732, holding improper, question as to cause of death without revealing pre-existent disease.

Aggravation of injury.

Approved in *Selleck v. Janesville*, 104 Wis. 579, 47 L. R. A. 694, 76 Am. St. Rep. 892, 80 N. W. 944, holding husband's recovery for wife's injury not barred by mistakes of reputable physicians carefully selected; *Arkansas River Packet Co. v. Hobbs*, 105 Tenn. 45, 58 S. W. 278, holding full duty of lessening damages discharged when using ordinary care, though without medical advice; *Elliott v. Kansas City*, 174 Mo. 567, 74 S. W. 617, and *Joliet v. Le Pla*, 109 Ill. App. 340, holding aggravation of injury by treatment of unskilful physician no defense, when plaintiff used ordinary care in selection.

Cited in footnote to *Texas & P. R. Co. v. White*, 62 L. R. A. 90, which denies liability of person causing injury for aggravation due to injured person's neglect to obtain necessary surgical assistance.

— Injury aggravated by existing disease.

Cited in footnote to *Maguire v. Sheehan*, 59 L. R. A. 496, which sustains liability for entire injury through negligence, though shock brought on delirium tremens, retarding recovery.

41 L. R. A. 566, *AITKEN v. WELLS RIVER*, 70 Vt. 308, 67 Am. St. Rep. 672, 40 Atl. 829.

41 L. R. A. 569, *ELLERBEE v. STATE*, 75 Miss. 522, 22 So. 950.

Temporary absence of judge.

Approved in *Durden v. People*, 192 Ill. 497, 55 L. R. A. 241, footnote p.

240, 61 N. E. 317, holding change of judge during trial without consent of accused, is mistrial.

Cited in *Gibson v. State*, 76 Miss. 140, 23 So. 582, holding judge's absence from trial cannot be reviewed unless excepted to.

Cited in footnote to *Horne v. Rogers*, 49 L. R. A. 176, which holds judge's absence during trial not prejudicial error.

Erroneous instruction as reversible error.

Approved in *Owens v. State*, 80 Miss. 515, 32 So. 152, holding criminal conviction reversible for vital, substantial errors.

Later appeal in 79 Miss. 10, 30 So. 57, reversing criminal conviction for substantial erroneous instructions.

Cited in *Lipscomb v. State*, 75 Miss. 616, 23 So. 210 (dissenting opinion), majority reversing criminal conviction for material erroneous instruction.

41 L. R. A. 575, *ZEHREN v. MILWAUKEE ELECTRIC R. & LIGHT CO.* 99 Wis. 83, 67 Am. St. Rep. 844, 74 N. W. 538.

Additional highway servitudes.

Approved in *Krueger v. Wisconsin Teleph. Co.* 106 Wis. 103, 50 L. R. A. 302, 81 N. W. 1041, holding telephone line additional servitude which cannot be erected without compensation.

Cited in *La Crosse City R. Co. v. Higbee*, 107 Wis. 393, 51 L. R. A. 926, 83 N. W. 701, holding electric railway not additional burden upon city street; *Allen v. Clausen*, 114 Wis. 249, 90 N. W. 181, sustaining injunction by abutting owner against unauthorized laying of street car tracks; *Diebold v. Kentucky Traction Co.* 63 L. R. A. 640, holding interurban railway not "street railway" within constitutional provision requiring franchise to be sold to lowest bidder, but is "trunk railway."

Cited in footnotes to *Jaynes v. Omaha Street R. Co.* 39 L. R. A. 751, which holds trolley railway an additional burden on street; *Birmingham Traction Co. v. Birmingham R. & Electric Co.* 43 L. R. A. 233, which holds electric-motor railway not additional servitude on highway.

Disapproved in *Ehret v. Camden & T. R. Co.* 60 N. J. Eq. 248, 46 Atl. 578, refusing injunction against construction of electric railway on county highway without compensation to abutting proprietors; *Ehret v. Camden & T. R. Co.* 61 N. J. Eq. 173, 47 Atl. 562, holding trolley line not additional servitude upon country highway.

Right of eminent domain.

Cited in *Younkin v. Milwaukee Light, Heat & Traction Co.* 112 Wis. 20, 87 N. W. 861, holding street railways powerless to condemn land prior to statute of 1891, conferring such power.

41 L. R. A. 581, *MADDOX v. DUNCAN*, 143 Mo. 613, 65 Am. St. Rep. 678, 45 S. W. 688.

Parties to action on note.

Approved in *Hill v. Combs*, 92 Mo. App. 253, holding maker and guarantor cannot be joined in same action without statutory permission; *Hill v. Coombs*, 93 Mo. App. 267, holding joint action lies against indorsers and guarantors.

Cited in footnote to *Edgerly v. Lawson*, 51 L. R. A. 432, which authorized action against maker by transferee of note after maturity without consideration.

Payments affecting statute of limitations.

Approved in *Corbyn v. Brokmeyer*, 84 Mo. App. 653, holding statute not interrupted as to guarantor by payments of payee and indorser; *Regan v. Williams*, 88 Mo. App. 585, holding statute not interrupted as to maker by payments of collateral promisor.

Waiver of statutory privilege.

Approved in *Keller v. Home L. Ins. Co.* 95 Mo. App. 638, 69 S. W. 612, holding patient may waive privilege of secrecy accorded to professional information.

41 L. R. A. 584, *FIRST NAT. BANK v. FIRST NAT. BANK*, 58 Ohio St. 207, 65 Am. St. Rep. 748, 50 N. E. 723.

Recovery of payments upon forged instruments.

Cited in *Woods v. Colony Bank*, 114 Ga. 685, 56 L. R. A. 931, footnote p. 929, 40 S. E. 720, holding presumption of drawee knowing drawer's signature not available to negligent holder; *First Nat. Bank v. First Nat. Bank*, 68 Ohio St. 48, 67 N. E. 91, holding indorser of negotiable note liable to indorsee compelled to pay same because of forgery of prior indorsement.

Cited in footnote to *Canadian Bank of Commerce v. Bingham*, 60 L. R. A. 955, which sustains drawee's right to recover amount of forged check payable to fictitious person, from one cashing same on indorsement purporting to be payee's, without requiring identification.

41 L. R. A. 587, *JOHNS v. NORTHWESTERN MUT. RELIEF ASSO.* 90 Wis. 332, 63 N. W. 276.

Later appeal in 94 Wis. 431, 69 N. W. 160.

Presumption as to death of insured.

Approved in *Butero v. Travelers' Acci. Ins. Co.* 96 Wis. 541, 65 Am. St. Rep. 61, 71 N. W. 811, denying right of recovery upon policy exempting "intentional injuries," where evidence of homicide preponderates.

Cited in footnotes to *Standard Life & Acci. Ins. Co. v. Thornton*, 49 L. R. A. 116, which holds accident, not suicide, presumed where sleeping car passenger found dead on track; *Boynton v. Equitable Life Assur. Co.* 52 L. R. A. 687, which requires insurer, claiming suicide of insured, to exclude every reasonable hypothesis of accidental death; *Cox v. Royal Tribe of Joseph*, 60 L. R. A. 620, which authorizes consideration of presumption of death from natural causes, in determining cause of death of insured found dead in water; *Fidelity & C. Co. v. Freeman*, 54 L. R. A. 680, which holds suicide of insured not conclusively shown by evidence.

Causes of death within policy.

Cited in footnotes to *Brown v. Sun L. Ins. Co.* 51 L. R. A. 252, which sustains recovery on policy of one whose death caused by taking overdose of morphine; *Courtemanche v. Supreme Court, I. O. O. F.* 64 L. R. A. 668, which holds accidental death of assured from taking poison to frighten wife into giving him money

not within provision that policy does not include assurance against self-destruction.

41 L. R. A. 589, *SMOOT v. PEOPLE'S PERPETUAL LOAN & BLDG. ASSO.* 95 Va. 686, 29 S. E. 746.

Statutory validation of usurious contracts.

Approved in *Bosang v. Iron Belt Bldg. & L. Asso.* 96 Va. 122, 30 S. E. 440, holding legislature may validate invalid usurious contracts.

Cited in *Atlanta Sav. Bank v. Spencer*, 107 Ga. 632, 33 S. E. 878, holding unconstitutional, special charter authorizing making of contracts otherwise invalid for usury.

Cited in footnotes to *Iowa Sav. & Loan Asso. v. Heidt*, 43 L. R. A. 689, which sustains statute taking away defense of usury; *Borrowers' & I. Bldg. Asso. v. Eklund*, 52 L. R. A. 637, which requires strict adherence to mode fixed by statute exempting loan associations from usury laws.

What constitutes usury.

Cited in footnotes to *Gray v. Baltimore Bldg. & L. Asso.* 54 L. R. A. 217, which holds percentage payable to loan association indefinitely, usurious, though called "premium;" *Washington Nat. Bldg. Loan & Invest. Asso. v. Stanley*, 58 L. R. A. 816, which holds exaction of monthly premium which, with interest, exceeds legal rate, unauthorized; *Pacific States Sav. Loan & Bldg. Co. v. Hill*, 56 L. R. A. 163, which holds requirement that borrower bid for stock and pay dues on same, device to cover usury.

What law governs question of usury.

Cited in footnotes to *Floyd v. National Loan & Invest. Co.* 54 L. R. A. 536, which holds contract with foreign loan association not within exemption of domestic associations as to usury, unless in conformity to local law; *National Mut. Bldg. & L. Asso. v. Braham*, 57 L. R. A. 793, which holds usury in loan by foreign loan association to resident, secured by mortgage on land in state, determined by local law.

Liability of officer for shortage in accounts.

Approved in *Safe Deposit Bank v. Schuylkill County*, 190 Pa. 192, 42 Atl. 539, holding payment to commissioners' clerk having possession of note, to be treated as made to county, although treasurer never received proceeds; *Equitable Sav. & Loan Asso. v. Roland*, 198 Pa. 649, 48 Atl. 866, holding association not estopped from enforcing security against treasurer by secretary's long concealment of deficit.

41 L. R. A. 593, *BOARD OF EDUCATION v. PURSE*, 101 Ga. 422, 65 Am. St. Rep. 812, 28 S. E. 896.

Control of pupils in public schools.

Approved in *Samuel Benedict Memorial School v. Bradford*, 111 Ga. 802, 36 S. E. 920, holding that school authorities, not courts, must determine suitability of subjects for composition and debate.

Cited in footnote to *Board of Education v. Booth*, 53 L. R. A. 787, which denies power of court to review question of guilt or innocence of pupil expelled from school.

Cited in note (62 L. R. A. 162) on right of school authorities to control pupils when going to and from school.

41 L. R. A. 609, *DENNEHY v. McNULTA*, 30 C. C. A. 422, 59 U. S. App. 264, 86 Fed. 825.

Illegality of corporation as defense.

Approved in *Harrison v. Glucose Sugar Ref. Co.* 58 L. R. A. 919, 53 C. C. A. 488, 116 Fed. 308, holding illegality of corporation no defense to one voluntarily contracting therewith; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 547, 46 L. ed. 685, 22 Sup. Ct. Rep. 431, holding illegality of combine no defense to action for goods purchased.

Illegality of contract as defense.

Approved in *Union Cent. L. Ins. Co. v. Berlin*, 33 C. C. A. 277, 62 U. S. App. 223, 90 Fed. 782, holding promise to extend note discharged by promisee's failure to perform unlawful condition imposed; *Gilbert v. American Surety Co.* 61 L. R. A. 257, 57 C. C. A. 623, 121 Fed. 503, holding seller of property in furtherance of illegal combination in restraint of trade cannot set up illegality of contract in action for its enforcement.

41 L. R. A. 612, *MOZINGO v. ROSS*, 150 Ind. 688, 65 Am. St. Rep. 387, 50 N. E. 867.

Payment suspending statute of limitations.

Approved in *Koontz v. Hammond*, 21 Ind. App. 80, 51 N. E. 506, holding that principal's payment of interest will not suspend statute as to surety; *McBride v. Ulmer*, 30 Ind. App. 157, 65 N. E. 610, holding credit on indebtedness of husband as part payment on debt which creditor was owing former's wife not such payment as would remove bar of statute.

41 L. R. A. 614, *LOUISVILLE & N. R. CO. v. WHITLOW*, 105 Ky. 1, 43 S. W. 711.

Conflict of laws.

Cited in *Baltimore & O. S. W. R. Co. v. Reed*, 158 Ind. 28, 56 L. R. A. 470, 92 Am. St. Rep. 293, 62 N. E. 488, holding in action for injury caused by negligence of coemployee in another state, common-law rule presumed to prevail in latter state, in absence of showing to contrary.

Cited in notes (56 L. R. A. 221) on conflict of laws as to action for death or bodily injury; (56 L. R. A. 313) on conflict of laws as to measure of damages.

41 L. R. A. 617, *SHEPARD & M. LUMBER CO. v. ELDRIDGE*, 171 Mass. 516, 68 Am. St. Rep. 446, 51 N. E. 9.

What constitutes estoppel.

Approved in *Winslow v. Everett Nat. Bank*, 171 Mass. 534, 51 N. E. 16, holding negligence in affording opportunity for forging indorsement no defense in action to recover deposit; *Scollans v. Rollins*, 173 Mass. 281, 73 Am. St. Rep. 284, 53 N. E. 863, holding rightful owner of bond fraudulently pledged by depositary not estopped from asserting title thereto; *Dallinger v. Richardson*, 176 Mass. 83, 57 N. E. 224, holding executor not estopped from de-

nying testator's residence by statements not relied upon nor so intended; *Welch v. Walsh*, 177 Mass. 558, 52 L. R. A. 784, 83 Am. St. Rep. 302, 59 N. E. 440, holding lessor not negligent as to guarantor in failing to use diligence in collecting rent.

41 L. R. A. 624, *STATE ex rel. SMYTH v. MOORES*, 55 Neb. 480, 76 N. W. 175.

Cited for history of litigation in *State ex rel. Wright v. Savage*, 64 Neb. 695, 90 N. W. 898.

Right of local self-government.

Cited in *State ex rel. Rosewater v. Holcomb*, 56 Neb. 583, 77 N. W. 1117, denying mandamus compelling governor to conduct trial of charges against fire and police commissioners authorized by void statute; *State ex rel. White v. Barker*, 116 Iowa, 104, 57 L. R. A. 250, 93 Am. St. Rep. 222, 89 N. W. 204, holding municipality has right to establish and control water works without legislative interference; *Lexington v. Thompson*, 113 Ky. 551, 57 L. R. A. 778, 68 S. W. 477, holding legislature cannot fix salaries of firemen in municipalities; *State ex rel. Smyth v. Kennedy*, 60 Neb. 303, 83 N. W. 87, denying writ of ouster against fire and police commissioners deprived of office by void statute; *State ex rel. White v. Barker*, 116 Iowa, 104, 57 L. R. A. 250, 93 Am. St. Rep. 222, 89 N. W. 204, holding statute authorizing appointment of board of water works trustees for cities of first class by judges of district court, infringement on right of local self-government; *McDonald v. Louisville*, 113 Ky. 437, 68 S. W. 413, holding amendment to city charter requiring levy of tax to create fund for pensioning members of fire department and families of deceased members, invalid.

Cited in footnote to *State ex rel. McCausland v. Freeman*, 47 L. R. A. 67, which sustains statute arbitrarily establishing high school and requiring its maintenance by people of county.

Cited in note (48 L. R. A. 480) on power of legislature to impose burdens on municipalities and to control their local administration and property.

Disapproved in *Americus v. Perry*, 114 Ga. 879, 57 L. R. A. 234, 40 S. E. 1004, holding right of local self-government within municipalities entirely dependent upon legislative judgment and discretion; *Newport v. Horton*, 22 R. I. 207, 50 L. R. A. 338, 47 Atl. 312, sustaining statute empowering governor to appoint police commissioners for city.

Overruled in *Redell v. Moores*, 63 Neb. 225, 55 L. R. A. 744, 93 Am. St. Rep. 431, 88 N. W. 243, holding legislature may empower governor to appoint fire and police commissioners in cities of metropolitan class.

Cited as overruled in *State ex rel. Wright v. Savage*, 64 Neb. 701, 90 N. W. 898, holding that although decision is not law, it is *res judicata* as to right of major's appointees to hold offices of fire and police commissioners; *State ex rel. Wright v. Savage*, 64 Neb. 703, 90 N. W. 898, holding question of legislative power to impose upon governor duty of appointing board of fire and police commissioners for city, regarded as settled.

41 L. R. A. 644, *PEOPLE v. SHELDON*, 156 N. Y. 268, 66 Am. St. Rep. 564, 50 N. E. 840.

Effect of coercion on verdict.

Approved in *Twiss v. Lehigh Valley R. Co.* 61 App. Div. 288, 70 N. Y. Supp. 241, setting aside verdict reached as result of coercion by trial judge; *Hagen v.*

New York C. & H. R. R. Co. 79 App. Div. 526, 80 N. Y. Supp. 580, holding language of court insisting upon agreement of jury, abuse of discretion.

41 L. R. A. 650, WILLIAMS v. HENDRICKS, 115 Ala. 277, 67 Am. St. Rep. 32, 22 So. 439.

Liability for cutting trees.

Approved in Glenn v. Adams, 129 Ala. 191, 29 So. 836, holding no liability incurred for cutting trees from lands of another under mistaken belief of ownership; Owens v. Fullington, 139 Ala. 663, 33 So. 1014, affirming judgment for defendant in action to recover statutory penalty for cutting trees from lands of another without his consent.

Liability for another's torts.

Approved in Southern R. Co. v. Wildman, 119 Ala. 571, 24 So. 764, holding employer liable for tortious acts of servant done within scope of employment.

Cited in footnote to Shapard v. Hynes, 52 L. R. A. 675, which denies liability for tortious act of former partner.

Cited in note (51 L. R. A. 464, 472) on liability of partnership for torts.

41 L. R. A. 658, BRYAN v. ADLER, 97 Wis. 124, 65 Am. St. Rep. 99, 72 N. W. 368.

Liability for servant's wrongful acts.

Approved in Bergman v. Hendrickson, 106 Wis. 437, 80 Am. St. Rep. 47, 82 N. W. 304, holding saloonkeeper liable for assault by bartender attempting to enforce payment for liquor; Franklin L. Ins. Co. v. People, 103 Ill. App. 563, holding company jointly liable with agent unlawfully transacting business; Gaertner v. Bues, 109 Wis. 171, 85 N. W. 388, holding landlord not liable in punitive damages for unauthorized or unratified acts of officer executing writ; Rueping v. Chicago & N. W. R. Co. 116 Wis. 630, 96 Am. St. Rep. 1013, 93 N. W. 843, holding recovery of compensatory damages for injury inflicted by servant in performance of duties unauthorized, unless wrongful act directed or subsequently affirmed by master.

41 L. R. A. 669, HALL v. NORFOLK & W. R. CO. 44 W. Va. 36, 67 Am. St. Rep. 757, 28 S. E. 754.

Liability for servant's wrongful acts.

Cited in State use of Burt v. Allen, 48 W. Va. 161, 50 L. R. A. 287, 86 Am. St. Rep. 29, 35 S. E. 990, holding justice of peace and sureties liable for double value of exempt property sold by special constable under process.

41 L. R. A. 677, O'LEARY v. BROOKS ELEVATOR CO. 7 N. D. 554, 75 N. W. 919.

Liability for injury to trespassing children.

Cited in footnotes to Brinkley Car Works Mfg. Co. v. Cooper, 57 L. R. A. 724, which denies liability for injury to six-year-old boy from carelessly walking into pool of hot water; Paolino v. McKendall, 60 L. R. A. 133, which denies duty of occupier of land burning rubbish to guard from fire young children accustomed to play there; Ryan v. Towar, 55 L. R. A. 310, which denies land owner's duty to make premises safe for one attempting to rescue trespassing child caught

in water wheel in unused building; *Uttermohlen v. Bogg's Run Min. & Mfg. Co.* 55 L. R. A. 911, which denies liability of mine owner for injury to trespassing child by cable and pulleys hauling coal cars; *Kopplekom v. Colorado Cement Pipe Co.* 54 L. R. A. 284, which holds owner of uninclosed city lot liable for injury to young child by toppling over of large cement pipe used by children as plaything; *Biggs v. Consolidated Barb-Wire Co.* 44 L. R. A. 655, which holds owner liable for maintaining dangerous machinery on private grounds unprotected from visits of trespassing children.

Liability of infant for torts.

Cited in note (57 L. R. A. 673) on liability of infant for torts.

41 L. R. A. 681, *KEYS v. PITTSBURG & W. COAL CO.* 58 Ohio St. 246, 65 Am. St. Rep. 754, 50 N. E. 911.

41 L. R. A. 689, *STATE v. GARDNER*, 58 Ohio St. 599, 65 Am. St. Rep. 785, 51 N. E. 136.

State regulation of trades and professions.

Approved in *State v. Gravett*, 65 Ohio St. 309, 55 L. R. A. 793, 87 Am. St. Rep. 605, 62 N. E. 325, holding legislature may require established practitioners of osteopathy to conform to reasonable standard of qualifications; *State v. Biggs*, 133 N. C. 739, 64 L. R. A. 144, 94 Am. St. Rep. 731, 46 S. E. 401, holding statute attempting to confer exclusive right to treat disease upon licensed doctors, not within police power; *State ex rel. Winkler v. Benzenberg*, 101 Wis. 177, 16 N. W. 345, sustaining statutory provision requiring examination of plumbers as to practical knowledge before issuing license.

Cited in footnote to *State v. Hyman*, 64 L. R. A. 637, which holds prohibition against use of room in tenement or dwelling house for manufacture of clothing, except by immediate member of family, within police power.

Equality of rights and privileges.

Cited in *State v. Gravett*, 65 Ohio St. 312, 55 L. R. A. 794, 87 Am. St. Rep. 605, 62 N. E. 325, holding statute void in discriminating against osteopaths by requiring longer term of study than is required of physicians; *Hubbard v. State (Ohio)* 58 L. R. A. 659, 64 N. E. 109, holding unconstitutional, statute creating public school teachers' pension fund by deduction of percentage of salaries; *French v. Shirley*, 7 Ohio N. P. 32, holding invalid, statute authorizing summary seizure and destruction of unlicensed fishing nets; *Yensen v. State*, 7 Ohio N. P. 23, holding unconstitutional, statute discriminating against small vessels in imposing tax for use of gill nets; *State v. Mitchell*, 97 Me. 74, 94 Am. St. Rep. 481, 53 Atl. 887, holding statute imposing license tax on peddlers not paying tax of \$25 on stock in trade, and exempting those paying such tax, invalid; *State ex rel. Lewis v. Smith*, 158 Ind. 572, 63 L. R. A. 129, 63 N. E. 25 (dissenting opinion), majority sustaining statute authorizing deduction of mortgages not exceeding \$700 from assessed valuation for taxation purposes.

Cited in footnotes to *Harrodsburg v. Renfro*, 51 L. R. A. 897, which holds void, ordinance imposing greater license fee for sale of liquors on main street of town than elsewhere; *Com. use of Titusville v. Clark*, 57 L. R. A. 348, which holds void, exemption from license tax of contractors and real-estate dealers, but not others. whose business less than \$1,000; *Knisely v. Cotterel*, 50 L. R. A. 87,

which sustains statute fixing different rates of license for retailers, wholesalers and sellers on board of trade; *State v. Garbroski*, 56 L. R. A. 570, which holds void, statute exempting veterans from requirement for peddling license.

41 L. R. A. 692, *STATE ex rel. MCCAIN v. METSCHAN*, 32 Or. 372, 46 Pac. 791, 53 Pac. 1071.

Amending complaint upon remandment.

Approved in *Lieuallen v. Mosgrove*, 33 Or. 291, 54 Pac. 664, holding privilege of pleading over must be determined by court below upon remandment for further proceedings; *McLeod v. Lloyd*, 43 Or. 281, 74 Pac. 491, holding, upon remand of case affirmed on appeal from judgment on demurrer, it is open to trial court whether or not to allow defeated party to plead further.

Actions maintained by state.

Approved in *State v. Ohio Oil Co.* 150 Ind. 38, 47 L. R. A. 634, 49 N. E. 809, sustaining right of state, as such, to maintain injunction against unlawful escape of natural gas.

41 L. R. A. 695, *ROBB v. PENNSYLVANIA CO. FOR INS. ON LIVES & G. A.* 186 Pa. 456, 42 W. N. C. 313, 475, 65 Am. St. Rep. 868, 40 Atl. 969, 41 Atl. 49.

Which of two innocent parties must suffer loss.

Approved in *Vanderslice v. Royal Ins. Co.* 9 Pa. Super. Ct. 237, 43 W. N. C. 384, holding that insurer must suffer loss of payments induced through fraud of third party intrusted with policy; *Harvey v. Schuylkill Real Estate, Title Ins. & T. Co.* 24 Pa. Co. Ct. 599, holding that use of corporation letterhead by solicitor does not justify belief that he is empowered to act for company in a particular transaction; *Googe v. Gaskill*, 18 Pa. Super. Ct. 43, holding that loss must be borne by party relying on assignment of mortgage forged by attorney in fact, authorized only to receipt for payments and enter satisfaction of record; *Grasselli Chemical Co. v. Biddle Purchasing Co.* 22 Pa. Super. Ct. 429, holding principal liable for goods sold and delivered to agent, according to previous dealing, by person without notice of revocation of agency.

41 L. R. A. 700, *HERMAN BROS. v. KATZ BROS.* 101 Tenn. 118, 47 S. W. 86.

Insurance; change of possession.

Cited in *McClelland v. Greenwich Ins. Co.* 107 La. 129, 31 So. 691, holding mere formal seizure by sheriff not such change of possession as invalidates policy.

41 L. R. A. 703, *HARRISON v. TURNBULL*, 95 Va. 721, 64 Am. St. Rep. 830, 30 S. E. 372.

Appeal by infant during minority.

Approved in *Seymour v. Alkire*, 47 W. Va. 305, 34 S. E. 953, and *Lockhart v. Vandyke*, 97 Va. 363, 33 S. E. 613, holding that infant aggrieved by adverse decree may sue out writ of error, bill of review, or original bill by next friend, or resort to same remedies within six months after attaining majority.

Collateral attack upon decrees.

Approved in *Turnbull v. Mann*, 99 Va. 45, 37 S. E. 288, holding decree confirm-

ing report of receiver as to delivery of trust note to custodian appointed by court cannot be collaterally questioned in proceeding for discharge of lien because of presumption of payment.

Effect of decree upon rights of unborn heirs.

Cited in *Ammons v. Ammons*, 50 W. Va. 406, 40 S. E. 490, holding unborn children standing in same class and having same rights as persons living, deemed before court by representation in proceedings for sale of their interest in estate.

41 L. R. A. 707, *HILLER v. ELLIS*, 72 Miss. 701, 18 So. 95.

Overstating preferred claim.

Distinguished in *Goodbar Shoe Co. v. Montgomery*, 73 Miss. 75, 19 So. 196, holding assignment not invalidated by overstatement of preferred claim, when assignee directed to pay "true" amount due.

41 L. R. A. 714, *MERRILL v. HARRIS*, 65 Ark. 355, 67 Am. St. Rep. 929, 46 S. W. 538.

Rights of child in parent's homestead.

Cited in note (56 L. R. A. 62) on rights of child or children in homestead of parent.

41 L. R. A. 718, *STATE v. CALDWELL*, 50 La. Ann. 666, 69 Am. St. Rep. 465, 23 So. 869.

Constitutional provisions; methods of procedure.

Approved in *State v. Cook*, 52 La. Ann. 117, 26 So. 751, holding constitutional change of method of drawing petit jury applicable to offense committed before adoption; *State v. Marceaux*, 50 La. Ann. 1139, 24 So. 611, holding constitutional provision reducing number of trial jurors applicable to one indicted before its adoption.

Cited in *State ex rel. Sherburne v. Baker*, 50 La. Ann. 1248, 69 Am. St. Rep. 472, 24 So. 240, holding constitutional provision for trial without jury inapplicable to offense committed before its adoption.

Cited in footnotes to *State v. Vincent*, 52 L. R. A. 83, which holds indictment found by less than twenty-three grand jurors demurrable; *State v. Kyle*, 56 L. R. A. 115, which sustains statute authorizing prosecution by information of crimes already committed.

Overruled in *State v. Ardoin*, 51 La. Ann. 172, 24 So. 802, holding constitutional provision reducing number of trial jurors invalid as applied to offenses committed before its adoption.

Self-operative constitutional provisions.

Approved in *State v. Favre*, 51 La. Ann. 437, 25 So. 93, holding self-operative constitutional provision for indictment by grand jury of twelve persons; *Globe Lumber Co. v. Griffeth*, 107 La. 623, 31 So. 1010, holding self-operative, constitutional provision as to delay for suspensive appeal.

41 L. R. A. 720, *SUPREME LODGE, O. OF G. C. v. SIMERING*, 88 Md. 276, 71 Am. St. Rep. 409, 40 Atl. 723.

Judicial interference with corporate elections.

Approved in *Walker v. Johnson*, 17 App. D. C. 169, sustaining preliminary in-

junction against holding corporate election; *Garmire v. American Min. Co.* 93 Ill. App. 333, sustaining interlocutory injunction against persons acting as directors until title determined by quo warranto.

41 L. R. A. 724, *PIPER v. NEW YORK C. & H. R. R. CO.* 156 N. Y. 224, 66 Am. St. Rep. 559, 50 N. E. 851.

Cited as Reversing 89 Hun, 75, 34 N. Y. Supp. 1072, in *Connor v. Metropolitan Street R. Co.* 77 App. Div. 389, 79 N. Y. Supp. 294.

Carrier's duty to passenger.

Cited in *Koehne v. New York & Q. C. R. Co.* 32 App. Div. 422, 52 N. Y. Supp. 1088, holding railroad company bound to exercise very high degree of care and skill in operation of its cars, to avoid injury to passengers.

Contributory negligence.

Approved in *Mearns v. Central R. Co.* 163 N. Y. 114, 57 N. E. 292, denying recovery to one injured by stepping from moving train after station called by guard; *Brugher v. Buchtenkirch*, 167 N. Y. 157, 60 N. E. 420, denying recovery to caller at apartment house, injured while passing along unfamiliar dark hallway; *Meinrenken v. New York C. & H. R. R. Co.* 81 App. Div. 137, 80 N. Y. Supp. 1074, holding it negligence to stand near track while noise and smoke of one train obscures approach of another; *Bentley v. Loverock*, 102 Ill. App. 171, denying recovery to licensee falling down elevator shaft in unfamiliar, poorly lighted building; *McCarthy v. Emerson*, 77 App. Div. 566, 79 N. Y. Supp. 180, holding hod carrier ascending plank without regarding proximity of overhead timbers, guilty of contributory negligence.

41 L. R. A. 727, *STATE ex rel. MONNETT v. ADAMS*, 58 Ohio St. 612, 65 Am. St. Rep. 792, 51 N. E. 135.

Civil rights of women.

Cited in footnotes to *Re Maddox*, 55 L. R. A. 298, which denies right of woman to practise law; *Oren v. Abbott*, 47 L. R. A. 92, which denies eligibility of woman as prosecuting attorney.

41 L. R. A. 728, *EVANSVILLE v. SENHENN*, 151 Ind. 42, 68 Am. St. Rep. 218, 47 N. E. 634, 51 N. E. 88.

Doctrine of imputed negligence.

Approved in *McNamara v. Beck*, 21 Ind. App. 484, 52 N. E. 707; *Chicago G. W. R. Co. v. Kowalski*, 34 C. C. A. 4, 92 Fed. 313; *Jeffersonville v. McHenry*, 22 Ind. App. 15, 53 N. E. 183, — holding parent's negligence not imputable to child suing for own benefit; *Warren v. Manchester Street R. Co.* 70 N. H. 361, 47 Atl. 735, holding parent's negligence not imputable to child in action by parent as administrator.

Cited in *Bias v. Chesapeake & O. R. Co.* 46 W. Va. 362, 33 S. E. 240 (dissenting opinion), majority sustaining parent's recovery for killing of child fifteen months old, while trespassing on tracks.

Municipal liability for street obstruction.

Later appeal in 26 Ind. App. 364, 59 N. E. 863, holding municipality bound to overcome presumption that lumber pile on street is unlawful obstruction.

Cited in *Anderson v. Fleming*, 160 Ind. 599, 67 N. E. 443, holding city liable for injury from fall into excavation across sidewalk, made by independent contractor under contract with city.

41 L. R. A. 737, *BARNARD v. SHIRLEY*, 151 Ind. 160, 47 N. E. 671.

Riparian rights.

Cited in footnotes to *Meng v. Coffey*, 60 L. R. A. 910, which requires use by riparian owners of water for irrigation to be reasonable; *People v. Hulbert*, 64 L. R. A. 265, which sustains right of upper riparian owner to bathe in lake from which municipality takes its water supply.

Cited in notes (50 L. R. A. 737) on state and Federal ownership of waters; (58 L. R. A. 240) on acquisition of water supply by right of eminent domain; (59 L. R. A. 333) on liability for facilitating evaporation from stream.

41 L. R. A. 760, *COX v. STATE*, 117 Ala. 103, 67 Am. St. Rep. 166, 23 So. 806.

41 L. R. A. 762, *MEYER v. SAN DIEGO*, 121 Cal. 102, 66 Am. St. Rep. 22, 53 Pac. 434.

Disqualification of judges.

Approved in *Meyer v. San Diego*, 121 Cal. 114, 53 Pac. 1128, holding judge owning real estate taxable for city's bonded indebtedness, disqualified to sit in suit to test validity of contract involving creation of bonded debt.

Cited in *Adams v. Minor*, 121 Cal. 374, 53 Pac. 815, holding judge who is stockholder in bank holding bonds issued by irrigation district, disqualified from sitting in action involving validity of bonds; *State ex rel. Hart v. Call*, 41 Fla. 445, 79 Am. St. Rep. 189, 26 So. 1014, holding tax-paying judge disqualified to sit in suit to declare election establishing school subdistrict illegal, and to restrain assessment and collection of tax for school purposes; *State ex rel. Schaw v. Noyes*, 25 Nev. 49, 56 Pac. 946, holding tax-paying judge not disqualified from sitting in suit to enjoin city executing contract for construction of water works to be paid for with municipal bonds.

Cited in footnote to *First Nat. Bank v. McGuire*, 47 L. R. A. 413, which holds judge disqualified to try case in which plaintiff is corporation of which his wife is a shareholder.

Distinguished in *Higgins v. San Diego*, 126 Cal. 308, 58 Pac. 700, holding possible contingency of such financial situation of city arising as may affect judge as taxpayer not disqualification to sit in action for money demand against city; *Los Angeles v. Pomeroy*, 133 Cal. 532, 65 Pac. 1049, holding contingency of possible future increase of taxation in city, too remote and indistinct to disqualify judge who is taxpayer; *State ex rel. Smith v. Pitts*, 139 Ala. 156, 36 So. 20, holding judge who has purchased property from alleged lunatic not disqualified from sitting in proceedings of inquisition of lunacy.

41 L. R. A. 767, *MAY v. MAY*, 5 App. D. C. 552.

Effect of removal of trustee.

Affirmed in 167 U. S. 318, 42 L. ed. 183, 17 Sup. Ct. Rep. 824, holding upon removal of trustee, surrender of possession and control of trust property follows as necessary incident.

41 L. R. A. 772, *PAULK v. SYCAMORE*, 104 Ga. 24, 69 Am. St. Rep. 128, 30 S. E. 417.

Equitable interference with enforcement of penal statutes.

Approved in *O'Brien v. Harris*, 105 Ga. 736, 31 S. E. 745, holding that equity cannot enjoin criminal acts not apparently affecting petitioner's property rights; *Moultrie v. Patterson*, 109 Ga. 373, 34 S. E. 600, denying injunction against enforcement of ordinance imposing penalty for selling meats and fish elsewhere than in city market, when adequate legal remedy exists; *Bainbridge v. Reynolds*, 111 Ga. 759, 36 S. E. 935, denying injunction against prosecution under penal ordinance; *Bainbridge v. Reynolds*, 111 Ga. 759, 36 S. E. 935, holding that equity will not consider question of validity of criminal ordinance upon petition for injunction; *Cannon v. Merry*, 116 Ga. 294, 42 S. E. 274, holding dispensary selling liquors openly under color of lawful authority not subject to abatement by injunction under "blind tiger" statute.

Cited in footnote to *State ex rel. Kenamore v. Wood*, 48 L. R. A. 596, which denies right to injunction against enforcing alleged unconstitutional statute for inspection of beer.

Criminal nature of ordinance prosecutions.

Cited in *Barnett v. Atlanta*, 109 Ga. 168, 34 S. E. 322, holding prosecution for violation of municipal penal ordinance, criminal case within statutory provision as to time for signing bill of exceptions.

41 L. R. A. 775, *PEOPLE ex rel. AKIN v. KIPLEY*, 171 Ill. 44, 49 N. E. 229.

Writ of error dismissed for want of jurisdiction in 170 U. S. 182, 42 L. ed. 998, 18 Sup. Ct. Rep. 550, on ground that no question under Constitution and laws of United States raised by pleadings.

Constitutionality of civil service act.

Followed without special discussion in *People ex rel. Akin v. Kraus*, 171 Ill. 131, 48 N. E. 1052.

Approved in *People ex rel. Akin v. Loeffler*, 175 Ill. 606, 51 N. E. 785, holding civil service act not violative of guaranteed constitutional "privileges and immunities;" *Morrison v. People*, 196 Ill. 463, 63 N. E. 989, sustaining civil service act authorizing president of county board to appoint civil service commission without consulting county commissioners; *Kipley v. Luthardt*, 178 Ill. 526, 53 N. E. 74, sustaining validity of civil service act as applied to police department of city of Chicago.

Who within civil service act.

Approved in *Brenan v. People*, 176 Ill. 623, 52 N. E. 353, holding civil service act applicable to employment under Chicago board of education; *People ex rel. Akin v. Loeffler*, 175 Ill. 598, 51 N. E. 785, holding civil service act applicable to subordinates in Chicago city clerk's office; *Atty. Gen. v. Trehy*, 178 Mass. 195, 59 N. E. 659, holding almoner of Chicopee, appointed annually by overseers of poor, subordinate officer subject to civil service rules.

Cited in footnote to *People ex rel. Leary v. Knox*, 54 L. R. A. 589, which holds promotion of police officer for personal heroism not prohibited by civil service law.

Judicial interference with proceedings in election contest.

Cited in *People ex rel. Malley v. Barrett*, 203 Ill. 109, 96 Am. St. Rep. 296,

67 N. E. 742, holding right to office not property right entitling *de jure* officer to injunction against production and canvassing of ballots in election contest.

Cited in footnote to *Taylor v. Beckham*, 49 L. R. A. 258, which denies power of court to review legislative determination of contest as to office of governor.

Delegation of legislative powers.

Cited in *Walker v. Towle*, 156 Ind. 643, 53 L. R. A. 751, 59 N. E. 20, holding ordinance empowering mayor to require temporary muzzling of dogs under certain circumstances, not delegation of legislative power.

Cited in footnote to *Adams v. Beloit*, 47 L. R. A. 441, which sustains option giving specially chartered cities power to adopt provisions of general law.

Construction of statutes.

Cited in *People ex rel. Krause v. Harrison*, 191 Ill. 267, 61 N. E. 99, Affirming 92 Ill. App. 651, holding that statutes will be construed with regard to existing circumstances, contemporaneous conditions, and object and necessity for adoption; *Dodge v. Chicago*, 201 Ill. 70, 66 N. E. 367, holding provision requiring instruments in general of local improvement board to be signed by president and secretary not applicable to recommendations to city council, where another provision relating to particular subject provided for signatures of majority of board.

Reasonableness of ordinances.

Cited in footnote to *Slaughter v. O'Berry*, 48 L. R. A. 442, which holds void, ordinance requiring city to provide materials and labor for making sewer connections to within 3 feet of building.

Right of trial by jury.

Approved in *Barclay v. Barclay*, 184 Ill. 475, 56 N. E. 821, Affirming 83 Ill. App. 369, holding jury trial not necessary in contempt proceedings for failure to pay alimony; *Moore v. Strickling*, 46 W. Va. 519, 50 L. R. A. 280, 33 S. E. 274, holding jury trial unnecessary in proceedings to remove public officer for immorality.

41 L. R. A. 792, *SUN INS. OFFICE v. VARBLE*, 103 Ky. 758, 46 S. W. 486.

What constitutes other insurance.

Distinguished in *Home Ins. Co. v. Koob*, 113 Ky. 369, 58 L. R. A. 61, 68 S. W. 453, holding policy prohibiting other insurance not violated by mortgagee effecting insurance upon his interest.

Tenant's duty as to repairs.

Cited in note (64 L. R. A. 660) on tenant's duty to leave premises in good condition.

41 L. R. A. 794, *STONE v. BOSTON & A. R. CO.* 171 Mass. 536, 51 N. E. 1.

What constitutes proximate cause.

Approved in *Fuchs v. St. Louis*, 167 Mo. 648, 57 L. R. A. 145, 67 S. W. 610, holding city not liable for explosion of gases in sewer, caused by contact with lighted candle in connecting cellar; *Chattanooga Light & P. Co. v. Hodges*, 109 Tenn. 341, 60 L. R. A. 461, 97 Am. St. Rep. 844, 70 S. W. 616, holding employee's negligence in entering burning building of employer to telephone alarm, proximate cause of death from burning.

Cited in footnotes to *Southern R. Co. v. Webb*, 59 L. R. A. 109, which holds

negligent jolting of train, hurling passenger through door on track insensible, cause of death by train of other company; *Daniels v. New York*, N. H. & H. R. Co. 62 L. R. A. 751, which holds death by suicide of one rendered insane by negligent act, not proximate result of the negligent act; *Cole v. German Sav. & L. Soc.* 63 L. R. A. 416, which holds that negligence of owner of building in permitting hall to be dark does not render him liable for injury to one stepping into elevator well through door pushed open by strange boy, apparently to permit her to enter.

Liability for negligence of third party.

Cited in *Chandler v. Kansas City Missouri Gas Co.* 174 Mo. 329, 62 L. R. A. 477, 97 Am. St. Rep. 570, 73 S. W. 502; holding gas company not liable for injury to ash-pit cleaner falling into hole made by third person under track extending from ash-pit to dump.

Cited in footnotes to *Langenbaugh v. Anderson*, 62 L. R. A. 948, which denies liability of lessor of lot for production of oil or gas therefrom, for injury to adjoining owner's property through escape of oil by lessee's negligence; *Louisville & E. Mail Co. v. Barnes*, 64 L. R. A. 574, which holds that negligence of steamer company does not prevent recovery for death of passenger by drowning while attempting to disembark, from other steamboat company whose negligence was also responsible for his death.

Taking case from jury.

Cited in *Lauterer v. Manbattan R. Co.* 63 C. C. A. 42, 128 Fed. 544, holding that where, as matter of law, defendant's negligence is not proximate cause of injury, case should be withdrawn from jury.

41 L. R. A. 800, *SMITH v. SMITH*, 171 Mass. 404, 68 Am. St. Rep. 440, 50 N. E. 933.

Annulment of marriage for disease and fraud.

Approved in *Donnelly v. Strong*, 175 Mass. 159, 55 N. E. 892, refusing to annul marriage for wife's concealment of prior marriage, where maintaining illicit relations with petitioner before marriage; *Di Lorenzo v. Di Lorenzo*, 71 App. Div. 518, 75 N. Y. Supp. 878, denying right to annulment of marriage after parties have lived together eight years, for subsequently discovered falsity of wife's statement, inducing the marriage, that she had been delivered of a child of which husband was the father; *Vondal v. Vondal*, 175 Mass. 384, 78 Am. St. Rep. 502, 56 N. E. 586, refusing to annul consummated marriage for undisclosed venereal disease existing prior thereto, but curable at time of marriage; *Svenson v. Svenson*, 178 N. Y. 59, 70 N. E. 120, annulling unconsummated marriage on ground of husband's previous affliction with venereal disease, knowledge of which he fraudulently concealed.

Cited in footnote to *McMahan v. McMahan*, 41 L. R. A. 802, which holds communication of syphilis to wife by husband, who is probably incurable, ground for divorce.

Recovery for contracting venereal disease.

Cited in footnote to *Deeds v. Strode*, 43 L. R. A. 207, which denies right to recover for contracting venereal disease from one with whom married woman lived under marriage void because former husband was living.

41 L. R. A. 802, *McMAHEN v. McMAHEN*, 186 Pa. 485, 40 Atl. 795.

Cruelty justifying divorce.

Cited in *Fitzgerald v. Fitzgerald*, 2 Dauphin Co. Rep. 260, granting divorce to wife for cruel and barbarous treatment upon evidence of communication of venereal disease by husband; *Baker v. Baker*, 195 Pa. 410, 46 Pa. 96, granting divorce to wife for cruel and barbarous treatment upon evidence that venereal disease was contracted by husband subsequent to marriage; *Rochelle v. Rochelle*, 28 Pa. Co. Ct. 460, holding charges against husband of illicit relations with other women, striking him with broom and milk can, and attempts to choke him, not cruel and barbarous treatment entitling husband to divorce; *Gardner v. Gardner*, 104 Tenn. 412, 78 Am. St. Rep. 924, 58 S. W. 342, holding compulsion of wife in delicate health to abnormal sexual intercourse constitutes cruel and inhuman treatment entitling her to divorce.

Cited in footnotes to *Ring v. Ring*, 62 L. R. A. 878, which holds habitual and intemperate use of morphine not cruel treatment entitling wife to divorce; *Maddox v. Maddox*, 52 L. R. A. 628, which denies right to divorce for cruelty, from failure to provide suitable dwelling house, clothing, and food.

Recovery for contracting venereal disease.

Cited in footnotes to *Deeds v. Strode*, 43 L. R. A. 207, which denies right to recover for contracting venereal disease from one with whom married woman lived under marriage void because former husband was living; *Smith v. Smith*, 41 L. R. A. 800, which authorizes annulment of marriage where husband afflicted with syphilis which is probably incurable.

Practice on dismissing master's report.

Cited in *Howe v. Howe*, 16 Pa. Super. Ct. 195, holding it not good practice for court of common pleas to dismiss exceptions to master's report in divorce suit, without discussing evidence.

41 L. R. A. 805, *McHUGH v. McHUGH*, 186 Pa. 197, 42 W. N. C. 307, 65 Am. St. Rep. 849, 40 Atl. 410.

Inference from nonproduction of evidence.

Approved in *Wills v. Hardcastle*, 19 Pa. Super. Ct. 529, and *Ginder v. Bachman*, 8 Pa. Super. Ct. 410, 43 W. N. C. 122, holding that jury may draw unfavorable inference of fact against party failing to produce material evidence within his control; *Wills v. Hardcastle*, 8 Del. Co. Rep. 389, holding jury may draw inference unfavorable to party failing to produce oral testimony of friendly witnesses, presumably best informed upon subject under investigation.

Presumption from attempt to influence juror.

Cited in *Com. v. Brown*, 23 Pa. Super. Ct. 502, holding competent to rebut prisoner's evidence of good character by proof, attempts to influence juror who has been or might have been impeached in his case.

41 L. R. A. 801, *GULF, C. & S. F. R. CO. v. BEALL*, 91 Tex. 310, 66 Am. St. Rep. 892, 42 S. W. 1054.

Parent's action for child's injuries.

Cited in *Sternenberg v. Mailhos*, 39 C. C. A. 412, 99 Fed. 47, sustaining action by parent for damages from loss of services of minor child negligently killed.

Cited in footnote to *Bagwell v. Atlanta Consol. Street R. Co.* 47 L. R. A. 486, which holds action for injury to minor daughter should not be dismissed for her refusal, after attaining majority, to submit to physical examination.

41 L. R. A. 817, *MORLEY v. SNOW*, 117 Mich. 246, 75 N. W. 466.

Right to eject passenger.

Cited in footnote to *Nashville Street R. Co. v. Griffin*, 49 L. R. A. 451, which denies authority to eject passenger who, after paying fare inside station, enters car which has stopped just outside station.

41 L. R. A. 820, *CARPENTER v. SNOW*, 117 Mich. 489, 72 Am. St. Rep. 576, 76 N. W. 78.

41 L. R. A. 823, *HURT v. FORD*, 142 Mo. 283, 44 S. W. 228.

Conditional execution of contract.

Cited in note (45 L. R. A. 346) on conditional execution of contract under parol agreement that it shall not take effect until others have signed it.

Pleading statute of frauds.

Approved in *Hillman v. Allen*, 145 Mo. 643, 47 S. W. 509, holding that statute of frauds need not be specially pleaded when answer denies agreement relied upon.

Promise to answer for another's default.

Approved in *Hartley v. Sandford*, 66 N. J. L. 631, 55 L. R. A. 208, footnote p. 206, 50 Atl. 454, holding void, father's oral promise to reimburse surety for son, if latter fails to pay debt; *Gansey v. Orr*, 173 Mo. 546, 73 S. W. 477, holding promise of incorporators to individually indemnify subscriber to stock of corporation in event of failure of enterprise, within statute of frauds.

Parol evidence to contradict written contract.

Cited in *Holmes v. Farris*, 97 Mo. App. 313, 71 S. W. 116, holding parol evidence not admissible to show that negotiable promissory note, absolute on its face, is payable only on happening of contingency.

41 L. R. A. 831, *DELAWARE, L. & W. R. CO. v. REICH*, 61 N. J. L. 635, 68 Am. St. Rep. 727, 40 Atl. 682.

Liability to trespassers and licensees.

Approved in *Devoe v. New York, O. & W. R. Co.* 63 N. J. L. 278, 43 Atl. 899, holding railway company not liable for death of child struck by train while crossing tracks, though such use of property acquiesced in; *Furey v. New York C. & H. R. R. Co.* 67 N. J. L. 274, 51 Atl. 505, holding company not liable to person injured by closing of train while attempting to pass through opening between cars; *Taylor v. Haddonfield & C. Turnp. Co.* 65 N. J. L. 104, 46 Atl. 707, holding company not liable to mere licensee upon highway, injured by horse becoming frightened at electric car; *Uthermohlen v. Bogg's Run Co.* 50 W. Va. 464, 55 L. R. A. 914, 88 Am. St. Rep. 884, 40 S. E. 410, holding owner not liable for injury to trespassing child by cable and pulley used in operating mines; *Savannah, F. & W. R. Co. v. Beavers*, 113 Ga. 411, 54 L. R. A. 320, 39 S. E. 82, holding owner of premises not liable for death of child by falling into unguarded

excavation while trespassing; *Clark v. Northern P. R. Co.* 29 Wash. 148, 59 L. R. A. 512, 69 Pac. 636, holding company not liable for death of child killed by train while crossing tracks to more readily reach circus permitted to exhibit upon its adjoining land; *Paolino v. McKendall*, 60 L. R. A. 135, denying that occupier of land burning rubbish thereon is under obligation to guard children, resorting to premises, against injury from fire; *Grant v. Hass*, 31 Tex. Civ. App. 692, 75 S. W. 342, holding owner setting spring gun to protect melon patch liable for injury to trespasser going to owner's house to make inquiry; *Land v. Fitzgerald*, 68 N. J. L. 30, 52 Atl. 229, holding lessor not liable for injury to tenant from fall of chimney from latent defect known to landlord.

Cited in footnotes to *Kramer v. Southern R. Co.* 52 L. R. A. 359, which denies railroad company's liability for death of child by fall of pile of cross-ties in unused portion of street; *George v. Los Angeles R. Co.* 46 L. R. A. 829, which denies company's liability to boys hurt while playing with trolley car left in street, after loosening brake; *Kopplekom v. Colorado Cement Pipe Co.* 54 L. R. A. 284, which holds owner of uninclosed city lot liable for injury to young child by toppling over of large cement pipe used by children as plaything; *Biggs v. Consolidated Barb-Wire Co.* 44 L. R. A. 655, which holds owner liable for maintaining dangerous machinery on private grounds unprotected from visits of trespassing children; *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 59 L. R. A. 920, which holds railroad company liable for injury to child on turntable not guarded or properly fastened.

Disapproved in *Edginton v. Burlington, C. R. & N. R. Co.* 116 Iowa, 434, 57 L. R. A. 570, footnote p. 561, 90 N. W. 95, holding railroad company liable for injuries to young children by unfastened turntable in unfenced lot near public way.

41 L. R. A. 836, *WHALEN v. CONSOLIDATED TRACTION CO.* 61 N. J. L. 606, 68 Am. St. Rep. 723, 40 Atl. 645.

Alighting from moving car as negligence.

Approved in *Scott v. Bergen County Traction Co.* 63 N. J. L. 411, 43 Atl. 1060, holding it not negligence *per se* for passengers to ride upon platform of electric street car, or to go there while awaiting opportunity to alight; *Babcock v. Los Angeles Traction Co.* 128 Cal. 178, 60 Pac. 780, sustaining recovery by passenger injured by sudden lurching of car after he started to leave, without waiting for it to come to full stop; *Hansen v. North Jersey Street R. Co.* 64 N. J. L. 696, 46 Atl. 718, holding common carrier negligent in failing to anticipate and avoid injury to passenger alighting from crowded car; *Flynn v. Consolidated Traction Co.* 64 N. J. L. 377, 45 Atl. 799, holding company not liable for injury to passenger struck by passing vehicle while standing upon running board of moving trolley car, preparatory to alighting.

Presumption from fact of accident.

Cited in *Dusenbury v. North Hudson County R. Co.* 66 N. J. L. 45, 48 Atl. 520, holding *prima facie* negligence shown by unexplained derailment of car; *Dusenbury v. North Hudson County R. Co.* 66 N. J. L. 46, 48 Atl. 520, holding question whether company exercised that high degree of care imposed upon carriers for safety of passengers, for jury.

Cited in footnotes to *Springer v. Ford*, 52 L. R. A. 930, which sustains presumption of negligence from injury to passenger by unexplained breaking of

elevator appliance; *Cassady v. Old Colony Street R. Co.* 63 L. R. A. 285, which holds ordinary burning out of fuse in electric car not prima facie evidence of carrier's negligence.

Distinguished in *Paynter v. Bridgeton & M. Traction Co.* 67 N. J. L. 624, 52 Atl. 367, holding that throwing of woman from street car by sudden jerk while in act of alighting raises no presumption of negligence.

41 L. R. A. 838, *PEOPLE ex rel. BURBY v. HOWLAND*, 155 N. Y. 270, 49 N. E. 775.

Constitutional rights of office.

Approved in *People ex rel. Ryan v. Washington County*, 155 N. Y. 296, 49 N. E. 779, holding unconstitutional, statute which deprives deputy sheriff of right to fees for services rendered in justice's criminal matters; *People ex rel. Saloom v. Whitney*, 32 App. Div. 146, 52 N. Y. Supp. 695, Affirming 24 Misc. 266, 53 N. Y. Supp. 570, sustaining statute depriving justice of peace of criminal jurisdiction in village by conferring same upon police justice therein; *People ex rel. Holmes v. Lane*, 53 App. Div. 535, 65 N. Y. Supp. 1004, holding invalid, statutory provision depriving justice of peace of constitutional powers, by conferring "exclusive" jurisdiction upon police justice; *People ex rel. Balcom v. Mosher*, 45 App. Div. 73, 61 N. Y. Supp. 452, holding invalid statute and rule requiring appointment of person graded highest, as conflicting with appointive power expressly conferred on officers; *Re Schultes*, 33 App. Div. 530, 54 N. Y. Supp. 34, sustaining provisions of Greater New York charter creating municipal court by consolidation of district and justice's court; *Re Davies*, 168 N. Y. 102, 56 L. R. A. 860, 61 N. E. 118, sustaining anti-monopoly act of 1899, requiring justice of supreme court to grant order for preliminary examination of witness to aid attorney general in framing complaint.

Cited in footnote to *McCulley v. State*, 46 L. R. A. 567, which upholds legislative power to abolish existing courts and change counties from one circuit to another.

Right of local self-government.

Cited in *People ex rel. Metropolitan Street R. Co. v. State Tax Comrs.* 174 N. Y. 435, 63 L. R. A. 890, 67 N. E. 69, holding local municipal functions cannot be transferred to state officer; *People ex rel. Devery v. Coler*, 173 N. Y. 115, 65 N. E. 956, holding statute conferring upon governor power of removal of city police commissioner, inconsistent with local power of appointment; *State ex rel. Geake v. Fox*, 158 Ind. 140, 56 L. R. A. 899, 63 N. E. 19, holding statute giving governor appointment of members of department of public safety in certain cities, who shall have supervision of fire, police, etc., violates constitutional principle of municipal self-government; *Re Brenner*, 35 Misc. 313, 71 N. Y. Supp. 44, holding that county clerk's duty of making up jury lists and drawing jurors cannot be transferred to commissioner of jurors of Kings county, not elected or appointed in constitutional manner; *State ex rel. Geake v. Fox*, 158 Ind. 140, 56 L. R. A. 899, 63 N. E. 19, holding invalid, statute authorizing governor to appoint board to control municipal fire and police departments; *People ex rel. Oneida County v. Oneida County*, 170 N. Y. 108, 62 N. E. 1092, sustaining legislative appointment of board of commissioners to erect county courthouse; *People ex rel. Ward v. Scheu*, 60 App. Div. 594, 69 N. Y. Supp. 597, holding that legislature may provide for filling vacancy in statutory office of commissioner of public works.

Delegation of legislative power.

Cited in *Kansas City v. Bacon*, 147 Mo. 304, 48 S. W. 860 (dissenting opinion), majority sustaining provision of city charter requiring recommendation of park commissioners before municipal council could establish public park, as not being delegation of legislative power.

41 L. R. A. 846, *JEWELERS' MERCANTILE AGENCY v. JEWELERS' WEEK-LY PUB. CO.* 155 N. Y. 241, 63 Am. St. Rep. 666, 49 N. E. 872.

Property rights in mental labor and secret information.

Approved in *Daly v. Walrath*, 40 App. Div. 224, 57 N. Y. Supp. 1125, holding exclusive right to produce play in United States lost by publication thereof in Germany with author's consent; *Larrowe-Loisette v. O'Loughlin*, 88 Fed. 898, holding right to copyright lost by author's selling books with restrictions against communicating contents; *Wright v. Eisle*, 86 App. Div. 358, 83 N. Y. Supp. 887, denying that architect has common-law right of property in plans for house after publication, so as to prevent copy by another.

Cited in footnote to *Miffin v. R. H. White Co.* 61 L. R. A. 134, which holds exclusive rights under copyright lost by author permitting publication in magazine of chapters of book, without other than usual notice of magazine publishers.

Cited in note (51 L. R. A. 358, 374, 375) on common-law rights of authors and others in intellectual productions.

Distinguished in *F. W. Dodge Co. v. Construction Information Co.* 183 Mass. 65, 60 L. R. A. 811, 97 Am. St. Rep. 412, 66 N. E. 204, holding right to protection against unauthorized use of secret information not lost by furnishing same to subscribers under contract not to disclose it; *Chicago Board of Trade v. Hadden-Krull Co.* 109 Fed. 706, granting injunction against unauthorized use of quotations by third party, though previously furnished for exclusive use of customer by ticker or blackboard.

41 L. R. A. 852, *CLEVELAND v. McCANNA*, 7 N. D. 455, 66 Am. St. Rep. 670, 75 N. W. 908.

What constitutes de facto officer.

Cited in footnote to *Oliver v. Jersey City*, 48 L. R. A. 412, which holds unauthorized acceptance of second office does not prevent one being *de facto* officer on continuing performance of duties of first office.

Judgment as set-off.

Approved in *Long v. Collins*, 15 S. D. 262, 88 N. W. 571, holding judgment for conversion of exempt property not satisfied by another judgment held by defendant as creditor of plaintiff.

41 L. R. A. 854, *STATE v. POWELL*, 58 Ohio St. 324, 50 N. E. 900.

Statutes prohibiting Sabbath and holiday desecration.

Approved in *Breyer v. State*, 102 Tenn. 110, 50 S. W. 769, sustaining statute prohibiting barbering under heavier penalty than imposed upon other violations of Sabbath; *State v. Sopher*, 25 Utah, 327, 60 L. R. A. 471, 95 Am. St. Rep. 845, 71 Pac. 482, upholding statute forbidding barbers to prosecute trade on Sunday, as valid exercise of police power; *Scougale v. Sweet*, 124 Mich. 320, 82 N. W. 1061, sustaining statute prohibiting Sunday baseball playing as breach of

peace; *State v. Hogreiver*, 152 Ind. 660, 45 L. R. A. 509, footnote p. 504, 53 N. E. 921, sustaining statute prohibiting baseball playing on Sunday.

Cited in footnote to *Watson v. Thomson*, 59 L. R. A. 602, which denies city's power to prevent carrying on of lawful avocation on Christmas day.

41 L. R. A. 858, *POLLEY v. HICKS*, 58 Ohio St. 218, 50 N. E. 809.

Gifts *inter vivos*.

Approved in *Jacobs v. Jolley*, 29 Ind. App. 31, 62 N. E. 1028, holding valid gift *inter vivos* established by voluntary assignment of specific part of deposit upon printed form provided by bank, accompanied by delivery of pass book, though not to become effective until donor's death.

Cited in footnote to *Murphy v. Bordwell*, 52 L. R. A. 849, which holds gift of bank deposit consummated by power of attorney to donee giving right to draw in donor's name.

41 L. R. A. 860, *HELMAN v. PITTSBURG, C. C. & ST. L. R. CO.* 58 Ohio St. 400, 50 N. E. 986.

Administrator's action for intestate's death.

Cited in *Wabash R. Co. v. Fox*, 64 Ohio St. 143, 83 Am. St. Rep. 739, 59 N. E. 888, holding that courts of Ohio have no jurisdiction to entertain action by administrator for wrongful death of railroad employee in Indiana.

41 L. R. A. 862, *McNAIRY COUNTY v. McCOIN*, 101 Tenn. 74, 45 S. W. 1070.

Indemnity for support of insane and indigents.

Approved in *Re Yturburru*, 134 Cal. 569, 66 Pac. 729, sustaining statute making estate of insane person liable for support in state hospital.

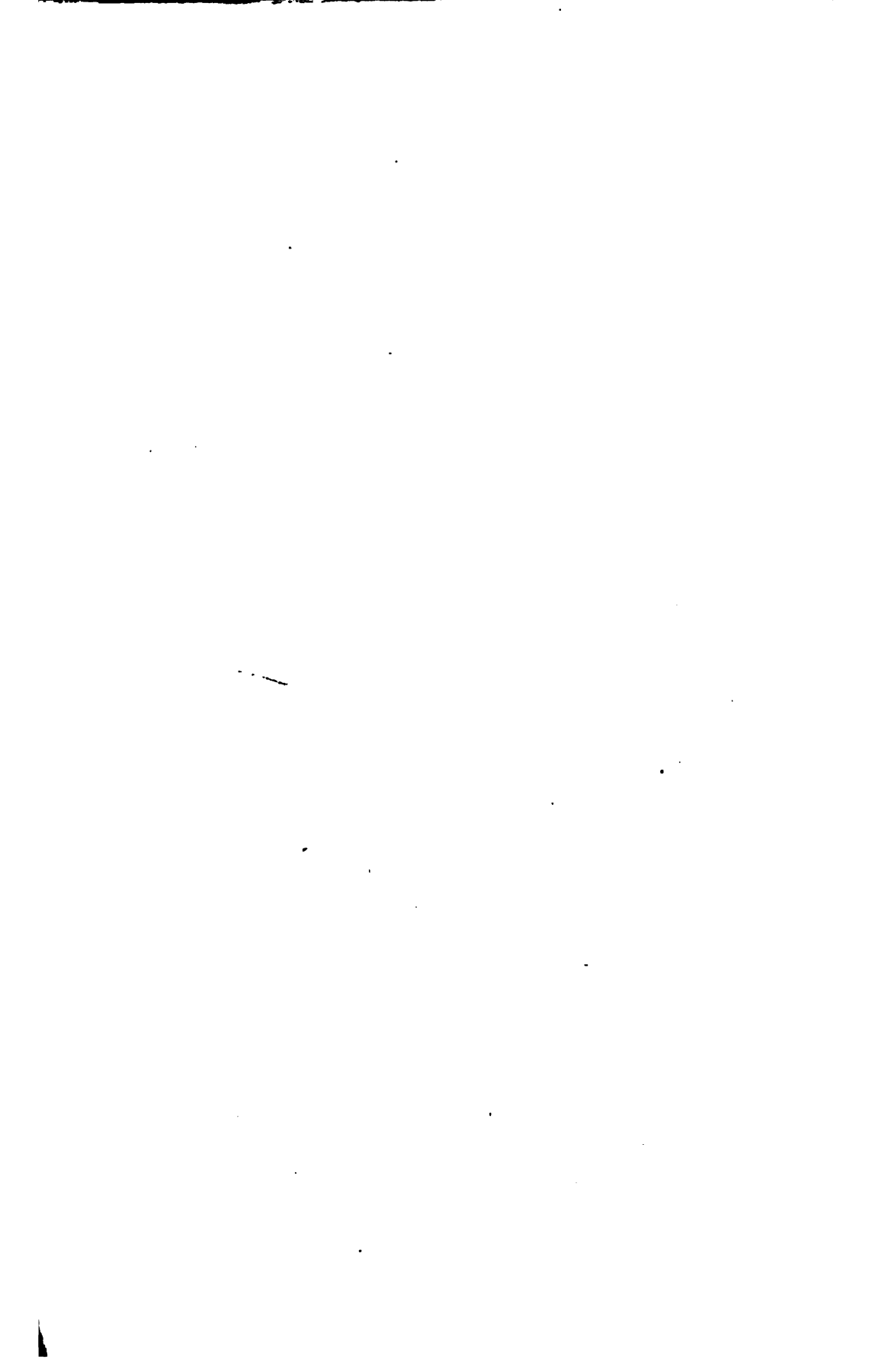
Cited in footnote to *Bon Homme County v. Berndt*, 50 L. R. A. 351, which sustains statute making estates of insane persons without heirs in United States dependent thereon for support chargeable with expense of maintenance in hospital.

Cited in note (55 L. R. A. 576) on liability of alleged pauper, or his estate, to pay for support or gifts obtained on ground of poverty.

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